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Pedigree for Due Process, A

Paul C. Wilson

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Notes

A Pedigree for Due Process?

_Burnham v. Superior Court of California_¹

The Court's [1989] term, now entering its final month, is bound to produce more famous cases, more sweeping rulings, more dramatic results than this little-noticed decision. But as a window on the most fundamental constitutional debate now taking place within the Court, it would be hard to top _Burnham v. Superior Court of California_.²

In 1990, the United States Supreme Court squarely examined the doctrine of transient jurisdiction³ and in a unanimous decision _upheld_ the constitutionality of its use by state courts.⁴

**I. THE FACTS**

Petitioner Dennis Burnham (Husband), on writ of certiorari, sought a determination from the United States Supreme Court that the California Superior Court, County of Marin, could not, consistent with the Due Process Clause of the fourteenth amendment, assert personal jurisdiction over him in a divorce suit filed by Francie Burnham (Wife).⁵

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¹. 110 S. Ct. 2105 (1990).
³. _Burnham_, 110 S. Ct. at 2105. The label "transient jurisdiction" is used by each member of the Court and the majority of Commentators who have addressed this issue. "[T]he 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 in the judgment) (emphasis added).
⁴. _Id._ at 2119. Although unanimous in their judgment, the Court disagreed sharply on the appropriate rationale to used. See _infra_ notes 115-233 and accompanying text. It is this disagreement which prevented the Court from issuing a majority opinion.
⁵. This action began in the California Superior Court, County of Marin, with Francie Burnham as Petitioner in a divorce suit. This case came before the Supreme Court, however, as a review of the California Court of Appeal decision denying her husband, Dennis Burnham, a Writ of Mandate for which he was Petitioner. To avoid any confusion, the author of this Note will refer to the parties only as Husband and Wife.
Husband and Wife were married in 1976 in West Virginia, then moved to New Jersey where they lived for ten years and raised two children. In July of 1987, they separated and Wife moved to California with their children. In January 1988, Husband traveled to California for business and to see his children. On January 24, 1988, as Husband was returning one of


7. Id. Prior to Wife's moving to California, Husband and Wife entered into a property settlement agreement. Burnham v. Burnham, Nos. A-1522-88T2, A-5705-87T2 (N.J. Super. Ct., App. Div. July 24, 1989) (affirming trial court's dismissal of both of Husband's divorce petitions). In an affidavit submitted to the California trial court, Husband states that both parties were represented by counsel in executing this agreement. Joint Appendix at 6-7, Burnham (No. 89-44). The agreement disposed of the parties' property and determined child custody as well as child and spousal support. Id. It purported to be controlled by New Jersey law and to give New Jersey courts exclusive jurisdiction to settle disputes regarding visitation and custody of the children. Id. Husband and Wife further agreed that Wife would institute divorce proceedings on grounds of "irreconcilable differences." Burnham, 110 S. Ct. at 2109.


In an unpublished decision, the appellate division of the New Jersey Superior Court affirmed both orders of dismissal. Id. Agreeing with the trial court, the appellate division stated that "[Husband] had deliberately and unfairly manipulated [Wife] into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for [her]." Id. Additional considerations of the trial court, adopted by the appellate division, were Husband's delay in issuing summons, the doctrine of forum non conveniens and the Uniform Child Custody Jurisdiction Act. Burnham v. Burnham, No. 8896-88 (N.J. Super. Ct. Chanc. Div., Sussex Cty., June 3, 1988) (order dismissing Husband's divorce petition). The Supreme Court of New Jersey declined to review this decision of the New Jersey Appellate Division. Burnham v. Burnham, 118 N.J. 194, 570 A.2d 959 (1989).

No mention is made by the Supreme Court of the dismissals of Husband's New Jersey actions or of the reasons given by the New Jersey trial and appellate courts in support of those dismissals.

8. Burnham, 110 S. Ct. at 2109. Wife, by affidavit to the trial court, states that this was the fourth visit to California by Husband after Wife's move. Joint Appendix at 9, Burnham (No. 89-44). She further states that on each occasion, the visitation was accompanied by Husband's business activities in the state. Id. Although Husband denies, by affidavit, having conducted any business in California, he does admit to having scheduled, for tax purposes, attendance at certain lectures and trade shows to
the children to his wife's residence, he was served with a California summons and a copy of Wife's divorce petition. Husband then returned to New Jersey.

Husband entered a special appearance in the California Superior Court, County of Marin, and moved to quash the service of summons or, in the alternative, to dismiss the action. Relying on Kulko v. Superior Court and Shaffer v. Heitner, Husband argued that he lacked sufficient contacts with California to support personal jurisdiction over him in a matter unrelated to his activities in that state. Wife contended that, because Husband had established a pattern of trips to California, he had sufficient minimum contacts to support jurisdiction there. Significantly, Wife also argued that personal service on Husband while he was in California, without more, was sufficient to confer jurisdiction there. The trial court determined that it had "jurisdiction, both in rem and in personam, over the subject matter and the parties, respectively."

Husband sought a writ of mandate from the California Court of Appeals, the state's intermediate appellate court. In an unpublished opinion, the

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10. Id. From January 24, 1988, the date of Husband's service, until May 17, 1988, the date of Wife's affidavit, Wife states that Husband traveled to California, to see his children and conduct business, on two other occasions. Joint Appendix at 9, Burnham (No. 89-44).
12. Joint Appendix at 5, Burnham (No. 89-44).
15. Joint Appendix at 7, Burnham (No. 89-44).
16. Petition for Writ of Certiorari at 3, Burnham (89-44).
17. Id.
20. Id. From January 24, 1988, the date of Husband's service, until May 17, 1988, the date of Wife's affidavit, Wife states that Husband traveled to California, to see his children and conduct business, on two other occasions. Joint Appendix at 9, Burnham (No. 89-44).
21. Joint Appendix at 5, Burnham (No. 89-44).
24. Joint Appendix at 7, Burnham (No. 89-44).
25. Petition for Writ of Certiorari at 3, Burnham (89-44).
26. Id.
28. In its order dated September 8, 1988, the trial court had ruled that, because Wife's domicile was California, the court had jurisdiction over the marital status but could not exercise personal jurisdiction over Husband. Burnham v. Burnham, No. Fl-10003 (Super. Ct. Sept. 8, 1988).
30. Burnham, 110 S. Ct. at 2109.
court of appeals denied Husband's relief.\textsuperscript{20} The court stated that "personal presence continues to be a valid jurisdictional predicate for in personam jurisdiction, and that \textit{Shaffer v. Heitner} does not compel a contrary conclusion."\textsuperscript{21} The court of appeals noted that no decision in California or in the United States Supreme Court has relied on an analysis of the defendant's contacts when the defendant had been personally served while in the forum state.\textsuperscript{22} The court cited decisions from other jurisdictions that had considered this issue and determined that \textit{Shaffer} did not foreclose assertions of jurisdiction based on in-state service.\textsuperscript{23} The California Supreme Court refused Husband's request to review the determination of the court of appeals.\textsuperscript{24}

The United States Supreme Court granted Husband's petition for a writ of certiorari.\textsuperscript{25} In four separate opinions, and without a majority, the nine Justices of the Supreme Court employed vastly different rationales in reaching the same conclusion: personal jurisdiction over a non-resident defendant who had been in the state for three days, engaged in activities unrelated to the pending action, and who was personally served with process while in the state did not violate "traditional notions of fair play and substantial justice."\textsuperscript{26}

\textbf{II. THE CONTROVERSY}

Prior to 1977, the idea that a court secured \textit{in personam} jurisdiction over a non-resident defendant for no other reason than that the defendant was served with process while voluntarily present within the forum state was one of the most fundamental and widely-accepted doctrines in American

\textsuperscript{21} \textit{Id.} (citations omitted). It is clear that the court of appeals rested its decision entirely on the issue of in-state service of process and did not consider Husband's other contacts, or lack thereof, with California. The only reference made to Husband's California contacts was that because of "the dual purposes of visitation and conducting business activities, the imposition of personal jurisdiction in this case will not act to discourage parental visitation." \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{26} International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
jurisprudence. Its roots, arguably, pre-date the founding of our nation. It was firmly entrenched before the adoption of the fourteenth amendment.


28. Werner, supra note 27, at 568-72. See also J. Story, Commentaries on the Conflict of Laws §§ 530-538, 543, 554 (1846). In the early English common law courts, jurisdiction in civil cases was asserted by arresting the defendant and incarcerating him until he posted a bond large enough to cover any judgment entered against him. R. Casad, Jurisdiction and Forum Selection § 4.03 (1988). This use of the writ of capias ad respondendum served the dual role of demonstrating the court's power over the defendant, that is, the forum sovereign's ability to enforce the judgments of its courts without reliance on foreign governments, and to demonstrate that the defendant had received fair notice of the suit. R. Casad, Jurisdiction in Civil Actions, Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts para. 2.02(2)(a) (1983) [hereinafter Casad]. This procedure continued to serve these two purposes in America only in its more symbolic form: personal service. Id. at para. 2.02(2)(b).

One commentator, however, rejects the idea that the rule has any significant history prior to the Supreme Court's decision in Pennoyer. "Only when transient service, hitherto a harmless adjunct of convenient jurisdiction, thus came to be required for the establishment of personal jurisdiction over nonresident defendants, did such service also become generally sufficient for this purpose." Ehrenzweig, supra note 27, at 292 (emphasis in original).

