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Recommended Citation
Cody Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 New Mexico Law Review 1 (2016).
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IF CORPORATIONS ARE PEOPLE, WHY CAN'T THEY PLAY TAG?

Cody J. Jacobs*

ABSTRACT

The Supreme Court's decision in Burnham v. Superior Court—despite producing a splintered vote with no opinion garnering a majority of the Court—made one thing clear: an individual defendant can be subject to personal jurisdiction simply by being served with process while he or she happens to be in a forum regardless of whether the defendant has any contacts with that forum. This method of acquiring personal jurisdiction is called transient, or "tag," jurisdiction. Tag jurisdiction is older than minimum contacts jurisdiction, and once was the primary method for determining whether an out of state defendant could be haled into a court. While Burnham held that tag jurisdiction remained constitutionally valid, the court split on the justification for allowing this form of jurisdiction, with four Justices approving the practice under an originalist methodology, and four others approving it based on contemporary notions of fairness.

This Article argues that both the originalist and fairness-based tests proposed in Burnham support allowing the assertion of tag jurisdiction over corporations and other entities through in-state service on their officers. This Article shows that at the time of the Fourteenth Amendment's ratification, corporations were often subject to personal jurisdiction based only on their officers' physical presence in a forum when served with process. The Article also demonstrates that the fairness considerations discussed in Burnham apply with even more force to modern corporations because of their greater ability to take advantage of the protections and services offered by states outside of their own. Finally, the Article examines how the application of tag jurisdiction to corporate entities would be in accord with general trends in constitutional law affording corporations rights equivalent to those of natural persons.

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* Abraham L. Freedman Fellow, Temple University Beasley School of Law. I would like to thank Christine Bartholomew for her extensive and helpful comments on this piece. I am also appreciative of all the feedback I received when I presented drafts of this paper to the SUNY Buffalo Law School Junior Faculty Forum and at the 2015 Scholarship and Teaching Development Workshop at Albany Law School. The paper also benefited from the excellent research assistance of Brian Sarama. This Article is dedicated to my daughter, Evann, who was born while it was being written. May you never accept that "life isn't fair."

INTRODUCTION

A French citizen voluntarily travels to California to attend a conference. While there, he is properly served with a lawsuit by a California corporation. Even if he has no significant ties to California and the lawsuit is unrelated to any California conduct, there is no question under *Burnham v. Superior Court*[1] that this hapless French citizen would be subject to personal jurisdiction in the California, simply by virtue of setting foot in California long enough to be served with process.

Now imagine a different scenario. A French corporation's vice president is attending a conference in California on behalf of the corporation. While in California the vice president is served with a lawsuit by an individual plaintiff. Like the scenario above, the lawsuit is unrelated to any California conduct and the Corporation has no significant ties to the forum. Unlike the unlucky French individual in the first scenario, the French corporation is not so clearly subject to personal jurisdiction. In fact, this second scenario describes the facts of *Martinez v. Aero Caribbean,* where the Ninth Circuit held that a French corporation—which allegedly manufactured and designed a defective plane that crashed, killing 68 people—*could not* be subject to personal jurisdiction in California even though its vice president was served in California.[2]

Why is it that a corporation is allowed to come and go from a state with impunity but an individual risks being haled into court simply by stepping across the state line? This Article argues that corporations[3] should be subject to "tag" jurisdiction by allowing the assertion of personal jurisdiction over a corporation in any forum where an officer is served while voluntarily present on the corporation's behalf.[4] Applying tag jurisdiction to corporations is consistent with the Supreme Court's reasoning for applying it to individual persons. Tag jurisdiction also fits into the theoretical framework in modern constitutional law of corporations as entities with constitutional protections equal to natural persons.

This Article will trace the history of tag jurisdiction, culminating in the Supreme Court's split decision in *Burnham* endorsing that practice even in the age of modern "minimum contacts" jurisdictional analysis. *Burnham* laid out two competing due process justifications for the continuing vitality of tag jurisdiction.

