The Left-For-Dead Fiction of Corporate "Presence": Is It Revived by Burnham?

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In Burnham v. Superior Court of California, four members of the United States Supreme Court argued that physical presence, without more, is a valid basis for jurisdiction over individuals. In doing so, the Justices determined that a "minimum contacts" analysis should not be applied, suggesting instead that presence alone is a sufficient basis for jurisdiction. The Court, however, was not faced with the issue of whether personal jurisdiction over corporations based on presence alone violates due process. Some post-Burnham cases have ruled in the affirmative and others in the negative when confronted with this question.

It is essential to distinguish between individuals and corporations because the intangible quality of corporations makes it much more difficult to determine when and where a corporation is "present"; in contrast, individuals are present wherever they may be found. Given this difference, this Note will discuss whether the principle of Burnham, allowing jurisdiction over an individual based on his mere presence and without regard for a subjective "fairness" analysis, may be extended to assert jurisdiction over a corporation based on its "presence."

The answer to this question is important because if "presence" of a corporation is validated as a basis for jurisdiction, it may be that "presence" and general jurisdiction are alternative bases for jurisdiction over nonresident corporations. The result of using "presence" as an alternative basis for jurisdiction could lead to many instances of unlimited jurisdiction over large corporations in virtually every state. If, according to Burnham, corporate presence is a sufficient basis for jurisdiction, then large corporations that are subject to service of process in many different states could be subject to a court's jurisdiction—without more—in all of those states.

In marked contrast, a general jurisdiction framework requires a subjective inquiry into the contacts of the corporation with the forum state. Only if the
corporation’s contacts are “continuous and systematic” will the forum state have jurisdiction. This Note will examine whether the rationale used by Justice Scalia in Burnham should be extended to corporations, or whether the concepts of “minimum contacts” and general jurisdiction were created by the Court to dispose of (and as a substitute for) the unmanageable test of corporate “presence.”

Part I will journey briefly down the well-travelled road of personal jurisdiction as applied to corporations. Part II will examine Burnham in an attempt to understand its reasoning and its potential ramifications on corporate jurisdictional law. Part III will survey post-Burnham cases that analyze whether the presence rationale, as espoused by four members of the Court, applies to corporations. Finally, Part IV will analyze the question posed and conclude that Burnham and its presence rationale should not be extended to corporations.

I. A BRIEF HISTORICAL OVERVIEW OF PERSONAL JURISDICTION OVER CORPORATIONS

A. Pre-International Shoe

At the time of Pennoyer v. Neff, corporations were deemed to be present at their place of incorporation. Because Pennoyer stood for the principle that a sovereign state has jurisdiction only over defendants found within its borders, it necessarily followed that corporations were subject to jurisdiction only where they were deemed to be “present”—in their place of incorporation.

Corporations, by virtue of the Commerce Clause, were able to conduct business outside of their place of incorporation, but according to the strict rule of Pennoyer, were not subject to suit in those states. Corporations could, however, bring suit in those states where they conducted business. This was, of course, an inequitable result to individuals who were harmed by a corporation outside of its place of incorporation.

Some courts reacted to this inequity by creating the legal fiction of corporate “presence” in order to subject a corporation to jurisdiction outside of its place of incorporation. According to this new doctrine, corporations were deemed to be “present” if they were “doing business” within the forum state. This doctrine proved to be unworkable, however, as courts attempted to sustain Pennoyer and its sovereignty approach, while applying subjective fairness

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6. 95 U.S. 714 (1878).
7. Id.
9. Id. at 584-86.
limitations at the same time.\textsuperscript{10} This was not intellectually honest, since fairness limitations were not included in the notion of power that Pennoyer had read into the Due Process Clause.\textsuperscript{11} The legal fiction of corporate “presence” was not the best mechanism to address whether it was reasonable or fair to hale a defendant into court. A device was needed which measured the contacts of the defendant with the forum state, instead of one which pretended to strictly adhere to Pennoyer and its “power” theory. Recognizing this, International Shoe developed the “minimum contacts” analysis in place of the “presence” and “doing business” theories.

\textbf{B. The International Shoe Era}

\textit{1. International Shoe}

\textit{International Shoe Co. v. Washington}\textsuperscript{12} attempted to do away with the “nineteenth-century theoretical underbrush”\textsuperscript{13} of the “presence” and “doing business” notions. In doing so, it departed from the sovereignty inquiry of

\begin{itemize}
\item \textsuperscript{10} See In re DES, 789 F. Supp. 552, 582 (E.D.N.Y. 1992); Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.).
\item \textsuperscript{11} In re DES, 789 F. Supp. at 582. Judge Learned Hand had this to say regarding the inadequacies of the corporate “presence” doctrine:
\begin{quote}
It scarcely advances the argument to say that a corporation must be “present” in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes. . . .

When we say therefore, that a corporation may be sued only where it is “present,” we understand that the word is used, not literally, but as shorthand for something else. It might indeed be argued that it must stand suit upon any controversy arising out of legal transactions entered into where the suit was brought, but that would impose upon it too severe a burden. On the other hand, it is not plain that it ought not, upon proper notice, to defend suits arising out of foreign transactions, if it conducts a continuous business in the state of the forum. . . . There must be some continuous dealings in the state of the forum; enough to demand trial away from its home.