Professor Ehrenzweig's analysis is, perhaps, more readily understood in light of his European background. Transient jurisdiction is denounced universally outside the common law countries. See generally Juenger, Judicial Jurisdiction in the United States and in the European Communities: A Comparison, 82 MICH. L. REV. 1195 (1984). The Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters "defined the appropriate jurisdictional bases as a matter of supranational law," binding on all member states. Id. at 1206. The Convention declared that judgments over nonresident defendants, who are citizens of member states, that are based on transient jurisdiction are unenforceable among member European states. Id. at 1197, 1206.

29. In Pennoyer v. Neff, 95 U.S. 714 (1877), decided prior to the more familiar language of the fourteenth amendment, the Court reviewed and decided the case based on "well-established principles of public law." Id. at 722. Articulations of these principles are numerous in both state and federal courts prior to 1869. See, e.g., Mills v. Durbee, 11 U.S. 481, 486 (1813) (an "eternal principle[] of justice which never ought to be dispensed with.") (Johnson, J., dissenting); Smith v. McCutchen, 38 Mo. 257, 258 (1866).
and formed the backdrop for the United States Supreme Court's early constitutional reviews of state courts' assertions of jurisdiction.\textsuperscript{30}

In 1945, with the Supreme Court's ruling in \textit{International Shoe Co. v. Washington},\textsuperscript{31} constitutional review of state court jurisdiction entered the modern era. The standards announced in that case, and the later Supreme Court cases applying them, have spawned extensive state legislation, inspired volumes of scholarly commentary and enumerable pages of judicial decisions devoted to discussions of the "minimum contacts" test. The doctrine of transient jurisdiction, however, was relatively unaffected by this storm of analysis which centered only around extraterritorial service.\textsuperscript{32}

Transient jurisdiction's relative immunity from scrutiny ended in 1977\textsuperscript{33} with the Supreme Court's decision in \textit{Shaffer v. Heitner}.\textsuperscript{34} In sweeping language, the Court stated that "\textit{all} assertions of state-court jurisdiction must be evaluated according to the standards set forth in \textit{International Shoe} and its progeny."\textsuperscript{35} While the facts of \textit{Shaffer} required the Court to decide only the continued validity of the doctrine of \textit{in rem} and \textit{quasi in rem} jurisdiction,\textsuperscript{36} the constitutionality of transient jurisdiction was to come under substantial debate as a result of this case and the language quoted above.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{30} \textit{E.g.}, \textit{Pennoyer}, 95 U.S. at 733; Wilson v. Seligman, 144 U.S. 41, 46 (1892); Goldey v. Morning News, 156 U.S. 518, 521 (1895).
\item \textsuperscript{31} 326 U.S. 310 (1945).
\item \textsuperscript{32} The Court in \textit{International Shoe} explicitly limited its holding to cases in which the defendant "be not present within the territory of the forum." \textit{International Shoe}, 326 U.S. at 316.
\item \textsuperscript{33} Maltz, \textit{Sovereign Authority, Fairness, and Personal Jurisdiction: The Case For the Doctrine of Transient Jurisdiction}, 66 WASH. U.LQ. 671, 673 (1988).
\item \textsuperscript{34} 433 U.S. 186 (1977).
\item \textsuperscript{35} \textit{Id.} at 212 (emphasis added). In a footnote immediately after this assertion, the Court noted that while no reassessment of the facts of prior cases, including \textit{Pennoyer}, was necessary, "\textit{[t]}o the extent that prior decisions are inconsistent with this standard, they are overruled." \textit{Id.} at 212 n.39.
\item \textsuperscript{36} \textit{Shaffer}, 433 U.S. at 189-96.
\end{itemize}
A. The Commentators

With "virtual unanimity," commentators decried the continued existence of transient jurisdiction. With "virtual unanimity," commentators decried the continued existence of transient jurisdiction. The doctrine was attacked, not on its conceptual basis, but on its inconsistency with modern methods of analysis and its potential for producing unfairness in a highly mobile society. Professor Vernon of the University of Iowa, in analyzing the impact of Shaffer, argued that transient presence as the single-factor basis for jurisdiction was no longer consistent with due process. He pointed out that presence in the forum state contributes no more to a modern constitutional inquiry than does ownership of property there. According to Vernon, temporary presence within a state is substantially weaker constitutionally than is domicile, the other traditional basis of general jurisdiction. Domicile at least carries the reciprocal rights and duties stressed by the Supreme Court in Milliken v. Meyer. Further, a defendant is unlikely to anticipate having

38. Posnak, supra note 37, at 744.
39. The notable exception to this is, of course, Ehrenzweig, supra note 27.
40. Posnak, supra note 37, at 744-45.
43. Id. at 303.
44. Id. at 302.
45. Id.
46. 311 U.S. 457, 462-64 (1940). The Court held that "[d]omicile in the state is alone 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." Id. at 462. This case involved a full faith and credit challenge in which the Colorado Supreme Court declined to enforce a Wyoming judgment, charging substantive error. The Supreme Court held that the Colorado courts were barred from reviewing the merits of the underlying case. After reviewing jurisdiction in the Wyoming action and declaring it proper, the Supreme Court ordered the Colorado courts to enforce the judgment.

This case is often cited today as the source of the "fair play and substantial justice" standard quoted in International Shoe. See supra note 26 and accompanying text. Interestingly, the Court, in Milliken, cites McDonald v. Mabee, 243 U.S. 90 (1917), as the source of this language. In McDonald, another full faith and credit challenge, the Court sustained the challenge when the basis of personal jurisdiction was substituted service of an absent defendant. The defendant in McDonald, although technically a domiciliary of the forum state, had left the state and did not intend to return. The court stated:
to defend suit in a forum over claims unrelated to his transitory presence there.\textsuperscript{47}

These inconsistencies, another author notes, are best illustrated by hypothetically inserting the transient jurisdiction issue into prior Supreme Court cases.\textsuperscript{48} \textit{Shaffer}, for example, denied Delaware \textit{quasi in rem} jurisdiction despite the state's asserted strong interest in the suit and the defendants' asserted ownership of property located there. The fact that the defendants had each been served in Delaware while playing in a charity golf tournament or attending a board meeting should not alter the outcome.\textsuperscript{49} In \textit{Kulko v. Superior Court of California},\textsuperscript{50} the Court denied California jurisdiction, despite that forum's strong interest, because the defendant had not purposefully availed himself of the benefits of California. This commentator again points out that the case should not be altered to any constitutionally significant degree by serving the defendant in an airplane over California on his way to Hawaii.\textsuperscript{51}

Other authors found transient jurisdiction inconsistent with a defendant's constitutionally guaranteed\textsuperscript{52} right to travel.\textsuperscript{53} Potential defendants might curb their travel to avoid service of process, avoiding any states in which they would not care to litigate.\textsuperscript{54} The Supreme Court has consistently held that a state may not even discourage travel in or through its territory without a justifying substantial interest.\textsuperscript{55} To these authors it seemed doubtful such an interest could be demonstrated because, by definition, a state lacks any

No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. . . . [G]reat caution should be used not to let fiction [of substituted service] deny the \textit{fair play} that can be secured only by a pretty close adhesion to fact. . . . To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if \textit{substantial justice} is to be done.  

\textit{Id.} at 91-92 (emphasis added). It is ironic that the Court in this case, having decided only whether deficiencies in service rise to the level of a violation of due process, should spawn the language which was to become the touchstone of personal jurisdiction analysis.

47. Vernon, \textit{supra} note 42, at 302-03.
48. Posnak, \textit{supra} note 37, at 746.
49. \textit{Id.} at 747.
51. Posnak, \textit{supra} note 37, at 748.
53. \textit{See} Brilmayer, \textit{supra} note 41, at 753; Comment, \textit{supra} note 37, at 210.
54. Comment, \textit{supra} note 37, at 210.
55. \textit{See} Brilmayer, \textit{supra} note 41, at 753 and cases cited therein.
significant connection with the suit in cases where jurisdiction is based solely on transient presence.\textsuperscript{56}

The broad language employed by Justice Marshall, writing for the Court in \textit{Shaffer}, has provided commentators with ample ammunition to counter arguments favoring the "bright line" nature of the transient jurisdiction doctrine.\textsuperscript{57} Justice Marshall stated that to sacrifice the due process protection offered by a "minimum contacts" analysis in exchange for the certainty of "bright line" rules was to pay too high a price.\textsuperscript{58} One author had even suggested that state courts might realize a net decrease in jurisdiction-related litigation\textsuperscript{59} due to the many complex corollary rules surrounding transient jurisdiction which would also be abrogated.\textsuperscript{60}

Commentators rested the bulk of their arguments, however, on the asserted potential for unfairness created by transient jurisdiction. It is true that often transient jurisdiction produces jurisdiction in a forum with which the defendant has other, perhaps sufficient, contacts.\textsuperscript{61} It is equally true, however, that our increasingly mobile society makes this less probable today than at any other time.\textsuperscript{62} Early in the history of the doctrine of transient jurisdiction, this unfairness to a defendant who was served while only temporarily in the forum state could, arguably, be seen only to have been a \textit{quid pro quo} for the absolute ban on extraterritorial service which protected him.\textsuperscript{63} Any fair exchange, however, has been lost with the unanimous enactment of state long-arm statutes after \textit{International Shoe}.\textsuperscript{64}

Professor Posnak, of Mercer University, argued that the obvious unfairness to the defendant of having to defend in an inconvenient forum\textsuperscript{65}
often obscures more subtle dangers. First, where transient presence is the only basis of personal jurisdiction, the forum state might have no interest in the litigation.66 Second, because the court might be required to apply law with which it lacks expertise, the court is more likely to commit error.67 To support this assertion, Prof. Posnak raises Fauntleroy v. Lum,68 in which Missouri courts, exercising transient jurisdiction, "seized upon the opportunity to misconstrue Mississippi law."69 In a subsequent action on the judgment, the Mississippi courts had no option, under the full faith and credit clause, but to uphold this clearly erroneous interpretation of state law.70

