CIVIL PROCEDURE—State Court Assertion of Personal Jurisdiction over a Nonresident Defendant Personally Served with Process for a Suit Unrelated to His Activities While Temporarily in the State Comports with Due Process—*Burnham v. Superior Court*, 110 S. Ct. 2105 (1990).

After separating in 1987, the petitioner, Dennis Burnham, remained a resident of New Jersey and his wife and two children moved to California.[1] Mrs. Burnham filed for divorce in California state court in January 1988.[2]

During a trip to California to conduct business and visit his children in late January 1988, the petitioner was personally served with Mrs. Burnham's divorce action.[3] Later, the petitioner made a special appearance and moved to quash the service of process, claiming the California Superior Court lacked personal jurisdiction over him because his only contacts in the state were visits for the purpose of conducting business and visiting his children.[4] The superior court denied the motion, and the California Court of Appeal denied mandamus relief holding the petitioner's physical presence in the forum state and personal service of process afforded a sufficient basis for the assertion of in personam jurisdiction under the due process clause.[5]

The United States Supreme Court granted certiorari and in a plurality opinion *held*, affirmed.[6] A state court assertion of personal jurisdiction over a nonresident defendant personally served with process for a suit unrelated to his activities while temporarily in the state comports with due process. *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990).

The Court's analysis began with an examination of cases that have shaped the principles embodied in the doctrine of personal jurisdiction beginning with *Pennoyer v. Neff*.[7] In *Pennoyer*, the Court stated the judgment of a court lacking personal jurisdiction violates the due process clause of the fourteenth amendment.[8] Seventy years later, the Court outlined the due process requirements for the assertion of long-arm jurisdiction in *International Shoe Co. v. Washington*.[9]

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1. Burnham v. Superior Court, 110 S. Ct. 2105, 2109 (1990).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* Justice Scalia delivered the opinion in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 2109. Justice White filed an opinion concurring in part and concurring in the judgment. *Id.* at 2119. Justice Brennan filed an opinion concurring in the judgment, in which Justices Marshall, Blackmun and O'Connor joined. *Id.* at 2120. Justice Stevens filed a separate opinion concurring in the judgment. *Id.* at 2126.
7. Pennoyer v. Neff, 95 U.S. 714 (1878), *overruled*, Shaffer v. Heitner, 433 U.S. 186 (1977).
8. *Id.* at 733.
9. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice."[10]

Justice Scalia carved out the ultimate question in the case: "[W]hether due process requires a similar connection between the litigation and the defendant's contacts with the [forum] State in cases where the defendant is physically present in the State at the time process is served upon him."[11]

Based on the standard set forth in *International Shoe*, the petitioner argued "that in the absence of 'continuous and systematic' contacts with the forum [state] a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum."[12] Petitioner contended the court's assertion of jurisdiction was improper because his limited contacts with the forum state were unrelated to the divorce action.[13]

In response, Justice Scalia restrictively interpreted the "minimum contacts" standard of *International Shoe* and determined the standard applied only when the defendant is not physically present in the territory of the forum.[14] In essence, the Court reasoned *International Shoe* permits the defendant's "litigation-related 'minimum contacts'" with the forum state to replace physical presence as a basis for jurisdiction.[15] This alternative does not usurp the validity of traditional assertions of jurisdiction based solely on personal service of process when the defendant is present in the forum.[16] Therefore, the "minimum contacts" standard is applied only when the state asserts jurisdiction over an absent nonresident defendant. In the present case, the petitioner was served with process when he was in the state

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10. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 483 (1940)).
11. Burnham v. Superior Court, 110 S. Ct. at 2110.
12. *Id.* at 2113.

> [It] has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to a suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

International Shoe Co. v. Washington, 326 U.S. at 317 (1945) (citation omitted).

13. Burnham v. Superior Court, 110 S. Ct. at 2114.
14. *Id.*
15. *Id.*
16. *Id.*

of California.[17] Accordingly, the Court flatly rejected this argument of the petitioner.[18]

The petitioner also argued *Shaffer v. Heitner*[19] "compel[led] the conclusion that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the state."[20] The petitioner's argument rested on the Court's statement in *Shaffer* that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[21] Under an expansive reading of this language, jurisdiction based on in-state service of process would be subject to the "minimum contacts" analysis of *International Shoe*. The Court, however, interpreted the *Shaffer* language as merely extending the "minimum contacts" analysis to quasi in rem jurisdiction[22] without altering the jurisdictional standards for persons physically present in the forum.[23] Therefore, the petitioner's argument was rejected.[24] In sum, all suits involving absent nonresident defendants are subject to the "minimum contacts" standard; however, suits involving physically present nonresident defendants are not.