This last appears to us to be really the controlling consideration, expressed shortly by the word “presence,” but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts. Nor is it anomalous to make the question of jurisdiction depend upon a practical test. . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is “present,” but at least it puts the real question, and that is something.
\end{quote}

\textit{Hutchinson, 45 F.2d at 141.}
\item \textsuperscript{12} 326 U.S. 310, 66 S. Ct. 154 (1945).
\item \textsuperscript{13} In re DES, 789 F. Supp. at 582.
Pennoyer in favor of a more flexible "fairness" approach. Under this analysis, a new touchstone of jurisdictional law emerged:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." 14

Although the "fairness" approach represented a tremendous change in many respects, the test retained a sovereignty component in that an individual defendant is subject to in personam jurisdiction if present within the forum state. Thus, it may be fairly argued that "minimum contacts" are only required when dealing with an absent defendant; a defendant served with process while present in the forum state would automatically be subject to jurisdiction without regard for any "fairness" inquiry. This argument is further supported by the precise holding of International Shoe, which involved a corporate defendant that was "absent" from the forum state under the old "doing business" test. 15

In Burnham, Justice Scalia applied this sovereignty component in determining that International Shoe did not overrule the "presence" basis of jurisdiction as to individuals present within the state. 16 Although this line of reasoning is probably consistent with International Shoe, it would be fallacious to apply this same reasoning to jurisdiction over corporations. The test announced in International Shoe attempted to do away with the fiction of corporate presence by substituting a "minimum contacts" analysis in its place. 17

This argument is also supported by the explanation given by the Court in International Shoe of why it was undertaking a "minimum contacts" analysis instead of a "presence" analysis:

[It] is clear that unlike an individual [a corporation's] "presence" without, as well as within, the state of its origin can be manifested only

15. Id. at 313-14, 66 S. Ct. at 157. As used in this Note, a "present" individual refers to one who is served with process while in the forum state; an "absent" person is one who is not served with process while in the forum state. A "present" corporate defendant is one that is incorporated in or whose principal place of business is in the forum state. An "absent" corporate defendant means a corporation that is not incorporated in and does not have its principal place of business in the forum state. As applied to corporations, of course, these shorthand meanings do not resolve the issue of whether a corporation is "present" by virtue of its "minimum contacts" with the forum state or because some other basis of in personam jurisdiction exists.
by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there ... is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.\(^8\)

Indeed, unlike the physical nature of an individual that survives even his death, corporate entities exist only to the extent of their contacts with the outside world.

2. General and Specific Jurisdiction

The doctrines of general jurisdiction and specific jurisdiction have emerged from this new "minimum contacts" inquiry. As the Court stated in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,\(^9\) "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or relating to the defendant's contacts with the forum, the State has been said to be exercising general jurisdiction over the defendant." General jurisdiction is conferred upon a court only if the defendant's contacts with the forum state are "continuous and systematic."\(^{20}\) If general jurisdiction exists, the corporation could be compelled to defend any suit brought against it within that state.

For example, corporation X enters into a contract with Y in state A. Corporation X also conducts certain activities in state B. If these activities meet the threshold of "continuous and systematic," corporation X would be amenable to a suit brought by Y in state B for a breach of contract which occurred in state A. Thus it may be said that state B's jurisdiction over corporation X is "dispute-blind," as the court is not concerned about the type of action being litigated; only the nature of the defendant's contacts with the forum state are analyzed.\(^{21}\)

The theory of general jurisdiction, like the threshold "minimum contacts" analysis which it grew out of, saw its beginnings in the old "presence" and

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21. See Twitchell, *supra* note 17, at 627, 636 ("[U]nder a dispute-blind test the nature of the defendant's forum contacts should be the sole factor in determining the presence or absence of general jurisdiction . . . . "). In *Burnham*, Justice Scalia suggests that general jurisdiction applies only to corporations: "It may be that whatever special rule exists permitting 'continuous and systematic' contacts to support jurisdiction with respect to matters unrelated to activity in the forum, applies only to corporations . . . ." 495 U.S. 604, 610 n.1, 110 S. Ct. 2105, 2110 n.1 (1990) (citation omitted) (emphasis in original).
“doing business” doctrines. Thus, courts still use the old terminology of “presence” and “doing business” when determining if there is general jurisdiction over a defendant-corporation. Because of this use of language, a defendant which has a tangible physical “presence,” such as a small office within the forum, is more likely to be subject to general jurisdiction than a defendant with more extensive contacts with the forum, but no physical “presence.” This does not mean, however, that the “presence” doctrine is still alive; rather, it indicates that the new test is still grappling with essentially the same problem as Pennoyer. When does a corporation carry on enough activities in a forum state to justify its being haled into court to defend any suit? As evidenced by the struggle of courts, the new test carries much of the problematic semantics of the old one.