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1. 495 U.S. 604 (1990).
2. 764 F.3d 1062 (9th Cir. 2014).
3. Although this Article mostly refers to corporations—which have been the subject of most litigation about this issue—the logic that would lead to the application of tag jurisdiction to corporations applies equally to other types of non-individual entities such as limited liability companies and partnerships.
4. Commentators and courts have also often used the phrase "transient jurisdiction" to describe this phenomenon. *See, e.g.*, *Burnham*, 495 U.S. at 632–636, 638 (Brennan, J., concurring); Armand Paliotta, *Jurisdiction:* Burnham v. Superior Court*: Adding Confusion to Transient Jurisdiction*, 44 OKLA. L. REV. 551 (1991); *see also* Joel H. Spitz, *The "Transient Rule" of Personal Jurisdiction: A Well-Intentioned Concept That Has Overstayed Its Welcome*, 73 MARQ. L. REV. 181 & n.3 (1989) ("The term 'transient jurisdiction' refers to jurisdiction over persons temporarily present in the forum. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 410 (3d ed. 1986)."). Other commentators have used other terminology. *See, e.g.*, Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L. J. 729 (1981) (referring to transient jurisdiction as the 'Gotcha' theory). This Article uses the phrases "tag jurisdiction" and "transient jurisdiction" interchangeably.

Those two justifications were based on the historical pedigree of tag jurisdiction and its inherent fairness. This article argues that both of these justifications strongly support the application of tag jurisdiction in the corporate context, because tag jurisdiction was frequently applied to corporations at the time of the Fourteenth Amendment's ratification and because applying tag jurisdiction to corporations is at least as inherently fair as applying it to natural persons.

The Article will also look at this issue through the lens of modern constitutional corporate personhood. Corporations have been afforded constitutional rights because they have been conceived of as the equivalent of natural people. Accordingly, corporate constitutional rights claims are almost never analyzed any differently than those of natural persons. This theoretical framework should entitle corporations to rights *equal* to those of natural persons—no more, no less. Yet, courts refusing to apply tag jurisdiction to corporations incongruously afford corporations *greater* protection under the Due Process Clause than natural persons.

This Article begins in Part II with an overview of the history of tag jurisdiction and the Court's modern personal jurisdiction doctrine, and an examination of the two principal opinions in *Burnham*. Part III will argue that the justifications for tag jurisdiction offered in *Burnham* strongly support the application of tag jurisdiction to corporations. Part IV will survey and critique the lower court decisions addressing whether corporations are subject to tag jurisdiction after *Burnham*. Part V will explain how applying tag jurisdiction to corporations is consistent with the recent treatment of corporations as equivalent to natural persons in other areas of constitutional law.

I. MODERN PERSONAL JURISDICTION DOCTRINE: RUNNING AWAY FROM TAG AND BACK AGAIN

A court's ability to exercise jurisdiction over a person, i.e. *in personam* jurisdiction, was historically based on a simple idea: a court may exercises jurisdiction over any person physically present in the forum.[5] Over the last seventy years — partly in response to technological and social changes that made it easier for corporations to do business in multiple places at once —courts have adopted and expanded alternative ways to assert jurisdiction over people and companies who are not physically present in the forum when served with process, but nevertheless have some level of minimum contacts with the jurisdiction that justify the assertion of the court's authority over that person or company. However, in *Burnham*, the Court

5. *See, e.g.*, *Burnham*, 495 U.S. at 610–11 ("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. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit. *See, e.g.*, *Potter v. Allin*, 2 Root 63, 67 (Conn. 1793); *Barrell v. Benjamin*, 15 Mass. 354 (1819). That view had antecedents in English common-law practice, which sometimes allowed 'transitory' actions, arising out of events outside the country, to be maintained against seemingly nonresident defendants who were present in England."); Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (noting the "well-established principles of public law respecting the jurisdiction of an independent State over persons and property . . . that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory").

made clear that this minimum contacts analysis was intended to *supplement* traditional *in personam* jurisdiction based on physical presence, not to replace it entirely.[6]

A. Modern Personal Jurisdiction Doctrine: Away From Tag, Towards Minimum Contacts

Prior to 1877, the question of personal jurisdiction was solely focused on physical presence.[7] Under this rule, courts could assert personal jurisdiction over any person who consented to jurisdiction,[8] voluntarily entered an appearance, had property in the state, or was served while physically present in a state.[9] A court was able to acquire jurisdiction over a defendant who was served in a forum regardless of whether the defendant's presence in the forum was related to the litigation or whether the duration of the defendant's stay in the forum was lengthy or brief.[10] The only limitation was that courts would not assert jurisdiction over a defendant who was served while physically present in a jurisdiction due to force, fraud, or in order to be a party or witness in another judicial proceeding — in other words, the defendant had to be voluntarily present in the forum in order for personal jurisdiction to arise from service.[11]

In *Pennoyer v. Neff*, the Court constitutionalized these traditional principles of jurisdiction, holding that the assertion of personal jurisdiction over a non-resident defendant who was only served by means of publication was improper under the Due Process Clause of the Fourteenth Amendment because the defendant had not consented to jurisdiction in the state, voluntarily appeared, or been served with process in the state.[12] Thus, this rather formalistic approach to jurisdiction became a

6. *See Burnham*, 495 U.S. at 619.