The doctrine of forum non conveniens,71 some commentators have stated, is sufficient to alleviate the harshness of the transient jurisdiction rule.72 Others feel that this doctrine is neither sufficient73 nor appropriate74 to protect a non-resident's constitutional right of due process. The application of this doctrine is discretionary, difficult to review and, as its name implies, concerned with the convenience of the parties rather than the rights of the defendant.75

The Reporters of the Restatement of Conflicts (Second) have not been unmoved by the flurry of debate over transient jurisdiction since Shaffer. The Restatement declares that "[a] state has the power to exercise judicial jurisdiction over an individual who is present within its territory" even though that presence be only "for an instant."76 The revised draft, proposed in 1986, would discard the transient jurisdiction doctrine by adding the language "unless the individuals relationship to the state is so attenuated as to make the

66. Id. at 751-52.
67. Id. at 753. See also Bernstine, supra note 37, at 66.
68. 210 U.S. 230 (1908).
69. Posnak, supra note 37, at 753.
70. Id. Professor Posnak's argument is, perhaps, overstated given the paucity of such examples as Fauntleroy and frequency with which conflict of laws rules require a state to apply another's law. His point remains, however, that transient jurisdiction increases the risks of these incidents by granting jurisdiction to courts having no particular interest in the litigation.
71. "Under [this] doctrine, a court that has jurisdiction of the persona and subject matter, and that is a court of proper venue, may nevertheless decline to exercise its jurisdiction in a given case if that court would be a seriously inconvenient forum." R. CASAD, supra note 28, at para. 1.04.
72. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 28 comment a (1975); Bernstine, supra note 37, at 66; Ehrenzweig, supra note 27, at 305; Posnak, supra note 37, at 759.
73. Werner, supra note 27, at 590.
74. Brilmayer, supra note 41, at 754-55.
75. Comment, supra note 37, at 202-04.
76. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 28 (1975).
exercise of such jurisdiction unreasonable. This drastic turnaround was made in consideration of the Supreme Court's ruling in Shaffer.

Legal discussions are seldom unanimous, however, and Professor Maltz has advocated the continued viability of transient jurisdiction. He acknowledged the frustration many commentators feel in addressing this doctrine and traced it to the fact that the "[t]he dispute centers on the most basic concepts of sovereign authority and fairness . . . [which] are not subject to proof or disproof." These concepts are the bases upon which arguments are built, but do not, themselves, make very satisfying topics of argument. Professor Malz, however, criticized attacks on transient jurisdiction predicated on preventing actual inconvenience to a defendant as plainly inconsistent with the Supreme Court's pattern of analysis in jurisdictional cases.

Professor Malz identified two concepts central to the Supreme Court's analyses which preclude identifying fairness as the constitutional foundation for the personal jurisdiction requirement. The first concept rests on the proposition that the Court consistently has held that Congress has the power to create nationwide personal jurisdiction for federal courts. The second concept postulates that due process is concerned only with whether a defendant can be compelled to cross a state line to defend an action, not with how far he must travel. The same contacts of a Missouri defendant, sufficient to force her to defend in Illinois, would be sufficient to force her to defend in Alaska. Professor Maltz finds the doctrine of jurisdiction consistent with the Supreme Court's "sovereignty-related analysis" and with the historical roots of fairness in our system.

A thoughtful and exhaustive treatment of the controversy over transient jurisdiction has, most recently, been provided by Erich Heichel. After tracing both the historical development of transient jurisdiction and the rise of

77. Restatement (Second) of Conflicts of Laws § 28 (Proposed Revisions 1986). "Jurisdiction will be lacking, however, when the sole basis for its exercise is the momentary presence within the State of the individual involved." Id. at comment b.

78. Restatement (Second) of Conflicts of Laws § 28 comment b (Proposed Revisions 1986).

79. Maltz, supra note 33, at 701.
80. Id.
81. Id.
82. Id. at 686.
83. Id. at 686-87. See infra notes 267-69 and accompanying text.
84. Maltz, supra note 33, at 687.
85. Id. at 697.
86. Id. at 701.
87. Note, supra note 37.
"minimum contacts" analysis under *International Shoe*, Mr. Heichel came to the reasonable conclusion that, while the old rationale for the transient jurisdiction doctrine should be abandoned, the rule itself should be salvaged. He advocated the doctrine's continued use under a "purposeful availment" analysis in which state courts would take in-state service as *prima facie* evidence of a jurisdictional nexus, subject to the defendant's right to rebut with a showing that jurisdiction would be unreasonable.

B. State and Lower Federal Courts

After the United States Supreme Court's decision in *Shaffer*, many state courts re-examined the doctrine of transient jurisdiction. Every state supreme court faced with the issue upheld the doctrine. A minority of lower state and federal courts addressing the issue have found, based primarily on the Supreme Court's language in *Shaffer*, that the doctrine is no longer constitutional. Three illustrative opinions are discussed below.

In 1985, the Court of Appeals for the Fifth Circuit, in *Amusement Equipment Inc. v. Mordelt,* reversed a district court judgment and held "that the rule of transient jurisdiction has life left in it yet." Referring to transient jurisdiction as "an historical truism," the court conceded that *Shaffer* required that it be re-analyzed under *International Shoe.* Finding that *International Shoe* itself created an exception for transient jurisdiction, the

88. Id. at 730.
89. Id. at 731.
92. 779 F.2d 264 (5th Cir. 1985).
93. Id. at 271.
94. Id. at 267.
95. Id. at 269. In doing so, the court noted the irony in having to re-evaluate this procedure, whose roots are found in a time when travel was arduous, for unfairness in a time when travel is "elastic, expansive, and inexpensive." Id. at 268.
court turned to Insurance Corp. of Ireland v. Compagnie des Bauxites\textsuperscript{96} for guidance.\textsuperscript{97} The test in Insurance Corp. of Ireland "requires that 'maintenance of the suit . . . not offend traditional notions of fair play and substantial justice.'"\textsuperscript{98} The court reasoned that, because physical presence is one of the traditional notions of fair play and substantial justice which govern jurisdictional inquiries,\textsuperscript{99} "[w]hen the defendant is present within the forum state, notice of the suit through proper service of process is all the process to which he is due."\textsuperscript{100}

In Humphrey v. Langford,\textsuperscript{101} the Georgia Supreme Court found that Georgia courts had personal jurisdiction over the South Carolina defendant after he was personally served in Georgia.\textsuperscript{102} In upholding transient jurisdiction, the court cited as "compelling reasons" the impracticality of having varying classifications of "sojourners" in the state: those subject to jurisdiction and those not.\textsuperscript{103} The court also noted that "[d]ue process is not solely for the . . . defendant" and that without transient jurisdiction some defendants could not be sued at all.\textsuperscript{104} The court found that the United States Supreme Court, in International Shoe, expressly exempted transient jurisdiction from

\textsuperscript{96} 456 U.S. 694 (1982).
\textsuperscript{97} Amusement Equip. Co. v. Mordelt, 779 F.2d 264, 269 (5th Cir. 1985).
\textsuperscript{98} Insurance Corp. of Ireland, 456 U.S. at 703 (citations omitted).
\textsuperscript{99} Mordelt, 770 F.2d at 269.
\textsuperscript{100} Id. at 270.
\textsuperscript{101} 246 Ga. 732, 273 S.E.2d 22 (1980).
\textsuperscript{102} Id. The defendant had entered Georgia to go bowling. Id. See also Drewko, Humphrey v. Langford: Transient Jurisdiction Reaffirmed, 15 J. MARSHALL L. REV. 237, 241-42 (1982).
\textsuperscript{103} Humphrey, 246 Ga. at 734, 273 S.E.2d at 24. "Where does a court draw the line between sojourners here for an evening of bowling and sojourners who commute to the state on a daily basis?" Id. This argument is not persuasive in that this distinction is precisely what courts may draw when exercising "minimum contacts" jurisdiction under their long-arm statutes. The court also cites as compelling reasons for the doctrine of transient jurisdiction situations in which the fact that some defendants have no residence, will flee from personal service, will terminate an in-state residence in order to establish residence in a more favorable jurisdiction, or will conspire with defendants of other states under circumstances preventing both from being subject to jurisdiction in the same court. Id.

It should be noted that "by statute, a nonresident, by his mere presence in this state, is subject to the state's jurisdiction." Drewko, supra note 102, at 243 (citing GA. CODE ANN. § 15-202 (1971)) ("The jurisdiction of this State and its laws extend to all persons while within its limits, whether as citizens, denizens, or temporary sojourners.").

\textsuperscript{104} Humphrey, 246 Ga. at 734, 273 S.E.2d at 24.
any "minimum contacts" analysis. The court declined to overrule transient jurisdiction on the basis of the dicta language in Shaffer and the cases following it because they "did not mandate such a result."

In Nutri-West v. Gibson, the Supreme Court of Wyoming re-examined the question of transient jurisdiction and found the doctrine was still proper. The court agreed with Shaffer that all assertions of jurisdiction should be governed by International Shoe. The court found, however, that this did not mean that a "minimum contacts" analysis was appropriate. Relying on the language in International Shoe that applied the minimum contacts test only when the defendant is "not present within the territory of the forum," the court found that transient jurisdiction met the general standard of fair play and substantial justice. It met this standard because jurisdiction based on presence is, itself, traditional. The court closed its discussion by stating, "We are unwilling to reject this established jurisdictional principle without direction from a higher authority."