Specific jurisdiction is an equally important concept in jurisdictional law. Unlike its dispute-blind counterpart of general jurisdiction, this type of jurisdiction requires an analysis into the type of claim involved in the suit. As the Court stated in Helicopteros, “It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum, the State is exercising ‘specific jurisdiction’ over the defendant.”

For example, corporation X enters into a contract with Y in state A. Corporation X’s activities in state A fall short of being labeled “continuous and systematic” contacts; thus, corporation X is not subject to general jurisdiction and the burden of having to defend any suit that might be brought against it within the forum. If a breach of contract occurs between corporation X and Y, however, corporation X may be subject to state A’s jurisdiction because the breach arises out of X’s contacts with the state. Ultimately, whether or not state A has jurisdiction depends on whether it is reasonable to hale corporation X into the state to defend the action. Thus, it may be said that state A’s jurisdiction over corporation X is “dispute-specific.”

22. See Kurland, supra note 8, at 582.
24. See Twitchell, supra note 17, at 634.
25. Id. at 644.
27. It may be that more contacts are needed than simply entering into a contract within the forum. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985).
28. To determine the “reasonableness” of haling a defendant into court to defend a claim, the court must look to the contacts to see if the defendant has purposefully availed himself of the benefits of a state so that he could reasonably anticipate being sued there. See id. at 472, 105 S. Ct. at 2182; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980); Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958); see also Twitchell, supra note 17, at 645 n.160.
29. The rules of specific jurisdiction as applied to individuals and corporations are not affected by Burnham because a nonresident defendant may still be sued when a claim arises out of its contacts
II. BURNHAM v. SUPERIOR COURT OF CALIFORNIA

A. Facts of the Case

Mr. and Mrs. Dennis Burnham were living in New Jersey when they decided to separate in July 1987. Both parties agreed that Mrs. Burnham, who intended to move to California, would take custody of their two children. They also agreed that Mrs. Burnham would file for divorce on grounds of "irreconcilable differences." In October 1987, Mr. Burnham deviated from this agreement by filing for divorce in New Jersey state court on grounds of desertion. Mrs. Burnham was never issued a summons, however, nor was she served with process. In January 1988, after unsuccessfully attempting to persuade Mr. Burnham to adhere to their previous agreement, Mrs. Burnham sued him for divorce in California state court.

Later that same month, Mr. Burnham visited California for the joint purposes of visiting his children and conducting business. After taking care of his business affairs, Mr. Burnham took his oldest child to San Francisco for the weekend. Upon his return of the child to Mrs. Burnham's residence, he was promptly served with a California court summons and a copy of Mrs. Burnham's divorce petition.

B. Opinion of the Court

The question presented to the Court was whether the California court could exercise personal jurisdiction over Mr. Burnham. In a unanimous affirmative response to the question, the Court battled fiercely over which line of reasoning correctly supported the answer. While all nine Justices agreed in the outcome, there was a 4-4-1 split in the rationale justifying California's exercise of jurisdiction over Mr. Burnham.

Justice Scalia (joined by the Chief Justice, Justice Kennedy, and Justice White, in part) reasoned that the physical presence of an individual in the forum state accompanied by service confers jurisdiction. The support for this reasoning was that presence is a traditional basis for a state's exercise of in personam jurisdiction, and thus comports with due process. Justice White did not join one section of Scalia's opinion because he would permit the Court to invalidate "even traditionally accepted procedures" if they denied due process.
He refused, however, to characterize transient jurisdiction as one of those "procedures" that "is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process."36

Justice Brennan wrote a concurrence (joined by Justices Marshall, Blackmun, and O'Connor) rejecting presence as a sufficient basis for jurisdiction over the individual.37 Instead, he would use presence as a factor to be considered in the "minimum contacts" analysis,38 as set forth by International Shoe.39

Justice Stevens agreed with the outcome, but gave no specific reasons why jurisdiction over Mr. Burnham could be conferred on the California court. Instead, he chastised the other members of the Court for what he perceived to be too much analysis of the case, suggesting that "the adage about hard cases making bad law should be revised to cover easy cases."40

In his reasoning that transient jurisdiction41 is not violative of due process, Justice Scalia based his argument on the history of jurisdictional law. Indeed, Scalia wrote that "among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."42 He supported his argument by pointing to Justice Story,43 whose beliefs regarding transient jurisdiction were incorporated in the Pennoyer v. Neff decision.44 Story believed the principle of transient jurisdiction, "which he traced to Roman origins, to be firmly grounded in English tradition."45 Scalia added that based on "contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted."46

opinion insofar as it held that transient jurisdiction does not violate due process. In White's view, transient jurisdiction "is so widely accepted throughout this country that" he "could not possibly strike it down . . . on the ground that it denies due process of law . . . ." Id. He disagreed, however, with Scalia's absolute reliance on historical pedigree: "[T]he Court has the authority . . . to examine even traditionally accepted procedures and declare them invalid." Id.