According to Justice Scalia, jurisdiction based solely on physical presence satisfies due process because it is a continuing legal tradition that defines the due process standard.[25] Supporting its proposition, the Court stated in-state service of process as a basis of jurisdiction has not been

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17. *Id.* at 2109.

18. *Id.* at 2115.

19. Shaffer v. Heitner, 433 U.S. 186 (1977). In *Shaffer*, the plaintiff brought a shareholder's derivative suit against a corporation's directors. *Id.* at 189-90. The Court obtained quasi in rem jurisdiction by attaching the out-of-state defendant's stock in the company located in Delaware. *Id.* at 191-92. Applying the minimum contacts analysis for absent defendants, the Court held the Delaware court could not preside over the case because the defendant's only contact with the state (ownership of property) was unrelated to the suit. *Id.* at 213.

20. Burnham v. Superior Court, 110 S. Ct. at 2115.

21. *Id.* (citing Shaffer v. Heitner, 433 U.S. at 212).

22. Justice Scalia interpreted *Shaffer* as standing "for nothing more than the proposition that when the 'minimum contact' substitutes for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation." *Id.*

23. *Id.* at 2116.

> The logic of *Shaffer's* holding—which places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact—does not compel the conclusion that physically present defendants must be treated identically to absent ones. As we have demonstrated at length, our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction. *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum" and nothing in *Shaffer* expands that requirement beyond that.

Id. (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

24. *Id.* at 2115.

25. *Id.*

abandoned by the courts of any state.[26] In addition, the proposition that mere physical presence confers jurisdiction is a firmly established principle of American jurisprudence dating back before *Pennoyer*.[27] Therefore, the Court circumvented any independent inquiry into the fairness or desirability of the doctrine because of its enduring nature and overwhelming acceptance among the states.[28] Nevertheless, Justice Scalia noted the Court's decision did not prevent individual states from abandoning the doctrine in their legislatures.[29]

In a concurring opinion, Justice White concluded that the traditionally accepted rule allowing the assertion of jurisdiction over a nonresident by personal service in the forum state cannot be invalidated absent a showing the rule is so arbitrary and lacking in common sense that it should be invalidated.[30] "[U]ntil such a showing is made, . . . claims . . . that the rule would operate unfairly as applied to the particular non-resident involved need not be entertained."[31] Thus, Justice White disagreed with Justice Scalia's conclusion that no showing of unfairness can overcome a traditional assertion of jurisdiction although the necessary showing "would be difficult indeed."[32]

Justice Brennan agreed the "transient jurisdiction"[33] rule is generally valid, but disagreed with Justice Scalia's reliance on history as the decisive factor for jurisdiction based solely on physical presence.[34] Justice Brennan also disputed Justice Scalia's broad characterization of the rule as being firmly rooted in American jurisprudence.[35] In Justice Brennan's view, the doctrine was foreign "to the common law and . . . weakly im-

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26. *Id.* at 2113. *But see* Nehemiah v. Athletics Congress of the United States, 765 F.2d 42, 46 (3d Cir. 1985); Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 310-14 (N.D. Ill. 1986); Schreiber v. Allis Chalmers Corp., 448 F. Supp. 1079, 1088-91 (D. Kan. 1978), *rev'd*, 611 F.2d 790 (10th Cir. 1979); Duehring v. Vasquez, 490 So. 2d 667, 671 (La. Ct. App. 1986); Bershaw v. Sarbacher, 40 Wash. App. 653, ___, 700 P.2d 347, 349 (1985).

27. Burnham v. Superior Court, 110 S. Ct. at 2110-11. Justice Scalia acknowledged that recent scholarship suggests the history of this rule of jurisdiction is unclear. *Id.* at 2111. However, Justice Scalia emphasized the wide acceptance of the rule by American courts at the time the fourteenth amendment was adopted. *Id.* (citing Murphy v. J.S. Winter & Co., 18 Ga. 690, 691-92 (1855)).

28. *Id.* at 2116.

29. *Id.* at 2119.

30. *Id.* at 2119-20 (White, J., concurring).

31. *Id.* at 2120 (White, J., concurring).

32. *Id.* (White, J., concurring),

33. The term "transient jurisdiction . . . refer[s] to jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State." *Id.* at 2120 n.1 (Brennan, J., concurring).

34. *Id.* at 2120 (Brennan, J., concurring). Due process requirements are "'readily offended by [perpetuating] ancient forms [of jurisdiction] that are inconsistent with the basic values of our constitutional heritage.'" *Id.* at 2121 (Brennan, J., concurring) (quoting Shaffer v. Heitner, 433 U.S. 186, 219 (1977)).