III. THE BURNHAM DECISION

The stage was set for the Supreme Court to address the constitutional viability of transient jurisdiction. The battle lines had been drawn. For a decade and longer, and with a nearly unanimous voice, scholars and commentators had counseled an end to this doctrine. With an equally unanimous voice, state and lower federal courts held the doctrine constitutional as a fundamental tenet of American jurisprudence.

105. Id. at 733, 273 S.E.2d at 23-24.
106. Id. at 733-34, 273 S.E.2d at 24. This case is noted here, not for the persuasiveness of its legal analysis, see supra note 103, but rather as evidence of the hostility state courts feel towards attempts to divest them of their jurisdiction. "This sovereign state has an adequate court system and is capable of rendering justice between litigants as well as any court system." Humphrey, 246 Ga. at 734, 273 S.E.2d at 24. This type of emphatic statement of parochial pride can be found implied in many of the state court opinions upholding transient jurisdiction.
108. Id. at 695.
109. Id.
110. International Shoe, 326 U.S. at 316.
111. Nutri-West, 764 P.2d at 695-696.
112. Id.
113. Id. at 696 (quoting Opert v. Schmidt, 535 F. Supp. 591, 594 (S.D.N.Y. 1982)).
To address this issue, the Supreme Court chose a case from the Fifth Division of the First Appellate District of the California Court of Appeals.\textsuperscript{114} Sharply divided on the rationale to be used, the Court was unanimous in its judgment affirming the superior court and its assertion of transient jurisdiction.

The split revealed by the two principal opinions, authored by Justice Scalia and Justice Brennan, strikes to the heart of due process analysis. At issue was the power of the Supreme Court to strike down, as violative of the Due Process Clause, a state court procedure which enjoys widespread acceptance and a long-standing history. Justice Brennan maintained that the Court has this power, while Justice Scalia determined that a sufficient "pedigree" precludes Supreme Court review. Justice White and Justice Stevens refused to enter this debate and wrote separately, concurring in the judgment. Each of these opinions is discussed separately below.

\section*{A. Justice Scalia\textsuperscript{115}}

Justice Scalia upheld the practice of transient jurisdiction based on his survey of its history and continued broad-based acceptance.\textsuperscript{116} This "pedigree"\textsuperscript{117} not only supports the Court's decision, states Justice Scalia, it prohibits the Court from conducting any independent review of the doctrine under the Due Process Clause.\textsuperscript{118}

Justice Scalia, announcing the judgment of the court,\textsuperscript{119} began with a brief recitation of the facts.\textsuperscript{120} He then began his analysis in this case by

\textsuperscript{114.} Supra notes 18-26 and accompanying text.
\textsuperscript{115.} Burnham, 110 S. Ct. at 2109-19. Chief Justice Rehnquist and Justice Kennedy join Justice Scalia in his opinion. Id. Justice White joins Justice Scalia except for his discussion of Shaffer, id. at 2115-17, and his "few words in response to Justice Brennan's concurrence." Id. at 2117-19. The exact point at which Justice White's analysis departs from Justice Scalia's opinion and the rationale for this departure are discussed in this Note in Section III(D).
\textsuperscript{116.} Id. at 2115.
\textsuperscript{117.} Id. at 2116.
\textsuperscript{118.} Id. at 2116-17.
\textsuperscript{119.} Id. at 2109.
\textsuperscript{120.} Id. Husband's divorce action filed in New Jersey is mentioned, but not the disposition of that action. Id. There is no discussion of the frequency of Husband's trips to California or the extent to which these trips were business related. But see supra notes 8-10. This is consistent with the Court's desire to keep the decision narrowly focused on the issue of transient jurisdiction despite any peculiarities in the facts of the case as presented.

The parties and their circumstances, except when attributing certain arguments or rebutting Justice Brennan's rationales, are not mentioned again in the balance of Justice Scalia's opinion. This is consistent with Justice Scalia's contention that no
reviewing the criteria used to review state court assertions of personal jurisdiction prior to the fourteenth amendment. The well-established principles of public law, found Justice Scalia, were that a state had power over the persons and property within that state, and could rightly subject any person found within its borders, no matter how briefly, to the personal jurisdiction of its courts. Justice Scalia then cited Justice Story for the proposition that this black letter law of American courts also was grounded firmly in English law. Justice Story's commentaries were relied upon by many state courts. Personal service on the defendant while present in the forum state was viewed, prior to 1868, as the sine qua non of personal jurisdiction. Justice Scalia concluded, therefore, that long before the first due process analysis of personal jurisdiction occurred in Pennoyer, transient jurisdiction was "among the most firmly established principles of personal jurisdiction in American tradition."

Justice Scalia next considered the impact of the watershed case of Pennoyer v. Neff. The "principles of public law" had become embodied in the Due Process Clause. For an in personam judgment to be valid under the constitution, a defendant "must be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance." The rigid requirements of presence or consent under Pennoyer fact-based analysis of the fairness of transient jurisdiction in this, or any other case, is appropriate. Id. at 2116.

121. Id. at 2109.
122. Pennoyer, 95 U.S. at 722.
123. Burnham, 110 S. Ct. at 2110.
124. Id. at 2111 (citing J. Story, Commentaries on the Conflict of Laws §§ 530-538, 543, 554 (1846)).
125. Id. Justice Scalia concedes that "[r]ecent scholarship has suggested that English tradition was not as clear as Story thought." Id. (citations omitted). Justice Scalia insists, however, that the accuracy of this understanding is not as important to the current analysis as is the pervasiveness of this belief. Id.
126. Id. at 2113-14. To support this, Justice Scalia cites extensive state court and United State Supreme Court cases culminating in the "well-established principles of public law." Id. (citing Pennoyer, 95 U.S. at 722). International Shoe and its progeny stand only for the proposition that personal service on the defendant while he is present in the forum state is no longer constitutionally required. Id. at 2114. "[T]he defendant's litigation-related 'minimum contacts' may take the place of physical presence as the basis of jurisdiction." Id.
127. Burnham, 110 S. Ct. at 2110.
128. 95 U.S. 714 (1878).
129. Burnham, 110 S. Ct. at 2114.
130. Id. (citing Pennoyer, 95 U.S. at 733).
were applied by the Supreme Court, both as a matter of due process and as a "fundamental principle of jurisprudence."\textsuperscript{131}

Justice Scalia then traced the fictionalization of these concepts which took place as the nation, and the courts, moved into the twentieth century.\textsuperscript{132} Advances in commerce, travel and communications produced this "inevitable relaxation of the strict limits on state jurisdiction."\textsuperscript{133} These advances required methods for constitutionally asserting personal jurisdiction over defendants who neither consented nor were physically present in the state for service of process.\textsuperscript{134} Substituted service for nonresident motorists\textsuperscript{135} and requirements of in-state agents as a condition of allowing nonresident corporations to transact business within a state\textsuperscript{136} typified the Court’s attempts to stretch Pennoyer to fit modern needs.\textsuperscript{137}

The Court in \textit{International Shoe} abandoned these fictions and determined that due process does not require strict adherence to the "presence or consent" doctrine of Pennoyer.\textsuperscript{138} The Court provided a method of testing novel approaches to jurisdiction on their own merits.\textsuperscript{139} Critical to Justice Scalia’s analysis is that the analysis of a defendant’s minimum contacts was expressly limited to situations where the defendant "be not present within the territory of the forum."\textsuperscript{140} The Court simply held that jurisdiction over a non-resident defendant, neither present nor consenting, may, in certain cases, not "offend 'traditional notions of fair play and substantial justice."	extsuperscript{141}

This fundamental distinction between novel (extraterritorial service) and traditional (in-state service or consent) methods of asserting personal jurisdiction over non-resident defendants is the heart of Justice Scalia’s analysis.\textsuperscript{142} For the Court to determine that transient jurisdiction, which helped to define the standard of "traditional notions of fair play and substantial

\begin{thebibliography}{9}
\bibitem{131} \textit{Id.} (citing Wilson v. Seligman, 144 U.S. 41, 46 (1892)).
\bibitem{132} \textit{Id.}
\bibitem{133} \textit{Id.} (citing Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting)).
\bibitem{134} \textit{Id.}
\bibitem{135} This concept was upheld in Hess v. Pawloski, 274 U.S. 352, 356 (1927), under Pennoyer’s consent analysis.
\bibitem{136} This requirement was upheld in Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1917), as an extension of Pennoyer’s "presence" analysis.
\bibitem{137} \textit{Burnham}, 110 S. Ct. at 2114.
\bibitem{138} \textit{Id.} at 2114.
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{International Shoe}, 326 U.S. at 316.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Burnham}, 110 S. Ct. at 2115.
\end{thebibliography}
Justice, is now unconstitutional under that very standard would be "perverse."

Justice Scalia next addressed the argument that Shaffer precluded any pedigree-based analysis when the Court in that case stated "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Justice Scalia discredited this argument as "wrench[ing] out of its context our statement in Shaffer." The assertions of jurisdiction referred to must be read in light of the language preceding the passage quoted. The Court was merely discarding "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner." Justice Scalia found that Shaffer determined only that every assertion of jurisdiction over an absent defendant be treated the same, regardless of the latin label historically attached to it. This rationale, stated Justice Scalia, cannot support the proposition that defendants served in the forum state should be treated the same as defendants not so served.