7. *But see* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 25–32 (1990) (noting that "Supreme Court intervention in state court assertions of personal jurisdiction did not, as one may sometimes gather, begin with *Pennoyer*" and recounting several jurisdictional cases the Court decided in the context of the interstate recognition of judgments).

8. Consent was—even in this period—often understood fairly broadly to encompass situations where state laws implied the consent of defendants who choose to conduct business in a state or even drive on a state's roads. *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty First Century World*, FLA. L. REV. 387, 391 n.13 (2012) (listing methods that a defendant could consent to jurisdiction during the nineteenth century, illustrating that—even in this period—consent was often understood fairly broadly to encompass situations where state laws implied the consent of defendants who chose to conduct business in a state); Borchers, *supra* note 7, at 29 (discussing a pre-*Pennoyer* example of the "fictionalized notion of 'consent'" that "would come to be the centerpiece of the [Supreme] Court's jurisdictional jurisprudence" several decades later.)

9. *See, e.g.*, Borchers, *supra* note 7, at 32.

10. *See Burnham*, 495 U.S. at 612–13 (collecting cases).

11. *See id.* at 613.

12. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877). *See* Borchers, *supra* note 7, at 38–43 (suggesting that *Pennoyer* was a bit ambiguous and that *Pennoyer* could have been read narrowly—to only provide a Fourteenth Amendment right to challenge a state court judgment collaterally to ensure that the state's jurisdictional rules were complied with, rather than to create any substantive limitations on the states' ability to set their own jurisdictional rules); *see also Burnham*, 495 U.S. at 616–17 ("*Pennoyer v. Neff*, while renowned for its statement of the principle that the Fourteenth Amendment prohibits such an exercise of jurisdiction, in fact set that forth only as dictum and decided the case . . . under 'well-

real limit on the authority of courts. However, in practice, this approach proved less rigid then it initially appeared. In the years that followed *Pennoyer*, the Court stretched the definition of "consent" to allow the assertion of personal jurisdiction over defendants who were not actually served within a state's borders by approving statutory schemes that implied consent from certain activities such as doing business within a state.[13]

By the middle of the twentieth century, the Court decided to depart from this fiction altogether in the landmark case of *International Shoe v. Washington*.[14] In that case, the Court held for the first time that the Due Process Clause 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.'"[15] The Court explicitly recharacterized its earlier opinions expanding the scope of "consent" as instances where a defendant's contacts with a state were sufficient to give rise to personal jurisdiction.[16] *International Shoe*'s expansion of courts' ability to assert jurisdiction over non-physically present defendants was largely a response to the advances in communications and transportation technologies that allowed people — and in particular companies — to conduct business over state lines with relative ease.[17]

Over the years following *International Shoe*, the Court refined the boundaries of this new method of acquiring personal jurisdiction over non-present defendants. The Court eventually developed two different ways to assert jurisdiction over such defendants: general jurisdiction and specific jurisdiction.[18] A court may assert general jurisdiction only when the defendant has such "continuous and systematic [contacts] as to render them essentially at home in the forum State."[19]

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established principles of public law.'"). *See* Borchers, *supra* note 7, at 50–51 (noting that over the next few decades, the ambiguity was resolved in favor of the broader reading of *Pennoyer*, firmly establishing the Due Process Clause as a substantive limitation on states' ability to exercise personal jurisdiction); *see, e.g.*, Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 195–97 (1915).

13. *See, e.g.*, *Burnham*, 495 U.S. at 617–18; *see also supra* note 8.

14. 326 U.S. 310 (1945).

15. *Id.* at 316.

16. *See id.* at 318–19; Rhodes, *supra* note 8, at 398–99.