35. *Id.*

planted in American jurisprudence . . . when the Fourteenth Amendment was adopted."[36] The rule was not uniformly recognized in America during the nineteenth century and did not receive wide publicity until after *Pennoyer*.[37] Although tradition is relevant to determine whether a given practice is consonant with due process, it is not dispositive.[38]

Unlike Justice Scalia, Justice Brennan undertook an independent inquiry into the prevailing in-state service rule, weighing the fairness of the rule against the potential burdens the rule imposes on a nonresident defendant.[39] On one side of the scale, a transient defendant secures state benefits such as fire and police protection when entering the forum.[40] In addition, the privileges and immunities clause of article IV of the Constitution prohibits a state "from discriminating against a transient defendant by denying him the protections of its law or the right of access to its courts."[41] Without transient jurisdiction, inconsistencies arise. A temporary nonresident may use the state courts as a plaintiff, yet retain immunity from being haled into the state courts as a defendant.[42]

On the other side of the scale, "[t]he potential burdens on a transient defendant are slight."[43] "'[M]odern transportation and communication have [reduced the burdens on] a party . . . defend[ing] himself'" in a foreign state.[44] Additionally, procedural devices[45] at the defendant's disposal alleviate any burdens that may be imposed.[46] Disregarding the murky history of in-state service of process as a basis of jurisdiction, Justice

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36. *Id.* at 2122-23 (Brennan, J., concurring) (footnote omitted).
37. *Id.* at 2123-24 (Brennan, J., concurring).
38. *Id.* at 2122 (Brennan, J., concurring).
39. *Id.* at 2120 (Brennan, J., concurring).
40. *Id.* at 2124-25 (Brennan, J., concurring).
41. *Id.* at 2125 (Brennan, J., concurring) (footnote omitted).
42. *Id.* (Brennan, J., concurring).
43. *Id.* (Brennan, J., concurring).
44. *Id.* (Brennan, J., concurring) (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)) (citation omitted).
45. In Burnham v. Superior Court, 110 S. Ct. 2105 (1990), the Court stated:
> For example, in the federal system, a transient defendant can avoid. protracted litigation of a spurious suit through a motion to dismiss for failure to state a claim or through a motion for summary judgment. Fed. Rules Civ. Proc. 12(b)(6) and 56. He can use relatively inexpensive methods of discovery, such as oral deposition by telephone (Rule 30(b)(7)), deposition upon written questions (Rule 31), interrogatories (Rule 33), and requests for admission (Rule 36), while enjoying protection from harassment (Rule 26(c)), and possibly obtaining costs and attorney's fees . . . (Rule 37(a)(4), (b)-(d)). Moreover, change of venue may be possible. 28 U.S.C. § 1404. In state court, many of the same procedural protections are available, as is the doctrine of *forum non conveniens*, under which the suit may be dismissed.

Id. at 2125 n.13 (Brennan, J., concurring) (citation omitted).
46. *Id.* (Brennan, J., concurring).

Brennan concluded the exchange of state benefits for the authority to call the transient nonresident into its courts is consistent with due process.[47]

I. DISCUSSION

The Court's decision exemplifies a retreat from judicial activism and a departure from past precedent.[48] In complete contradiction to the exacting analysis used in previous decisions, the Court summarily validates the doctrine of "transient jurisdiction" based on its historical pedigree and defers the ultimate decision of abandoning a traditional jurisdictional doctrine to the individual states.[49] Justice Scalia's opinion forces the conclusion that no showing of unfairness can overcome a traditional jurisdictional practice.[50] Justice White's concurring opinion, however, begs the question of what specific circumstances would make in-state service of process so unfair to the defendant as to compel a court not to entertain the case.[51] Thus, state legislatures are left with no guidance to determine the outer boundaries of "transient jurisdiction." In addition, Justice Brennan noted:

> This reliance is misplaced, for States have little incentive to limit rules such as transient jurisdiction that make it *easier* for their own citizens to sue out of state defendants. That states are more likely to expand their jurisdiction is illustrated by the adoption by many States of long-arm statutes extending the reach of personal jurisdiction to the limits established by the Federal Constitution.[52]

Perhaps the assertion of jurisdiction over the petitioner in the present case was fair because of the petitioner's limited prior contacts with the state. Such an assertion of jurisdiction, however, would not reflect the same picture of fairness if the petitioner had never visited California prior to being served with process and service occurred at a California airport when the petitioner was traveling to Hawaii. Due process does not differentiate between these two situations.

The Court's treatment of the doctrine of "transient jurisdiction" does violence to the concept of fairness because transient nonresidents are

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47. *Id.* (Brennan, J., concurring).

48. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colum. v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

49. Burnham v. Superior Court, 110 S. Ct. at 2119.

50. *Id.* at 2125-26 n.14 (Brennan, J., concurring).

51. *Id.* at 2120 (White, J., concurring).