36. Id.
37. Id. at 628, 110 S. Ct. at 2120 (Brennan, J., concurring).
38. Id.
40. Burnham, 495 U.S. at 640, 110 S. Ct. at 2126 (Stevens, J., concurring).
41. The term "transient jurisdiction" refers "to jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State." Id. at 629 n.1, 110 S. Ct. at 2120 n.1 (Brennan, J., concurring).
42. Id. at 610, 110 S. Ct. at 2110.
43. Id. at 611, 110 S. Ct. at 2111.
45. Burnham v. Superior Court of California, 495 U.S. 604, 611, 110 S. Ct. 2105, 2111 (citing J. Story, Commentaries on the Conflict of Laws §§ 530-538, 543, 554 (1846) ("'By the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found,’ for ‘every nation may . . . rightfully exercise jurisdiction over all persons within its domains.’").
46. Id. at 611, 110 S. Ct. at 2111 (citing Murphy v. J.S. Winter & Co., 18 Ga. 690 (1855)).
The effect of this history, in Scalia’s view, is that presence as a basis for in personam jurisdiction is not violative of due process. Justice Scalia followed the view of the Supreme Court’s decision in *Hurtado v. California*:

[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country . . . . [That which], in substance, has been immemorially the actual law of the land . . . therefore is due process of law.\(^{47}\)

Furthermore, Justice Scalia denied that *International Shoe* and its progeny foreclosed his reliance on historical pedigree.\(^{48}\) He argued that because *International Shoe* involved jurisdiction over an *absent* defendant, it does not require a “minimum contacts” analysis over a physically *present* defendant.\(^{49}\) In other words, the test set out in *International Shoe* to determine whether jurisdiction is consistent with “traditional notions of fair play and substantial justice” should be applied only in cases involving *absent* defendants.\(^{50}\) Therefore, *International Shoe* does not overrule one of the bases of jurisdiction recognized in *Pennoyer v. Neff*\(^{51}\) (as well as Justice Story’s belief): the physical presence of an individual within the forum state is a basis for jurisdiction. Scalia concluded this line of reasoning by writing:

The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of “traditional notions of fair play and substantial justice.” That standard was developed by analogy to “physical presence,” and it would be perverse to say it could now be turned against that touchstone of jurisdiction.\(^{52}\)

Scalia left open the question of whether this rationale for presence as a basis for jurisdiction should apply to corporations. The only mention of corporations appeared in a footnote of his opinion:

We have said that “[e]ven when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between

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47. *Id.* at 619, 110 S. Ct. at 2115 (quoting *Hurtado v. California*, 110 U.S. 516, 528-29, 4 S. Ct. 111, 117-118 (1884)).
49. *Burnham*, 495 U.S. at 618, 110 S. Ct. at 2114.
50. *Id.*
51. 95 U.S. 714 (1878).
52. *Burnham*, 495 U.S. at 619, 110 S. Ct. at 2115.
the State and the foreign corporation." Our only holding supporting that statement, however, involved "regular service of summons upon [the corporation's] president while he was in [the forum State] acting in that capacity." It may be that whatever special rule exists permitting "continuous and systematic" contacts, to support jurisdiction with respect to matters unrelated to activity in the forum, applies only to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon "de facto power over the defendant's person." We express no views on these matters . . . .

The language of this footnote is open to varying interpretations, as may be seen by a survey of the cases following Burnham. Justice Brennan (joined by Justices Marshall, Blackmun, and O'Connor) concurred in the judgment of the Court that Mr. Burnham was subject to the jurisdiction of California. While agreeing that transient jurisdiction does not usually violate due process, Brennan opined that a rule which is part of this country's tradition does not necessarily comply with due process "by virtue of its 'pedigree.'" Because of his belief that history is not the only factor which makes a traditional rule constitutional, Brennan would have made an independent inquiry to determine whether the assertion of jurisdiction was consistent with "traditional notions of fair play and substantial justice."

In support of his argument that history is not dispositive of the jurisdictional issue, Brennan cited the innovative Shaffer v. Heitner decision. In Shaffer, the Supreme Court supposedly broke with the traditional rules regarding quasi in rem jurisdiction to comport with contemporary notions of due process.

Although Justice Brennan did not use presence as the sole factor for conferring jurisdiction over the defendant, he used it as a weighty factor in determining whether the "minimum contacts" analysis was satisfied. Because American courts have upheld transient jurisdiction for over a century, Brennan stated that it "is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process." He stated further that "by visiting the forum State, a transient defendant actually 'avail[s] himself of

53. Id. at 610 n.1, 110 S. Ct. at 2110 n.1 (citations omitted).
54. See infra Part III.
55. Id. at 629, 110 S. Ct. at 2120 (Brennan, J., concurring).
57. Burnham, 495 U.S. at 633, 110 S. Ct. at 2122.
58. Id. at 630, 110 S. Ct. at 2120 (citing Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569 (1977), where quasi in rem jurisdiction, although it had been the law for over 100 years, was overruled because it did not comport with contemporary notions of due process).
59. Burnham, 495 U.S. at 637, 110 S. Ct. at 2124.
significant benefits provided by the State,” and thus comports with the requirements of due process.