17. *See, e.g.*, Warren B. Chik, *U.S. Jurisdictional Rules of Adjudication over Business Conducted Via the Internet—Guidelines and A Checklist for the E-Commerce Merchant*, 10 TUL. J. INT'L & COMP. L. 243, 250 n.28 (2002); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 779–80, 782–83 (1995) (noting that with the refinement of the corporate form and easier methods of travel "[c]orporations proved particularly troublesome" to courts in the post-*Pennoyer*, pre-*International Shoe* era by making it difficult to secure jurisdiction over them in states where they may cause harm). *But see* Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to* International Shoe, 10 GEO. MASON L. REV. 59, 62 (2001) ("[T]he decision [in *International Shoe*] did not result simply from the expansion of interstate business or the inherent weakness of the *Pennoyer* system. Instead, *International Shoe* was caused primarily by the emergence of a new conception of the law and the role of the judge. It was only because judges saw the law through the lenses of sociological jurisprudence and legal realism that judges believed *International Shoe* was necessary to address interstate corporate activity.").

18. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

19. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

Once the existence of such contacts is established, a court may assert jurisdiction over a defendant for any cause of action, even one not related to the defendant's contacts with that forum.[20]

Specific jurisdiction on the other hand, the far more litigated type of jurisdiction,[21] arises when the defendant's contacts with the forum gave rise to the cause of action.[22] In assessing whether a court may exercise specific jurisdiction, a court looks at whether the defendant "'purposefully directed' his activities at residents of the forum" and whether the litigation "arise[s] out of or relate[s] to those activities."[23] Even if such purposefully created contacts exist, and those contacts are sufficiently connected to the cause of action, personal jurisdiction still may only be asserted when it is consistent with "traditional notions of fair play and substantial justice."[24] This analysis depends on "an evaluation of several factors," including "the burden on the defendant, the interests of the forum State, . . . the plaintiff's interest in obtaining relief[,] the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies."[25]

At first, the Supreme Court used these formulations to expand the scope of state authority to subject non-resident corporations to personal jurisdiction.[26] However, beginning in the late 1970s, the Court pared back the growth of minimum contacts-based jurisdiction primarily by requiring a greater level of purposeful availment on the part of defendants—especially corporate defendants—to subject themselves to jurisdiction in a particular forum.[27]

B. *Burnham:* Back To Tag Again, But Why?

Importantly, tag jurisdiction falls outside of the minimum contacts framework of specific or general jurisdiction. Its exercise does not turn on whether the defendant's contacts with the state are systematic, related to the cause of action, or whether those contacts are purposeful. Instead, it depends only upon whether the defendant was served while voluntarily physically present in the jurisdiction. During the entire period after *International Shoe* when the Court was developing the minimum contacts doctrine, the Court was conspicuously silent on whether tag jurisdiction remained valid.

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20. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

21. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630 (1988).

22. *See, e.g.*, *Goodyear*, 131 S. Ct. at 2851.

23. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citation omitted); *accord* Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case [to support the exercise of personal jurisdiction] that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

24. Asahi Metal Indus. Co. v. Superior Court of California, Solano Cnty., 480 U.S. 102, 113 (1987) (quotations omitted) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316).

25. *Asahi*, 480 U.S. at 113 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

26. *See, e.g.*, Rhodes, *supra* note 8, at 400–01 & n.73 (collecting cases).

27. *See* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 562 (2012) ("In the ten remaining personal jurisdiction cases of the twentieth century—after *Hanson* and through 1990—the Court would reject jurisdiction in seven.").

In the absence of any indication to the contrary, courts continued to recognize tag jurisdiction as a valid method of obtaining personal jurisdiction over non-resident defendants even after *International Shoe*.[28] These courts saw *International Shoe* as a vehicle for expanding jurisdiction rather than contracting it, and held that it only applied to situations involving substituted service where the non-resident is not present in the forum.[29] In perhaps the most vivid illustration of the viability of this traditional form of jurisdiction in the modern world, a federal district court in Arkansas upheld the assertion of jurisdiction over a non-resident defendant who was simply in a plane flying over Arkansas when he was served with process.[30]