Justice Scalia, however, acknowledged the distinct difference between his analytical approach and that employed by the Court in Shaffer. Justice Marshall, writing for the Court in Shaffer, undertook an independent analysis of the desirability and fairness of the doctrine of quasi in rem jurisdiction. Justice Scalia undertook no such independent analysis, nor did he consider it appropriate in light of the continued broad-based support for transient jurisdiction. This inquiry might be appropriate, found Justice Scalia, when the "ancient form" being perpetuated is one unique to a single state or currently employed by only a small number of states, as was the device in

143. Id.
144. Id. This is so, qualifies Justice Scalia, at least of an "American jurisdictional practice [which] is, moreover, not merely old; it is continuing." Id. at 2113. This qualification by Justice Scalia seems to be in anticipation of his attempt to distinguish the quasi in rem procedure stricken down by Shaffer as one endorsed by only a single state. See infra notes 154-58 and accompanying text.
145. Shaffer, 433 U.S. at 212.
146. Burnham, 110 S. Ct. at 2115.
147. Id.
148. Id. at 2116 (citing Shaffer, 433 U.S. at 212).
149. Id. at 2115.
150. Id. at 2116.
151. Id.
152. Id.
153. Id.
154. Id.
155. Shaffer, 433 U.S. at 212.
Shaffer. Justice Scalia, in short, has determined that transient jurisdiction is a touchstone of jurisdictional analysis. No independent inquiry into the desirability of this doctrine is proper or necessary. "[I]ts validation is its pedigree, as the phrase ‘traditional notions of fair play and substantial justice’ makes clear."

B. Justice Brennan

Justice Brennan found, as did Justice Scalia, that the use of transient jurisdiction by state courts is constitutional. He disagreed vehemently, however, with Justice Scalia’s method of analysis and conclusion that the Court lacks authority to declare the doctrine unconstitutional. Justice Brennan contended that the analysis employed by Justice Scalia is precluded by the Court’s decision in Shaffer. To Brennan, the "far more sensible construct" of International Shoe and its progeny must be applied in each review of an exercise of personal jurisdiction. Characterizing Justice Scalia’s attempts to distinguish Shaffer as "nimble gymnastics," Justice Brennan classified Justice Scalia’s opinion as unfaithful to precedent.

Embarking on the independent analysis he believes is necessitated by Shaffer, Justice Brennan began by recognizing that history, or pedigree, while not dispositive, is relevant in determining the continued constitutionality of transient jurisdiction. Justice Brennan, however, was much less certain than Justice Scalia of the jurisprudential origins of transient jurisdiction and

156. Burnham, 110 S. Ct. at 2115.
157. Id. "[That which], in substance, has been immemorially the actual law of the land . . . therefore[e] is due process of law." Id. (citing Hurtado v. California, 110 U.S. 516, 528-29 (1884) (conviction by a state on an information alone, without a grand jury indictment, held valid under due process review)).
158. Id. at 2116 (citing International Shoe, 326 U.S. at 316) (emphasis in original).
159. Id. at 2120-26. Justices Marshall, Blackmun, and O’Connor join Justice Brennan in his opinion, concurring in the Court’s judgment.
160. Burnham, 110 S. Ct. at 2120.
161. Id.
162. Id.
163. Shaffer, 433 U.S. at 219 (Brennan, J., concurring in part and dissenting in part) ("[T]he minimum-contacts analysis developed in International Shoe . . . represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in Pennoyer v. Neff.").
164. Burnham, 110 S. Ct. at 2120 (citing Shaffer, 433 U.S. at 212).
165. See supra notes 154-58 and accompanying text.
166. Burnham, 110 S. Ct. at 2122.
characterized them as "murky."\textsuperscript{167} Regardless of its origin, however, Justice Brennan found that the clear understanding now, and for at least a century, is that jurisdiction in the first instance is based upon geography.\textsuperscript{168} The relevancy of the background of transient jurisdiction, Justice Brennan stated, is that it "provides a defendant voluntarily present in a particular state today 'clear notice that [he] is subject to suit' in the forum."\textsuperscript{169} Therefore, because transient jurisdiction is consistent with reasonable expectations, Justice Brennan found that a strong presumption of constitutionality is justified.\textsuperscript{170}

Justice Brennan next turned to the requirement of "purposeful avail-ment"\textsuperscript{171} and determined that Husband had enjoyed "significant benefits provided by [California]."\textsuperscript{172} These benefits were police and fire protection, emergency medical services, use of roads and waterways and the fruits of California's economy.\textsuperscript{173} Under the Constitution, California may not

\textsuperscript{167} Id. at 2124. Convinced by the scholars cited by Justice Scalia who suggest that Justice Story's analysis was wrong, see supra note 125, Justice Brennan determined that transient jurisdiction was a "stranger to the common law."\textsuperscript{174} Burnham, 110 S. Ct. at 2122. Justice Brennan further found that transient jurisdiction was "rather weakly implanted in American jurisprudence" at the time of the adoption of the fourteenth amendment and was not widely accepted until after the Court's decision in Pennoyer. Id. at 2122-24.

These statements raised the scholastic ire in Justice Scalia who responded, in his opinion, with no less than twenty-five citations to state court cases which evidence the acceptance of transient jurisdiction, through holdings, dicta and implication, between the years of 1819 and 1930. Burnham, 110 S. Ct. at 2111-12. Justices Scalia and Brennan directly locked horns over three cases: Coleman's Appeal, 75 Pa. 441 (1874); Gardner v. Thomas 14 Johns. 134 (N.Y. 1817); Molony v. Dows, 8 Abb. Pr. 316 (N.Y. Common Pleas 1859). Burnham, 110 S. Ct. at 2112 n.3, 2123 n.9.

No clear winner emerges from this "battle of the footnotes." Justice Brennan, however, may well only have goaded Justice Scalia into this discussion to illustrate that the history-bound analysis proffered by Justice Scalia is not without its own substantially subjective aspects.

\textsuperscript{168} Burnham, 110 S. Ct. at 2124. Justice Brennan points out that at least seven of the cases cited by Justice Scalia stated the rule in either "dictum or situations where factors other than in-state service supported the exercise of jurisdiction." Id. at 2124 n.10. Justice Scalia responds that personal service was the sole basis for the judgment in each case and any alternative bases, apparent to us now using contemporary notions, is irrelevant to the inquiry. Id. at 2111 n.2.

\textsuperscript{169} Id. at 2124 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)) (emphasis in original).

\textsuperscript{170} Id.

\textsuperscript{171} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

\textsuperscript{172} Burnham, 110 S. Ct. at 2125.

\textsuperscript{173} Id. While there is nothing in the facts stating which of these Husband actually used, it is uncontroverted that they were available to him on each of his visits

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discriminate against transient visitors to the state in denying them the
protection of its laws or, subject to the doctrine of forum non conveniens,
access to its courts.\textsuperscript{174} This last factor, access to the courts, was especially
significant to Justice Brennan because "[w]ithout transient jurisdiction, an
asymmetry would arise: a transient would have the full benefit of the power
of the forum State's courts as a plaintiff while retaining immunity from their
authority as a defendant."\textsuperscript{175}

Justice Brennan next analyzed the potential burdens to a transient
defendant and found that they are slight.\textsuperscript{176} Three factors support his
conclusion: first, the availability of modern communications and transporta-
tion;\textsuperscript{177} second, service in the forum state, and hence presence at least once,
indicates that the forum is unlikely to be "prohibitively inconvenient;"\textsuperscript{178} and
finally, any burden accruing to the defendant from transient jurisdiction can
be mitigated through the use of modern procedural devices.\textsuperscript{179}

Justice Brennan placed significant weight on this last factor and cited
several devices available to defendants. In federal courts, the Federal Rules
of Civil Procedure provide the means for early disposition of spurious suits as
well as inexpensive discovery devices such as the oral deposition by
telephone, and deposition on written questions.\textsuperscript{180} Federal law provides,
under some circumstances, for a change of venue within the federal courts
system.\textsuperscript{181} Finally, the doctrine of forum non conveniens is available in
many state courts and may allow a defendant to have his case dismissed.\textsuperscript{182}
Ultimately, Justice Brennan determined that "as a rule the exercise of personal
to the state. For Justice Scalia's response to this factor in Justice Brennan's analysis,
see infra notes 190-91 and accompanying text.

175. \textit{Id.} (citing Maltz, \textit{supra} note 33, at 698-99). Professor Malz posits a
situation where T, a non-resident who is transiently present in the forum state F, owes
R, a resident of F, a sum of money. Should R attack T in an effort to recover his debt
directly from T's wallet, T could call on F's police and courts to protect him. Without
the doctrine of transient jurisdiction, however, R could not invoke the power of F to
recover his debt. Maltz, \textit{supra} note 33, at 698-99.
176. \textit{Burnham}, 110 S. Ct. at 2125.
177. \textit{Id.}
178. \textit{Id.}
179. \textit{Id.}
180. \textit{Id.} at 2125 n.13.
182. \textit{Id.}
jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process.

C. Parting Shots

The final section of Justice Scalia's opinion is a response to the concurring opinion of Justice Brennan. He attacked Justice Brennan's decision that the Court should apply "contemporary notions of due process" in assessing the use of transient jurisdiction. He characterized the concurrence's proposed standard as "seductive," without precedent, and requiring the application of "each Justice's subjective assessment of what is fair and just." Justice Scalia recited the list of benefits of which Justice Brennan said Husband had availed himself and retorted that a contract exchanging jurisdictional power for those benefits would certainly be found to be "unconscionable" under the Uniform Commercial Code. The absurdity of Justice Brennan's position, as seen by Justice Scalia, is that all the benefits of California which have accrued to Husband and which make it fair for California courts to assert jurisdiction over him have also accrued to many who were "fortunate enough" to escape the state without service of process and over whom, it is clear, jurisdiction could not be asserted.