In *Burnham*, Justice Scalia simply reaffirmed what *Pennoyer v. Neff* held over 100 years ago—that a state has jurisdiction over an individual who is present within its borders. This does not depart, however, from the “minimum contacts” test of *International Shoe*; rather, it merely limits its application to absent defendants. Although Justice Brennan would conduct a “fairness” inquiry into all jurisdictional issues, whether it concerns an absent or present defendant, *International Shoe* does not on its facts extend to present defendants. With this in mind, the focus of this Note shifts to the issue of whether other courts have extended the “presence” rationale of *Burnham* to corporations.

### III. POST-*BURNHAM* JURISPRUDENCE

While there is a plethora of cases interpreting whether Justice Scalia’s or Justice Brennan’s reasoning will prevail in the context of individuals, there are only a handful of cases that tackle the issue of whether “presence” alone is a constitutionally sufficient basis for jurisdiction over corporations. This section will examine those cases that have decided the latter question. Significantly, to maintain that the “presence” rationale does apply to corporations, one must follow Justice Scalia’s argument; if one were to follow Justice Brennan’s argument, then the “fairness” inquiry would be conducted in all instances, thereby defeating the notion that there could be jurisdiction over a corporation based solely on its “presence.”

**A. Siemer v. Learjet Acquisition Corp.**

The plaintiffs in *Siemer*, all residents of European countries, filed a wrongful death suit in the United States District Court for the Eastern District of Texas against a Kansas aircraft manufacturer for a crash that occurred in an Egyptian desert. The court granted the defendant’s motion to dismiss for lack of in personam jurisdiction. The defendant was a Delaware corporation with its principal place of business in Kansas. Its contacts with Texas consisted of a certificate giving it

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60. *Id.*, 110 S. Ct. at 2124-25 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985)).
62. Even under Justice Brennan’s analysis, the presence of an individual within the forum state will usually satisfy the “minimum contacts” test.
63. 966 F.2d 179 (5th Cir. 1992).
64. *Id.* at 180.
65. *Id.*
the right to do business in Texas; an agent for service of process in Dallas; one percent of its spare parts sales went to buyers with Texas addresses; a wholly-owned, but separately operated, subsidiary transacted business in San Antonio; advertisements placed in national journals were distributed in Texas (as well as other states); and the defendant mailed information to prospective customers located in Texas.66

The narrow issue of the case was whether in-state service of process on a corporate agent, without more, satisfies the requirements of due process.67 The court rejected the plaintiff’s assertion that Burnham was dispositive of the jurisdictional question, reasoning that Burnham did not involve a corporation and did not decide any issues pertaining to corporations.68 Furthermore, the court stated that “Burnham, to the extent it provides any guidance, reinforces [the defendant] Learjet’s position.”69 The court pointed to the first footnote of Justice Scalia’s opinion,70 which noted that “‘the continuous and systematic contact rule [may] appl[y] only to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon de facto power over the defendant’s person.’”71

The court then conducted a “minimum contacts” analysis to determine whether it could assert general jurisdiction over the defendant.72 Finding that the appointment of an agent for service of process and the registration to do business within the state, without more, was insufficient to confer general jurisdiction, the court ruled in favor of the defendant.

B. MBM Fisheries, Inc. v. Bollinger Machine Shop & Shipyard, Inc.73

In MBM, the president and vice-president of a Louisiana corporation were representing their company at a Seattle trade show. The Seattle-based plaintiff attempted to base general jurisdiction on the service of process on these corporate officers while present in Washington. The Washington Court of Appeals granted the defendant’s motion to dismiss for lack of personal jurisdiction.74

Similar to Siemer, the Washington Court of Appeals found that Burnham did not decide the issue of whether corporate “presence” is a constitutionally sufficient basis for in personam jurisdiction. The court stated in a footnote:

66. *Id.* at 181.
67. *Id.* at 180.
68. *Id.* at 182.
69. *Id.*
70. See supra note 53 and accompanying text.
72. *Id.* at 183.
74. *Id.* at 629-31.
[T]he nonresident defendant in Burnham was a natural person. Whether or not a nonresident natural person may be subject to the jurisdiction of this state by virtue of his or her mere presence in Washington, an issue we do not here decide, service of process on an agent of a nonresident corporation who is merely “present” in Washington does not, without more, comport with due process.\textsuperscript{75}

Thus, the court rejected the notion that the transient “presence” of an unregistered corporate agent is enough to confer jurisdiction over a corporation. However, the court did not decide the issue of whether the “presence” of a registered agent is a sufficient basis for personal jurisdiction. It did decide that, under the “fairness” approach, the defendant did not engage in such “continuous or substantial activity” as would permit Washington to exercise general jurisdiction.\textsuperscript{76}

C. Demirs v. Plexicraft, Inc.\textsuperscript{77}

The plaintiff in Demirs, a resident of Rhode Island, sued the defendant, a California corporation, for breach of an employment contract. The federal district court of Rhode Island framed the issue in a specific jurisdiction context, finding that the cause of action arose “from a breach of an employment contract with a Rhode Island resident and the defendant’s contacts with Rhode Island arise from that contract.”\textsuperscript{78} Determining that it could exercise specific jurisdiction because the defendant had “minimum contacts” with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’” the court ruled in favor of the plaintiff.\textsuperscript{79}