However, when the Court finally offered a clue of which direction it was heading on the issue, it appeared to signal that tag jurisdiction was on its way out. In *Shaffer v. Heitner*,[31] a six Justice majority held that the physical presence of property in a state was insufficient to justify the assertion of personal jurisdiction over a non-resident defendant in the absence of minimum purposeful contacts with the forum by the defendant and a showing that asserting jurisdiction was consistent with traditional notions of fair play and substantial justice.[32] Thus, even when the defendant's property is present in a state, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[33] The Court reached this conclusion after recognizing that the assertion of jurisdiction over property — although it has a long historical pedigree — is really just an assertion of jurisdiction over the property's owner.[34] The Court concluded that this fiction "supports an ancient form without substantial modern justification" and "[i]ts continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant."[35]

The Court's virtually unanimous[36] willingness to put an end to traditional in-rem jurisdiction led many commentators to predict the demise of tag jurisdiction

28. *See, e.g.*, Donald Manter Co. v. Davis, 543 F.2d 419, 420 (1st Cir. 1976) (citations omitted) ("It has long been black letter law that personal service within its geographical area establishes a court's personal jurisdiction over the defendant. The cases relied upon by defendant discussing 'fairness,' etc., allegedly contra, are directed either to the fairness of the basis for substituted service when an individual was not personally served or present within the area, or to the fairness of subjecting a foreign intangible entity, such as a corporation, to the jurisdiction of the court. *See, e. g.*, *Hanson v. Denckla*, . . . ; *International Shoe Co. v. Washington*. . . . The concern, in other words, was with expanding jurisdiction beyond traditional limits, not with contracting it."); Nielsen v. Braland, 119 N.W.2d 737, 738 (1963) ("This case involves service on an individual defendant within the State of Minnesota of a summons in a transitory cause of action. The cases relied upon by defendant involve the amenability of a foreign defendant to jurisdiction in personam by substituted service. . . . Where the defendant is present within the state, except when exempt from service, and is personally served, the court acquires jurisdiction in personam regardless of the fact that he is a nonresident.").

29. *See, e.g.*, *Donald Manter*, 543 F.2d at 420.

30. Grace v. MacArthur, 170 F. Supp. 442, 442–47 (E.D. Ark. 1959).

31. 433 U.S. 186 (1977).

32. *Id.* at 212.

33. *Id.*

34. *Id.*

35. *Id.*

36. Six Members of the Court joined the majority opinion. *Id.* at 189. *See also id.* at 217–19 (Stevens, J., concurring) (appearing to agree that the simple presence of property alone in a state was insufficient to

as well.[37] These scholars argued that *Shaffer* essentially severed the connection between a state's physical power over the property and people within its borders and its ability to exercise jurisdiction.[38] By replacing a traditional focus on physical power with the modern *International Shoe* test in the context of dealings with property, the Court appeared to be preparing to make a similar shift with respect to people.[39] Nevertheless, most lower courts continued to adhere to traditional tag jurisdiction even after *Shaffer*.[40] Thus, the stage was set for the Supreme Court to resolve the divide between scholars and courts when the Supreme Court granted certiorari in a case involving a New Jersey resident with no significant ties to California who was served with a court summons and divorce petition during a brief visit to California.[41]

Despite all the hype, the Justices agreed unanimously that tag jurisdiction generally remained valid.[42] However, they sharply disagreed on the rationale for that holding, with no opinion managing to garner five votes. Justice Scalia, writing in large part for four Justices,[43] applied an originalist[44] methodology. He began with a discussion of the long historical pedigree of transient jurisdiction, tracing its lineage back to English common law practice as early as the late seventeenth century.[45] Justice Scalia noted that under this practice:

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confer personal jurisdiction in the absence of some kind of procedure for notifying property owners that such ownership subjected them to potential jurisdiction); *id.* at 219 (Brennan, J., concurring in part, dissenting in part) (agreeing with the Court that "the minimum-contacts analysis developed in *International Shoe*" should govern the assertion of state-court jurisdiction even when property is owned by the defendant in the forum state, but disagreeing with the Court's application of the *International Shoe* analysis to the facts of the case); *id.* at 216 (noting that then-Justice Rehnquist recused himself from the case).

37. *See, e.g.*, Daniel O. Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of in Personam Jurisdiction?*, 25 VILL. L. REV. 38, 66 (1979) ("But if due process means fairness based on the existence of minimum contacts between the defendant, the litigation, and the forum, then it would appear that in personam jurisdiction, grounded solely upon mere physical presence, is inconsistent with the holding of *Shaffer* and should, therefore, be laid to rest."); *see also* Douglas A. Mays, Note, Burnham v. Superior Court*: The Supreme Court Agrees on Transient Jurisdiction in Practice, but Not in Theory*, 69 N.C. L. REV. 1271, 1271 n.5, 1283 n.104 (1991) (collecting sources); Earl M. Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U.L.Q. 671, 674 n.13 (1988) (collecting sources).