Justice Scalia applauded Justice Brennan's acknowledgment of one "fairness" factor, that of Husband's "reasonable expectation" of being subject to suit in California. This is correct, found Justice Scalia, only because

183. Justice Brennan is careful to note that, while the facts of the present case do not require setting the outside boundaries, a defendant unknowingly or involuntarily in a state will likely not be subject to the rule of transient jurisdiction as reaffirmed by the Court. Burnham, 110 S. Ct. at 2124 n.11, 2125, 2126.
184. Id. at 2125.
185. The critiques by Justice Scalia and Justice Brennan of the other's opinion and view of the Court's role in due process analysis have been culled out of the discussions above and will be dealt with in this separate section. Both Justice Scalia and Justice Brennan end their opinions with footnotes, Burnham, 110 S. Ct. at 2119 n.5, 2125 n.14, which are, quite possibly, more illuminative of their positions than are the balance of their respective opinions. It is this use of footnotes which gives rise to the title for this section.
186. Id. at 2117 (joined only by Chief Justice Rehnquist and Justice Kennedy)
187. Id. at 2122.
188. Id. at 2117.
189. Id.
190. Id.
191. Id. at 2117-18.
192. Id. at 2118.
of the long-standing tradition of transient jurisdiction; the very factor which Justice Brennan has tried, unsuccessfully, to avoid. Justice Scalia illustrated the circular nature of Justice Brennan's argument in a single sentence: "The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition."  

Justice Scalia, unrelenting in his attack on Justice Brennan's opinion, declared that not only is Justice Brennan "unwilling to confess that the Justices of this Court can possibly be bound by . . . tradition . . . , neither is [he] willing to embrace the logical consequences of that refusal—or even to be clear about what consequences (logical or otherwise) [he] does embrace." Justice Scalia warned that when Justice Brennan states that "as a rule" the use of transient jurisdiction is constitutional, he is giving "nothing more than his estimation that, usually, all the elements of "fairness" will be present." Litigants should not rely on Justice Brennan's opinion if their facts differ significantly from those presented by the present case.

Justice Scalia cautioned that, despite the invocation of the word "rule," Justice Brennan is advocating nothing less than a "totality of the circumstances" test. This test, in which everything must be litigated, fosters the type of uncertainty over preliminary issues which the traditional rules of territorial jurisdiction were designed to avoid. This uncertainty may be a necessary evil when the Court is faced with novel bases for jurisdiction adopted by the states, such as those relying on extraterritorial service of process. No such justification for a "reasonableness" inquiry exists, however, when the device at issue, physical presence, "has hitherto been considered the very baseline of reasonableness."

Unlike the cannonade employed by Justice Scalia (attacking with one-third of the text of his opinion), Justice Brennan was content to return only small-arms fire, peppering Justice Scalia with footnotes. He began by pointing out that the use of the word tradition in the phrase "traditional notions of fair play and substantial justice," meant simply that these "two notions" were traditional ones and not that the specific list of "notions" is

193. Id.
194. Id.
195. Id.
196. Id. at 2125.
197. Id. at 2118 (emphasis in the original).
198. Id. at 2118-19.
199. Id. at 2119.
200. Id.
201. Id.
202. Id. (emphasis in original).
limited by "pedigree" alone.\textsuperscript{203} The Court, in \textit{International Shoe}, did not intend to foreclose the use of contemporary societal norms in due process analysis.\textsuperscript{204} Justice Brennan pointed out that Justice Scalia conceded that tradition must, in some instances, give way to contemporary notions of fairness, when he admitted that the thousand-year-old practice of acquiring jurisdiction by force or fraud had largely disappeared from the common law by the nineteenth century.\textsuperscript{205} Justice Brennan chided Justice Scalia for assuming "that the evolution of our legal system, and the society in which it operates, ended 100 years ago."\textsuperscript{206}

Justice Brennan stated that the state courts which have upheld the continued use of transient jurisdiction at least did so only after undertaking the sort of independent due process analysis which Justice Scalia found unnecessary and prohibited to the Supreme Court.\textsuperscript{207} The very fact of a debate among the commentators illustrates that they have rejected Justice Scalia's historically-bound approach.\textsuperscript{208} In fact, notes Justice Brennan, several commentators have directly challenged the history of transient jurisdiction which lies at the core of Justice Scalia's argument.\textsuperscript{209}

Justice Brennan cautiously guarded the ability of the Supreme Court to strike down, as violative of due process, unfair state court procedures. This power continues in the Court even though the challenged procedure may enjoy a long history and broad current application.\textsuperscript{210} To decide, as Justice Scalia has, that the Due Process Clause does not grant the Supreme Court the power to protect "out-of-staters"\textsuperscript{211} from unfair laws passed by "self-interested states"\textsuperscript{212} is to be "oblivious to the \textit{raison d'etre} of various constitutional doctrines . . . such as the art. IV Privileges and Immunities Clause and Commerce Clause."\textsuperscript{213} Justice Brennan warned that, if the Court is powerless to do anything but wait for states to rid themselves of a traditional procedure which has become unjust, the wait could be substantial because the states have little incentive to act.\textsuperscript{214}

\begin{footnotes}
\item[203] Id. at 2120 n.2 (emphasis added).
\item[204] Id.
\item[205] Id. at 2121 n.3.
\item[206] Id.
\item[207] Id. at 2121 n.4.
\item[208] Id. at 2121 n.5.
\item[209] Id. at 2122-24 nn.8-10. \textit{See supra} notes 125, 167 and accompanying text.
\item[210] \textit{Burnham}, 110 S. Ct. at 2121.
\item[211] Id. at 2125 n.14.
\item[212] Id. at 2119 n.5.
\item[213] Id. at 2125 n.14.
\item[214] Id.
\end{footnotes}
Justice Scalia responded by framing the question as "whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court."[215] He concluded that it is for our society, as expressed through its laws, to determine what process is traditionally considered to be due.[216] The vague doctrines of the Commerce Clause and the Privileges and Immunities Clause, raised by Justice Brennan, should not serve as authority for the Court to prevent society from "greedy adherence to its traditions."[217] Justice Scalia found no authority to base due process on whatever a shifting majority of the Court feels comports with their own perceptions of fairness.[218] To attempt to do so, Justice Scalia stated, can only be described as imperious.[219]

**D. Justice White**[220]

Justice White joined in much of Justice Scalia's opinion. He provided the fourth vote for the statement that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define due process."[221] Justice White could not join, however, Justice Scalia's interpretation of *Shaffer*. Although Justice White "could not possibly" strike down the rule of transient jurisdiction,[222] he was quick to point out that this was because of the wide acceptance the rule still enjoyed and not because the Court lacked the ability to do so.[223] Justice White relied on *Shaffer* for the authority to strike even traditionally accepted procedures,[224] and in this interpretation he implicitly joined Justice Brennan.[225] What kept Justice White from explicitly joining Justice Brennan was that, before ruling transient jurisdiction unconstitutional, Justice White would require a showing that the rule is "so arbitrary and lacking in common sense in so many instances" that the continued use of the procedure would violate due process in every case.[226]

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215. *Id.* at 2119.
216. *Id.* at 2119 n.5.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 2119.
221. *Id.*
222. *Id.* at 2115.
223. *Id.* at 2119.
224. *Id.*
225. *Id.* at 2120.
226. *Id.* at 2119-20.
Until this difficult threshold showing is made, "claims [of unfairness] in individual cases ... need not be entertained."\textsuperscript{227}

### E. Justice Stevens\textsuperscript{228}

Justice Stevens refused to join in the opinion of any other Justice. In a terse, four sentence opinion, Justice Stevens chastised both Justice Scalia and Justice Brennan for the unnecessarily broad reach of their opinions and referred the reader to his dissenting opinion in \textit{Shaffer}.\textsuperscript{229} Citing the "historical evidence and consensus" discussed by Justice Scalia, the "considerations of fairness" addressed by Justice Brennan, and the "common sense displayed" by Justice White, Justice Stevens found that the determination of the continued constitutionality of transient jurisdiction is an easy case.\textsuperscript{230} Justice Stevens quipped that "[p]erhaps the adage about hard cases making bad law should be revised to cover easy cases."\textsuperscript{231}

### IV. COMMENT

\textit{Burnham v. Superior Court of California}, one author has already noted, is "destined for all the textbooks."\textsuperscript{232} The question addressed by this section is: Which chapter? This case makes important contributions to many areas of constitutional and procedural law. Three such areas include: (1) the debate as to whether sovereignty or fairness is the constitutional foundation for personal jurisdiction; (2) the nationwide service of process and personal jurisdiction in federal courts; and (3) the role of tradition in due process analyses. The practical application of transient jurisdiction and its impact on these areas are addressed below.

\textsuperscript{227} Id.

\textsuperscript{228} Id. at 2126.

\textsuperscript{229} Id. (citing \textit{Shaffer}, 433 U.S. at 217 (Stevens, J., concurring in the judgment)). In \textit{Shaffer}, Justice Stevens stated, "My uncertainty as to the reach of the opinion, and my fear that it purports to decide a great deal more than is necessary to dispose of this case, persuade me merely to concur in the judgment." \textit{Shaffer}, 433 U.S. at 219. Interestingly, Justice Stevens' opinion in \textit{Shaffer} also included his position on transient jurisdiction: "If I visit another State ... I knowingly assume some risk that the State will exercise its power over my ... person while there." Id. at 218 (cited by \textit{Burnham}, 110 S. Ct. at 2124 (J. Brennan, concurring in the judgment)).