The court buttressed its minimum contacts analysis with the argument that the “presence” of the corporation was a major factor to be considered:

This Court notes that although “minimum contacts” has become the touchstone of in personam jurisdiction, presence of a defendant in the jurisdiction is still to be considered. To the extent that the corporate defendant paid rent and thereby leased office space from the plaintiff, I find that the defendant established a physical presence within Rhode Island which adds support to the already strong case for jurisdiction in this forum.\textsuperscript{80}

\textsuperscript{75}. Id. at 631 n.3.
\textsuperscript{76}. Id. at 631.
\textsuperscript{78}. Id. at 252.
\textsuperscript{79}. Id. at 254 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)).
\textsuperscript{80}. Id. (citing Burnham v. Superior Court of California, 495 U.S. 604, 619, 110 S. Ct. 2105, 2115 (1990)).
More interestingly, in a footnote preceding the above quotation, the court implied that the “minimum contacts” analysis should be used only for absent defendant corporations by agreeing with Justice Scalia’s analysis of Shaffer and International Shoe: “Shaffer, like International Shoe, involved jurisdiction over an absent defendant, and it stands for nothing more than the proposition that when the ‘minimum contact’ that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation.” 81

Although the court used a “minimum contacts” analysis to assert jurisdiction over the defendant, it is unclear whether it would have found “presence” alone a sufficient basis for personal jurisdiction. Judging by the court’s placing of the above footnote within the context of its discussion of “presence,” however, it is conceivable that jurisdiction could have been based on the corporation’s “physical presence” alone. 82

D. Allied-Signal, Inc. v. Purex Industries, Inc. 83

The plaintiff, a New Jersey corporation, served process on the registered agent of a nonresident corporation. The Superior Court of New Jersey held that Scalia’s rationale in Burnham applied to corporations. Implicit in this holding is that no “minimum contacts” analysis is required when there is a “present” corporate defendant. Therefore, the court eschewed a “minimum contacts” analysis, and held that jurisdiction existed over the defendant corporation, which was deemed to be “present” because it had an agent who was registered for service of process with the Secretary of State.

To support its holding, the court wrote that “[w]hile due process merely requires that a nonresident defendant ‘reasonably anticipate’ being sued in the forum state, presence of an individual defendant in the forum state accompanied by service, confers in personam jurisdiction.” 84 Additionally, the court stated that “[o]nly where there was no service on a corporate registered agent has question been raised involving service upon unregistered agents as the corporate ‘presence’ in the state.” 85 In essence, the court argued that when a registered agent of a corporation has been served with process, the United States Supreme Court has never questioned jurisdiction over that defendant. Rather, the only time “presence” as a basis for jurisdiction over corporations has been questioned was when service was made on an unregistered agent. 86 The question remains, however, whether the presence of an unregistered agent constitutes corporate “presence.”

81. Id. at 254 n.1 (citing Burnham, 495 U.S. at 620, 110 S.Ct. at 2115) (emphasis added).
82. Id. at 254.
84. Id. at 944 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 100 S.Ct. 2559, 567 (1980)) (emphasis added).
85. Allied-Signal, 576 A.2d at 945.
86. See infra text accompanying notes 101-108.
In contrast to the *Siemer* court’s interpretation of Justice Scalia’s footnote in *Burnham*, the *Allied-Signal* court stated that, “Justice Scalia was not . . . referring to circumstances limiting state jurisdiction, but to circumstances expanding state jurisdiction and possibly [circumstances] unique to corporations, which obviously have no personal presence anywhere.” The *Allied-Signal* court suggested that Justice Scalia meant that general jurisdiction only applies to corporations—not individuals. Furthermore, the court refused to limit *Burnham* to its facts; instead, it used the footnote to extend Scalia’s rationale to apply to corporate defendants that have a registered agent in the forum state.

IV. ANALYSIS

Four members of the Supreme Court in *Burnham* argued that the mere presence of an individual in the forum is a sufficient basis for a state’s exercise of personal jurisdiction. Whether courts will extend this argument to assert jurisdiction over corporations based on their “presence,” without applying a subjective “fairness” test, is unclear. However, courts should not engage in a “presence” analysis with respect to corporations, as the concepts of “minimum contacts” and general jurisdiction were created to dispose of this unworkable test.

A. Text of International Shoe

In support of the proposition that “presence” is something different from general jurisdiction and thus a viable alternative basis for jurisdiction over corporations, a strong argument can be based on the text of *International Shoe*. The Court stated that if the defendant is “not present within the territory of the forum,” then a “minimum contacts” analysis should be applied. It necessarily follows that if the defendant is present within the forum when served with process, then no “minimum contacts” analysis is required. However, *International Shoe* involved an absent defendant, so its jurisprudential value regarding present defendants is questionable, as Justice Scalia recognized in *Burnham*.

To maintain that *International Shoe* does not abrogate presence as a basis for jurisdiction over corporations, one must ignore that the “minimum contacts” test in *International Shoe* was meant to cure the previous difficulties associated with the “presence” analysis. As the Court stated in *International Shoe*, “To say that the corporation is . . . ‘present’ . . . is to beg the question to be decided.