38. *See, e.g.*, Bernstine, *supra* note 37, at 52–53, 61–62.

39. *See, e.g.*, *id.* at 61–62.

40. *See* Paul C. Wilson, *A Pedigree for Due Process?* Burnham v. Superior Court of California, 56 MO. L. REV. 353, 366 (1991); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1117 n.78 (1990).

41. *See* Wilson, *supra* note 40, at 366 (noting the "nearly unanimous voice [of] scholars [who] had counseled an end to" tag jurisdiction before *Burnham* was decided and the "equally unanimous voice [of] state and lower federal courts" in upholding the doctrine).

42. *See* Burnham v. Sup. Ct. of Cal., 495 U.S. 604, 607 (1990) (Scalia, J., plurality); *id.* at 628–29 (Brennan, J., concurring); *id.* at 640 (Stevens, J., concurring).

43. *See id.* at 607 (noting that Justice Scalia's opinion was joined in its entirety by Chief Justice Rehnquist and Justice Kennedy, and joined in large part by Justice White).

44. *See* Liang Kan, Comment, *A Theory of Justice Souter*, 45 EMORY L.J. 1373, 1379–80 (1996) (describing Justice Scalia's opinion as purporting to be based on the original understanding of the Fourteenth Amendment).

45. *Burnham*, 495 U.S. at 610–11.

> [E]ach State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit.[46]

It was against this backdrop that Justice Scalia analyzed and rejected the petitioner's arguments for departing from this tradition. First, Justice Scalia characterized *International Shoe* as merely holding that "the defendant's litigation-related 'minimum contacts' *may take the place of physical presence* as the basis for jurisdiction[.]"[47] The minimum contacts test "was developed by analogy to 'physical presence,' and it would be perverse to say it could now be turned against that touchstone of jurisdiction."[48]

Next, in a portion of his opinion joined only by Chief Justice Rehnquist and Justice Kennedy, Justice Scalia rejected the argument that *Shaffer* required the abandonment of tag jurisdiction.[49] Justice Scalia argued that "*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."[50] Justice Scalia dismissed *Shaffer*'s seemingly clear statement that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"[51] as simply a statement that

> quasi in rem jurisdiction . . . and *in personam* jurisdiction, are really one and the same and must be treated alike—leading to the conclusion that quasi in rem jurisdiction, i.e., that form of *in personam* jurisdiction based upon a 'property ownership' contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of *International Shoe*.[52]

Thus, "[t]he logic of *Shaffer*'s holding—which places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact—does not compel the

46. *Id. See id.* at 611 (admitting that recent scholarship had called into question how firmly rooted that English tradition actually was). *But see id.* (noting that whether that perception of history was accurate or not, it was the perception that was "shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted").

47. *Id.* at 618 (emphasis added).

48. *Id.* at 619.

49. *See id.* at 619–20 (characterizing this point as petitioner's "strongest argument," perhaps suggesting Justice Scalia's underlying disagreement with *Shaffer*). *See also Burnham*, 495 U.S. at 621–22, 621 n.4 (admitting that "[i]t is fair to say, however, that while our holding today does not contradict *Shaffer*, our basic approach to the due process question is different" and asserting that *Shaffer* "may have involved a unique state procedure" for acquiring in rem jurisdiction).

50. *Id.* at 620.

51. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

52. *Burnham*, 495 U.S. at 620–21.

conclusion that physically present defendants must be treated identically to absent ones."[53]

The core of the disagreement among the Members of the Court in *Burnham* was whether tradition alone could justify the continuation of tag jurisdiction. Justice Brennan's opinion for four justices,[54] while agreeing with Justice Scalia that "the Due Process Clause . . . generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum[,]"sharply disagreed with the idea that tradition should be "the *only* factor" in determining whether a jurisdictional rule satisfies due process requirements.[55] Instead, Justice Brennan proposed an "independent inquiry into the . . . fairness of the" rule being evaluated.[56]