\textsuperscript{230} \textit{Burnham}, 110 S. Ct. at 2126.

\textsuperscript{231} Id.

\textsuperscript{232} Mullenix, \textit{Badly Fractured Decisions Muddy Cases on Venue}, NAT'L L. J., Aug. 13, 1990, at S9 (referring to the \textit{Burnham} decision as "notorious"). For evidence that this prediction will become reality, see M. ROSENBERG, H. SMET, R. DREYFUSS, \textit{ELEMENTS OF CIVIL PROCEDURE—CASES AND MATERIALS} 225-26 (5th ed. 1990).
A. Application

Given the vigorous nature and wide-ranging implications of the debate among the Justices in *Burnham*, it is easy to overlook the conclusiveness of their resolution of the question presented. This unanimous nature of the judgment of the Court, however, will not be lost on state courts. Nine Justices squarely faced the issue of whether personal service on a non-resident individual intentionally present in the forum state, without more, was sufficient to create personal jurisdiction over that individual. Nine Justices held that it was. No glimmer of hope survives for future defendants "tagged" in this manner. It should be a very long time before the validity of this doctrine is questioned again.

This does not mean, however, that every application of transient jurisdiction will be problem-free. It is important to note, for instance, that five Justices required the defendant's presence in the forum state to be intentional or voluntary and knowing. This requirement, arguably, could be used to forestall the specter of *Grace v. MacArthur*, which is certain to be raised by commentators. The argument would be that potential defendants, traveling in jetliners at altitudes of thirty thousand feet or more, are not aware of each state as they pass over it, or at least that they have no intention of being present in these states. This argument is likely to be accepted by these same Justices. The entire Court, perhaps, could be persuaded by this argument because this type of presence within a state cannot be considered to have the substantial pedigree of the type of presence that has traditionally made a defendant subject to service.

Additionally, practitioners will have to reacquaint themselves with

233. 170 F. Supp. 442 (E.D. Ark. 1959). The district court in this case upheld jurisdiction over the defendant on the basis of his having been served process while in an airplane over Arkansas. Interestingly, for a case so often cited in discussions of transient jurisdiction, the court took transient jurisdiction for granted and the sole issue was whether the defendant was within the territorial limits of Arkansas. Id. at 444-47.

234. This is, perhaps, one of the few cases to be cited more frequently by commentators than by courts. See, e.g., Werner, *supra* note 27, at 588-89 (characterizing this case as the most notorious of all transient jurisdiction cases).

235. Supporting this argument is the decision in *Grace* itself, which states "that a time may come, and may not be far distant, when commercial aircraft will fly at altitudes so high that it would be unrealistic to consider them as being within the territorial limits of . . . any particular state." *Grace*, 170 F. Supp. at 447.

236. Beginning with the Supreme Court's decision in *Shaffer*, commentators have de-emphasized the common law rules attendant to transient jurisdiction in anticipation of the abrogation of that doctrine. An Arkansas appellate court spoke of this trend with apparent relief: "The progressive emphasis on [minimum contacts] . . . may someday obviate the notion of mere presence as a basis, and we will no longer be
the various common law exceptions and limitations to the doctrine of transient jurisdiction.\textsuperscript{237} Virtually all states will not recognize service on a defendant who has been fraudulently induced to enter the forum, or has been brought within the forum by force.\textsuperscript{238} Many states grant immunity from service to any person in the forum state solely to participate in legal proceedings.\textsuperscript{239} A minority extend this protection to persons in the state for arbitrations, negotiations\textsuperscript{240} and administrative hearings.\textsuperscript{241} Several states refuse to extend the immunity to defendants in criminal trials within the state,\textsuperscript{242} and a very few states do not recognize any immunity for parties or witnesses at all.\textsuperscript{243}

Another doctrine which will have to be re-examined in light of \textit{Burnham} is the doctrine of special, or limited, appearances. The United States Supreme Court, in \textit{York v. Texas},\textsuperscript{244} has held that when a defendant enters a special appearance simply to contest jurisdiction, a state may assert personal jurisdiction over the defendant based on that appearance without violating due process.\textsuperscript{245} This holding has been severely criticized\textsuperscript{246} but has never been overruled by the Supreme Court.\textsuperscript{247} Currently, all fifty states recognize the procedure of special appearance,\textsuperscript{248} but a future retreat from this unanimity would not seem to invoke the due process clause.
B. Constitutional Foundation for Personal Jurisdiction

The Supreme Court has often shifted its focus, from sovereignty to fairness and back again, in analyzing the constitutional requirement of personal jurisdiction. Before Pennoyer, reviews of state court jurisdiction arose only in the context of a full faith and credit challenge. To be enforceable in another state, the court entering judgment had to have personal jurisdiction over the defendant, acquired by either personal service on the defendant while he was physically present within the forum, or by his consent. A court was free to fashion other methods of acquiring personal jurisdiction, so long as interstate enforcement was not needed.

The Supreme Court, in Pennoyer, incorporated these requirements into the fourteenth amendment Due Process Clause and provided an avenue for direct attack on a court's exercise of jurisdiction. The essence of Justice Field's opinion in that case is that a court's jurisdiction arose from, and that the Due Process Clause is a necessary limitation on the power of the sovereign asserting jurisdiction.

Limiting the sovereign power of the states remained the sole justification for a due process limitation on personal jurisdiction until the Supreme Court's decision in International Shoe. This case introduced the more malleable concepts of fairness and reasonableness as justifications for limiting a state court's jurisdiction.

The Supreme Court, in Hanson v. Denckla, was quick to point out, however, that the minimum contacts test was "more than a guarantee of immunity from inconvenience[ce,] . . . [it was] a consequence of territorial limitations on the power of respective States." The focus shifted away from sovereignty in Shaffer, in which Justice Marshall stated that in jurisdictional analyses, the focus must be on "the relationship among the defendant, the forum, and the litigation."

World Wide Volkswagen Corp. v. Woodson gave the Court reason, again, to re-evaluate the balance between the two justifications. The minimum contacts requirement "perform[s] two related, but distinguishable functions.
It protects the defendant [from unfair burdens] and it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.\footnote{Id. at 291-92.}

The balance between these two justifications shifted dramatically again in \textit{Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee}.\footnote{456 U.S. 694 (1982).} Justice White, in reference to the federalism language in \textit{World Wide Volkswagen}, stated that the Due Process Clause "is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns."\footnote{Id. at 702 n.10.} He noted that if federalism were the key concern, it would not be possible for a defendant to waive personal jurisdiction.\footnote{Id.} The restriction which the personal jurisdiction requirement places on a state’s sovereign power "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."\footnote{Id.}

The Supreme Court’s decision in \textit{Burnham} operates to shift the focus back to sovereignty. Justice Scalia’s reliance on history and tradition serve to highlight that it is the sovereign power of the California state courts over defendants present within their territory that is the interest at issue and not fairness to the defendant. Nothing in Justice Brennan’s analysis is to the contrary. Justice Brennan, perhaps caught between his career-long stand in favor of broad state court jurisdiction and his distrust of Justice Scalia’s tradition-bound analysis, purported to analyze the prospects for unfairness to defendants under transient jurisdiction and concluded that they are insignificant.\footnote{See supra notes 121-31 and accompanying text.} This is the most frustrating part of Justice Brennan’s opinion because transient jurisdiction, as he defined it, is concerned only with the presence of, and not fairness to, the defendant. If the potential for unfairness under this doctrine is insignificant under every member of the Court’s analysis, is anything left of "fairness" as a constitutional justification for a due process limitation on personal jurisdiction?

\footnote{See supra notes 126-84 and accompanying text.}

\footnote{Leathers, \textit{Supreme Court Jurisdictional Voting Patterns Related to Jurisdictional Issues}, 62 WASH. L. REV. 631, 673-76 (1987). "Justice Brennan’s record is the clearest and best articulated of all the members of the Court." \textit{Id.} at 673. Justice Brennan, sometimes in the majority but often in the minority, has voted to uphold state court jurisdiction in nine out of nine opportunities. \textit{Id.} at 674-76.}
C. Nationwide Reach of Federal Courts

The Federal Rules of Civil Procedure authorize service of process anywhere in the state in which the district court sits; anywhere outside the state which would be within the reach of that state's long-arm statute; anywhere within a one hundred mile radius of the district court; and anywhere specifically provided for by congressional act or other Rule.265 To date, Congress has enacted several provisions for nationwide service of process for specific causes of action in federal courts.266 The power of Congress to authorize such nationwide service is conclusively established.267 The issue of personal jurisdiction in federal courts, when service is made pursuant to a nationwide service statute, is much less clear.