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87. See supra text accompanying note 53.
88. Id. at 944-45.
91. *Burnham*, 495 U.S. at 619, 110 S. Ct. at 2115.
92. See Twitchell, supra note 17, at 624 n.66; Prescott, supra note 17, at 1151.
For the terms ‘present’ or ‘presence’ are used merely to symbolize those activities of the corporation’s agent within the state . . . .”

B. “Pedigree” Supporting “Presence” as a Constitutionally Sufficient Basis for Jurisdiction

One may also argue that the history of personal jurisdiction supports the argument that “presence” is still a constitutionally sufficient basis for asserting jurisdiction over corporations. As Justice Scalia noted in Burnham, jurisdiction over individuals based on “presence” is one of the continuing traditions of our legal system that defines due process. Corporations, by analogy, have traditionally been subject to jurisdiction wherever they are “present.” “Minimum contacts,” and its general jurisdictional component, was developed as a substitute for the “presence” doctrine. According to this argument, because the “minimum contacts” doctrine is a substitute for the old test of “presence,” it follows that the “minimum contacts” should not now be turned against the “presence” touchstone of jurisdiction. Thus, the argument concludes, jurisdiction may still be conferred over a corporation based on “presence.”

If “minimum contacts” do not make the “presence” analysis obsolete, the next logical question is what utility the “presence” doctrine would serve. Unless the “presence” test could be used to assert jurisdiction even where a general jurisdictional framework would not confer jurisdiction upon a court, the “presence” argument, as applied to corporations, serves no useful purpose today.

In Burnham, Justice Scalia applied the “presence” test to an individual. This was easily done because Mr. Burnham could be found within the state. More importantly, Justice Scalia undoubtedly thought that there was a need for the Court to establish a “presence” test for individuals. It may be that an individual is present in the forum when served with process even though his contacts with the state fall short of being deemed “continuous and systematic.” Further, the claim against the individual may neither arise out of nor relate to the defendant’s contacts with the forum state. In this scenario, both general and specific jurisdictional frameworks would fail to grant jurisdiction. Thus, a

93. International Shoe, 326 U.S. at 316, 66 S. Ct. at 159 (citing Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.)).
94. See Burnham, 495 U.S. at 619, 110 S. Ct. at 2115.
97. Arguably, general jurisdiction never applies to individuals, but only to corporations, as Justice Scalia suggests in a footnote in Burnham: “It may be that whatever special rule exists permitting ‘continuous and systematic’ contacts, to support jurisdiction with respect to matters unrelated to activity in the forum, applies only to corporations . . . .” 495 U.S. 604, 610 n.1. 110 S. Ct. 2105, 2110 n.1 (1990) (citation omitted).
"presence" test allows courts to assert jurisdiction over a transient defendant if he is physically present and served within the borders of the forum.98

1. Transient "Presence" of Corporations

With corporations, no such need to implement a separate "presence" test exists. Although there are at least two arguments to the contrary, the "gap" that was evident in the context of individuals is not apparent with corporations. First, it can be argued that a corporation should be deemed "present" when any of its agents are within the forum, no matter how fleeting the agent's appearance may be. However, this argument is easily disposed of, as the MBM Fisheries99 case illustrates. Courts long ago dismissed the notion that jurisdiction could be conferred over a corporation based on its transient "presence."100

2. "Single-Contact" Basis of Jurisdiction

A more persuasive argument may be that the registration of an agent to receive process in a state is automatically sufficient to support jurisdiction over a corporation. Like transient jurisdiction over individuals, there is a "gap" between the general and specific jurisdictional frameworks where the corporation would not be subject to jurisdiction, since its contacts may neither be "continuous and systematic," nor its specific contacts sufficiently related to the suit at hand. In this case, a "presence" analysis would support jurisdiction if the agent's "physical presence" is equated with the corporation's "presence." Some authority supporting this basis for jurisdiction exists, including Allied-Signal, that held when a corporation has registered an agent to do business within a state, then that corporation is deemed to be "present" or "doing business," and has therefore subjected itself to the jurisdiction of that state.101

The Allied-Signal court stated that "[o]nly where there was no service on a corporate registered agent has question been raised involving service upon unregistered agents as the corporate 'presence' in the state."102 Relying on this evidence, the court proceeded to consider the "presence" of an agent registered to receive service of process as a justification for conferring jurisdiction over the corporation.103

98. The desirability of this result is left open to debate and is beyond the scope of this Note.
100. See Kurland, supra note 8.
102. Allied-Signal, 576 A.2d at 945.
103. Id.
Although there is some authority for this "single-factor" basis of jurisdiction, it is not strongly supported. The Supreme Court has proclaimed that the "presence" of a registered agent in the forum is a "helpful but not a conclusive test" in determining if there is jurisdiction over the corporation. Other courts have stated that a corporation's qualification to do business in the forum state and service on its registered agent in the state "is of no special weight" in evaluating general personal jurisdiction. Indeed, the Fifth Circuit came to this same conclusion in Siemer.