52. *Id.* at 2126 n.14 (Brennan, J., concurring) (citation omitted).

treated the same as domiciliaries, another traditional basis of jurisdiction.[53] In *Milliken v. Meyer*, the Court held that "[d]omicile in the state alone is sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[54] This principle is fair in the eyes of due process because a domiciliary is afforded certain state privileges and protections because of his domicile. Therefore, the state may exact reciprocal duties.[55]

Based on the Court's opinion in *Burnham*, a nonresident passing through a state is subject to the same automatic jurisdiction as a domiciliary of the state. The Court was oblivious to constitutional doctrine designed to protect out-of-state defendants.[56] Justice Brennan referred to the asymmetrical relationship created when nonresident defendants are permitted to sue as plaintiffs, yet retain immunity from being defendants.[57] A similar asymmetry between domiciliaries and nonresidents exists under the Court's holding. Inherently, a domiciliary is situated differently with respect to the forum than a nonresident temporarily in the state. Recall the previous example in which the petitioner merely passes through California for the first time on his way to Hawaii. The only state benefit the petitioner receives is the use of the airport, and this benefit is not comparable with the benefits and privileges received by a domiciliary. Accordingly, the Court implicitly endorses an asymmetry that does not conform to fairness requirements of the due process clause of the fourteenth amendment.

Justice Scalia attacked Justice Brennan's approach, suggesting Justice Brennan developed "a 'totality of the circumstances' test" leading to endless fact-specific litigation rather than a rule of law.[58] However, a "totality of circumstances" test is consistent with the fairness and reasonableness considerations of *International Shoe*.[59] Furthermore, the exercise of jurisdiction based solely on a person's physical presence in the forum may be improper when "the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."[60] Considerations of fairness and reasonableness are not satisfied merely because a certain form of jurisdiction is traditional. Therefore, fact-specific

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53. Milliken v. Meyer, 311 U.S. 457 (1940).

54. *Id.* at 462.

55. *Id.* at 463.

56. Burnham v. Superior Court, 110 S. Ct. at 2126 n.14 (Brennan, J., concurring) (citation omitted).

57. *Id.* at 2125 (Brennan, J., concurring).

58. *Id.* at 2119.

59. "The clear focus in *International Shoe* was 'fairness and reasonableness.'" World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting).

60. Burnham v. Superior Court, 110 S. Ct. at 2124 (Brennan, J., concurring) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1986)).

litigation is an evil that must be tolerated to preserve the fundamental underpinnings of due process.

II. CONCLUSION

Under the holding of *Burnham*, state courts are free to assert jurisdiction over nonresidents based solely on in-state service of process. A traditional practice of jurisdiction automatically satisfied the due process requirement of "traditional notions of fair play and substantial justice"—its validation was its pedigree.[61]

The power to decide whether jurisdiction based on in-state service is desirable or fair lies with the individual state legislatures.[62] When most states are seeking to expand their long-arm jurisdiction to the outer perimeters of constitutionality, legislatures are unlikely to curb the power of their courts over nonresident defendants.

As an alternative, the writer suggests a two-tier analysis of jurisdiction based solely on a nonresident defendant's physical presence in the forum state. The first step is to determine the nature of the suit and its relationship to the defendant's contacts. If the subject matter of the litigation is related to the defendant's contacts with the forum, the court need not apply the *International Shoe* standard because a sufficiently close nexus exists between the litigation and the defendant's contacts. However, if the litigation is unrelated to the defendant's contacts with the forum, the court is obligated to determine whether maintaining the suit offends "traditional notions of fair play and substantial justice." This approach reduces the asymmetry between permanent residents and nonresidents and limits the necessity of fact-specific litigation to suits unrelated to the defendant's contacts with the forum state.

This two-tier analysis is consistent with the "minimum contacts" standard of *International Shoe*. If the litigation is related to the defendant's contacts with the state, "traditional notions of fair play and substantial justice" are not offended because the defendant could reasonably anticipate being hailed into court.[63] However, if the litigation is unrelated to the defendant's contacts with the forum, "traditional notions of fair play and substantial justice" dictate the court weigh the sufficiency of the defendant's contacts with the forum state to determine the fairness and reasonableness of asserting jurisdiction. Factors the court should consider include: "[B]urden on the defendant," "forum State's interest in adjudicating the dispute," "plaintiff's interest in obtaining convenient and effective relief,"

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61. Burnham v. Superior Court, 110 S. Ct. at 2116.

62. *Id.*

63. This analysis "provides a defendant voluntarily present in a particular state *today* 'clear notice that [he] is subject to suit' in the forum." *Id.* at 2124 (Brennan, J., concurring) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297).

"interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive policies."[64] This approach does not prohibit the assertion of jurisdiction over any claim, related or unrelated, if the nonresident defendant's contacts with the forum are "continuous and systematic" and assure compliance with "traditional notions of fair play and substantial justice."

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64. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980), *quoted in* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).