The Supreme Court has not had occasion to rule directly on what standards district courts should apply when a defendant has been served pursuant to a nationwide service provision enacted by Congress. In Stafford v. Briggs,268 the Supreme Court reversed the First Circuit Court of Appeals and found that the statute in question did not authorize nationwide service under the present facts.269 In doing so, the Court did not reach the question of personal jurisdiction under nationwide service. Justice Stewart, joined by Justice Brennan, dissented and did reach this question. "The short answer to [defendant's argument that they lacked minimum contacts with Rhode Island, site of the District Court,] is that due process requires only certain minimum contacts between the defendant and the sovereign that has created the court."270 Justice Stewart also stated that "[t]he issue is not whether it is unfair to . . . [the] defendant . . ., but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defen-

265. FED. R. CIV. PROC. 4(e)-(f).
267. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946). Because article III of the Constitution left to the discretion of Congress the manner in which lower federal courts should be established, Congress could well have established only a single district without reference to state lines. In this way, service of process would run throughout the country. United States v. Union Pac. R.R., 98 U.S. 569, 602 (1878).
269. Id. at 540-45.
270. Id. at 554 (Stewart, J., dissenting) (emphasis added).
The defendants were all residents of the United States and, therefore, Justice Stewart found no due process violation.272

No other Supreme Court cases address the issue of personal jurisdiction in cases involving nationwide service of process. Most circuits addressing this issue have held that "the defendant's aggregate contacts with the entire United States provide the measure of minimum contacts necessary for personal jurisdiction."273 The Sixth District Court of Appeals and several district courts have stated that where nationwide service of process is provided, due process requires only reasonable notice. These courts undertook no minimum contacts analysis at all.274

The Supreme Court, in *Omni Capital International v. Rudolf Wolff & Co.*,275 declined the plaintiff's request that they adopt, as a matter of federal common law, nationwide service of process in all federal question cases.276 "That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress."277 Accepting the challenge of the Supreme Court, the Advisory Committee on Civil Rules has proposed a new Rule 4 which provides not only for nationwide but also world-wide service of process.278

The Supreme Court's decision in *Burnham*, and its emphasis on the power of a sovereign over a defendant solely on the basis of that defendant's transient presence within the sovereign's territory, will have substantial impact

271. *Id.* It should be noted that this dissenting statement by Justice Stevens in *Briggs* emphasizing sovereignty pre-dates the majority decision of Justice White in *Insurance Corp. of Ireland* and its emphasis on jurisdictional restraints as protective of the defendants liberty interests. *See supra* notes 258-61 and accompanying text.

272. *Briggs*, 444 U.S. at 554. It is important, at this point, to emphasize that the only constitutional limitation on a federal court's exercise of jurisdiction is the fifth amendment Due Process Clause.


274. Haile v. Henderson Nat'l Bank, 657 F.2d 816, 825 (6th Cir. 1981); *see also* Erichson, *supra* note 273, at 1140 n.152. This would appear to be consistent, at least so far as jurisdiction over United States residents, with Justice Stewart's conclusion in *Briggs*. *See supra* notes 268-72 and accompanying text; *see also* Leroy v. Great Western United Corp., 443 U.S. 173, 192 (1979) (White, J., dissenting) (stating in conclusory terms that there are "no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents").


276. *Id.* at 111.

277. *Id.*

278. A complete analysis of this proposed change is beyond the scope of this Note. For a comprehensive review and analysis of this new rule, its language, authors and procedures for adoption, see Erichson, *supra* note 273.
on the analysis of this new rule and the entire question of personal jurisdiction in federal courts. A reasonable conclusion would seem to be that any defendant served with process while within the United States, whether under the new Rule 4 or other pre-existing nationwide service statute, would be subject to the personal jurisdiction of the district court which issued the summons, regardless of its location. This conclusion seems inevitable after Burnham and its rejuvenation of the idea that a defendant, served within the territory of a sovereign, is subject to the jurisdiction of the courts created by that sovereign. Venue will, of course, limit the number of these fora available to the plaintiff. It is, however, debatable whether the defendant's interests in a fair forum are adequately protected by statutory, rather than constitutional, means.

D. A Pedigree for Due Process

In Michael H. v. Gerald D., the Supreme Court faced the issue of whether or not a natural father had a constitutionally protected liberty interest in his parental relationship with a child whose mother was married to, and cohabitating with, another man at the time of the child's conception and birth. Justice Scalia, with whom Chief Justice Rehnquist joined, delivered the opinion of an extremely divided court. The Court held that the state law statutory presumption, preventing the natural father from establishing paternity at an evidentiary hearing, did not violate either the natural father's, or the daughter's, due process rights, nor did the statute violate the daughter's equal protection rights. Justice Scalia surveyed the long-standing history and current broad-based support for this type of statutory presumption and stated that "[i]n this case, the existence of such a tradition, continuing to the present day, refutes any possible contention that the [natural father's] alleged right is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental or 'implicit in the concept of ordered liberty.'"

279. This is supported by those commentators relying heavily on the "fairness" justification for due process limitations on personal jurisdiction to ameliorate the impact of nationwide service of process. See Erichson, supra note 273, at 1140-44; Lusardi, supra note 266, at 32-48; Note, Pendant Personal Jurisdiction and Nationwide Service of Process, 64 N.Y.U. L. REV. 113, 128-30 (1989).

280. Erichson, supra note 273, at 1135-38. This will come as little comfort, however, to corporate defendants for whom venue is proper anywhere that personal jurisdiction lies. 28 U.S.C. § 1391(c) (1988).


282. Id. at 2333.

283. Id. at 2333-46.

284. Id. at 2344 n.6. (citations omitted).
In a maneuver which demonstrates the deep division within the court, Justice O'Connor and Justice Kennedy joined Justice Scalia in his entire opinion, with the exception of a single footnote. In this footnote, Justice Scalia responds to Justice Brennan’s criticism of his use of tradition in due process analysis by stating, "Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best . . . , a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."

Justice Brennan, writing in dissent, issued a scathing attack on Justice Scalia’s tradition-bound method of analysis, which Justice Brennan characterizes as both "novel" and "misguided." Justice Brennan went on to state:

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. This Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by my oath to uphold.

The next Term, in Burnham, Justice Scalia advanced substantially the same argument and received substantially the same response from Justice Brennan. This time, however, Justice Kennedy, who abandoned Justice Scalia’s use of binding tradition in Michael H., joined Justice Scalia’s entire opinion. He and Chief Justice Rehnquist, who voted with Justice Scalia in Michael H., comprise the three-Justice "tradition faction."

With the 1989 Term almost at a close, Justice Scalia initiated the third round of this continuing battle. This time the battlefield was to be the first amendment. In Rutan v. Republican Party, the Supreme Court held that hirings, promotions, transfers and recalls based on political affiliation or support are impermissible infringements on public employees’ first amendment rights. Justice Scalia, with whom Chief Justice Rehnquist and Justice Kennedy joined, and with whom Justice O’Connor joined only in part, authored the dissent.
Justice Scalia attacked the majority for their practice of ignoring tradition: "[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."\(^{293}\) The Framers of the Bill of Rights, Justice Scalia urged, intended only to protect "long-recognized personal liberties" from transient majorities, not to create new rights contrary to accepted political norms.\(^{294}\) Citing his opinion in *Burnham*, Justice Scalia decried the current Court practice of "examin[ing] a historical practice, endow[ing] it with an intellectual foundation, and later, by simply undermining that foundation, relegat[ing] the constitutional tradition to the dustbin of history."\(^{295}\)

Responding on this occasion was Justice Stevens, who wrote a separate concurring opinion.\(^{296}\) Justice Stevens challenged Justice Scalia's depiction of the relevant history\(^{297}\) and quoted extensively from his own Seventh Circuit Court of Appeals decision in *Illinois State Employees Union v. Lewis*\(^{298}\) as support to counter many assertions made by Justice Scalia.\(^{299}\) Justice Stevens ultimately dismissed, out of hand, Justice Scalia's assertion that tradition should be given dispositive effect\(^{300}\) by stating simply that the argument is "advanced in two plurality opinions that Justice Scalia has authored, but not by any opinion joined by a majority of the Members of this Court."\(^{301}\)

This, then, is the "fundamental constitutional debate" which Ms. Greenhouse noted in the quotation which opened this Note. Is the Supreme Court, absent an express prohibition found in the Bill of Rights, bound by the pedigree of whatever right or procedure may be before it, or is it free to re-evaluate these doctrines under modern notions of fairness and justice? How, then, will these notions themselves be tested?

This debate is, of course, not a new one.\(^{302}\) Nor is it likely to be

\(^{293}\) *Id.* at 2748.

\(^{294}\) *Id.*

\(^{295}\) *Id.* at 2749 n.2.

\(^{296}\) *Id.* at 2740.

\(^{297}\) *Id.* at 2741 n.3, 2744 n.4.

\(^{298}\) 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973).


\(^{300}\) *Id.* at 2752.

\(^{301}\) *Id.* at 2741.

\(^{302}\) "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process for 'Not lightly vacated is the verdict of quiescent years.'" Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944) (quoting Coler v. The Corn Exch. Bank, 250 N.Y. 136, 141, 164 N.E. 882, 884 (1928) (Cardozo, J.)). It is unlikely, however,
resolved by this Court or future Courts. At the close of the 1989 Term, the Court stood divided by a vote of 6-3 in favor of more wide-open review. The majority view, however, lost a powerful advocate when Justice Brennan retired and it remains to be seen how Justice Souter will affect this debate.

V. CONCLUSION

Prior to the Supreme Court’s decision in Burnham, the doctrine of transient jurisdiction was approved by virtually every court in the United States. It is difficult to characterize a case as landmark which, arguably, makes no change in the law. This characterization, however, is justified for Burnham. Although the full impact of this decision must await future decisions of the Court, it may well mark the beginning of the Court’s withdrawal from the standards of International Shoe and constitutional protection for defendants from litigation in unfair fora.

PAUL C. WILSON

that Judge Cardozo would countenance a method of analyses that could be framed as: Never vacated is the verdict of quiescent years.

303. At present, those Justices arguing that "pedigree" should be given preclusive effect are Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia.

At the close of the 1989 Term, those Justices voting that tradition should be given some, but not conclusive, weight were Justice Blackmun, Justice Brennan, Justice Marshall, Justice O’Connor, Justice Stevens, and Justice White.