Assuming the registration of an agent within the forum state is a constitutionally sufficient ground to support jurisdiction over a corporation, it still does not follow that a separate "presence" test is the proper analysis. The "single-factor" jurisdiction may still be better suited to a general jurisdictional framework which analyzes not only the contacts of the defendant with the forum, but also the factors under "traditional notions of fair play and substantial justice." Thus, when analyzing jurisdiction over corporate defendants, no "gaps" exist for a "presence" analysis to fill; general jurisdiction is already tailored to factor in the "presence" of a registered agent.

C. Justice Scalia's Footnote

In a Burnham footnote, Justice Scalia touches upon the question of whether "presence" is a constitutionally valid basis for jurisdiction over a corporation. Although the last sentence of this footnote seemingly indicates that Justice Scalia remains neutral on the issue, since the Court in Burnham expressed "no views

109. Justice Scalia's footnote stated:

We have said that "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation." Our only holding supporting that statement, however, involved "regular service of summons upon [the corporation's] president while he was in [the forum State] acting in that capacity." It may be that whatever special rule exists permitting "continuous and systematic" contacts to support jurisdiction with respect to matters unrelated to activity in the forum applies only to corporations, which have never fitted comfortably in a jurisdictional regime based upon "de facto power over the defendant's person." We express no views on these matters...
on [the] matte[r],"110 the Siemer and Allied-Signal courts quoted his language in support of contradictory interpretations.111

The Siemer court has given the proper interpretation to Justice Scalia’s footnote. The only guidance the footnote provides is in line with historical lessons—the application of a “presence” theory to corporations is unworkable. Allied-Signal mistakenly reads the footnote to mean that Scalia intended to expand jurisdiction over corporations, presumably making both general jurisdiction and “presence” available as bases for jurisdiction over corporations. Although Scalia suggests that general jurisdiction applies only to corporations,112 it does not follow that corporations are subject to the “presence” theory that applies to individuals. Quite the opposite follows, since general jurisdiction was developed after International Shoe as a substitute for the “presence” doctrine.113 Indeed, general jurisdiction over corporations is the corollary to “presence” as a basis for jurisdiction over individuals. Therefore, Burnham should not be applied to corporations.

D. Policy Considerations

Besides textual and historical arguments, policy considerations also weigh against acceptance of “presence” as a constitutionally viable basis for jurisdiction over corporations. Two significant policy concerns, the danger of unlimited jurisdiction and the threat of forum-shopping, discourage the application of any corporate presence theory. Suppose that the “single contact” basis of jurisdiction is upheld as an instance where a “presence” analysis would operate. Under this scenario, a giant corporation such as Exxon would be subject to jurisdiction in virtually every state based on its “presence.” Once the court found that Exxon had one contact—a registered agent—with the forum, the court could deem Exxon “present” for jurisdictional purposes, regardless of its level of contacts with the forum state and without engaging in any “fairness” debate. In this case, it would not matter if it were unfair for Exxon to defend every type of claim in every state. All that would matter would be whether Exxon had a registered agent in the forum.

Although one may quickly conclude that no injustice has occurred because Exxon receives benefits from every state and has considerable resources to defend such suits, this quick reaction changes when examining other situations. For instance, suppose a small mail-order business in Michigan derives a very small profit from customers in Georgia. To do business in the state, Georgia requires the corporation to register an agent for service of process. According

110. Id.
111. See supra discussion at notes 63-72, 83-88 and accompanying text.
112. See Daniel J. Capra, Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice, 50 Md. L. Rev. 632, 671 (1991).
113. See Twitchell, supra note 17, at 634.
to the "presence" analysis, the Michigan corporation may be haled into the Georgia court to defend any suit filed against it.

Additionally, if a "single contact" basis of jurisdiction is adopted, nothing prevents plaintiffs from forum shopping for the most favorable law against large corporations, such as Exxon, and small corporations, such as the Michigan mail order business. To sue Exxon for a negligence claim, plaintiff could easily search the statutes of every state to find the longest prescriptive period and the highest damage cap. To control such manipulation of the law, courts should not apply the "presence" test to corporations.

V. CONCLUSION

This Note does not attempt to resolve the difficult question of what constitutes corporate "presence" because "presence" should not be a basis for jurisdiction over corporations. It can not be said with any degree of certainty when and where a corporation, because of its incorporeal nature, is "present." Is a corporation "present" when there are no offices in the state, but all of its employees reside within the forum? Is a corporation "present" when all of its offices are in the state, but none of its employees reside in the forum? Is a corporation "present" when half of its offices and employees reside within the forum while the other half of its offices and employees are in another state? Is the corporation "present" in both states? It quickly becomes apparent why there should not be a strict "presence" test for corporations, but a more manageable "fairness" analysis.

In the aftermath of Burnham, it would be incorrect to implement a "presence" analysis from both a theoretical and practical standpoint. International Shoe disposed of the "presence" test in favor of the "minimum contacts" analysis, and the abstract concept of corporate "presence" has proven difficult to manage. Therefore, Justice Scalia's rationale in Burnham should not be extended to establish "presence" as a constitutionally sufficient alternative basis of jurisdiction.

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