Justice Brennan argued that the originalist approach suggested in Justice Scalia's opinion was inconsistent with the Court's decisions in *Shaffer* and *International Shoe*, with the former casting off a traditionally valid form of jurisdiction and the latter allowing an expansion of jurisdiction not supported by tradition.[57] Instead, Justice Brennan proposed that tradition should be just one factor in a larger fairness inquiry.[58]

Applying that fairness analysis to tag jurisdiction, Justice Brennan first noted that, because tag jurisdiction was a longstanding tradition[59] in the United States, defendants were on notice that they may be subject to jurisdiction in a forum by physically entering it.[60] Justice Brennan further noted that a person avails himself of significant benefits of a forum simply by choosing to enter it, including gaining access to the state's emergency services, roads, and "the fruits of the State's economy[.]"[61] The opinion also argued that "[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."[62] Finally, the opinion found the exercise of jurisdiction over transient defendants fair because of advances in transportation and communications technology that make it easier for a non-resident to defend themselves in a foreign forum, particularly one that non-resident already visited at least once when he or she was served with process.[63]

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53. *Id.* at 621.

54. *Id.* at 628 (Brennan, J., concurring) (noting that Justice Brennan's opinion was joined by Justice Marshall, Justice Blackmun, and Justice O'Connor).

55. *Id.* at 628–29 (Brennan, J., concurring).

56. *Id.* at 629.

57. *See id.* at 629–33.

58. *See id.* at 633.

59. *See id.* at 634–35 & nn.9–10 (noting that Justice Brennan taking issue with Justice Scalia's characterization of the history of tag jurisdiction by stating "for much of the 19th century, American courts did not uniformly recognize the concept of transient jurisdiction, and it appears that the transient rule did not receive wide currency until well after our decision in *Pennoyer v. Neff* . . . ").

60. *Burnham*, 495 U.S. at 636–37 (Brennan, J., concurring).

61. *Id.* at 637–38.

62. *Id.* at 638.

63. *Id.* at 638–39.

Justice Scalia, in a different portion of his opinion joined by only two other Justices,[64] strongly defended relying entirely on tradition in determining the validity of jurisdictional rules. He argued that Justice Brennan's proposal was overly subjective and would essentially come down to "each Justice's subjective assessment of what is fair and just."[65] Instead, Justice Scalia concluded that "[t]he 'contemporary notions of due process' applicable to personal jurisdiction are the enduring '*traditional* notions of fair play and substantial justice' established as the test by *International Shoe*" and that this test is satisfied whenever lower courts "adhere[] to jurisdictional rules that are generally applied and have always been applied in the United States."[66]

Justice Stevens deprived either side of a majority-making fifth vote[67] with a brief enigmatic concurrence that expressed concern about the "unnecessarily broad reach" of both primary opinions.[68]

None of the opinions discussed any distinctions between natural persons and corporations, except for one footnote in Justice Scalia's 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 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." *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 440, 72 S.Ct. 413, 415, 96 L.Ed. 485 (1952). It may be that whatever special rule exists permitting "continuous and systematic" contacts, *id.*, at 438, 72 S.Ct., at 414, 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—

64. *Id.* at 608–609 (noting that Chief Justice Rehnquist and Justice Kennedy joined this portion of Justice Scalia's opinion).

65. *Id.* at 623.

66. *Id.* at 622–23.

67. *Id.* at 628 (White, J., concurring) (joining Justice Scalia's opinion in substantial part, but also writing a separate concurrence (for himself only), suggesting that he believes the Court may have authority to declare traditionally accepted procedures invalid under the Due Process Clause, but only where there has been a showing "that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case").

68. *Id.* at 640 (Stevens, J., concurring); *see* Mays, *supra* note 37, at 1278 n.68 (describing Justice Stevens' concurrence in *Burnham* as "a short and somewhat enigmatic opinion"); *see also* Winton D. Woods, Burnham v. Superior Court: *New Wine, Old Bottles*, 13 GEORGE MASON U. L. REV. 199, 209 n.30 (1990) ("Justice Stevens thus continues his practice in close cases of the jurisdictional kind by refusing to join with anybody's theory. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (Stevens, J., concurring); Shaffer v. Heitner, 433 U.S. 186 (1977) (Stevens, J., concurring).").

> and, for simplicity's sake, omit reference to this aspect of "contacts"-based jurisdiction in our discussion.[69]

In this footnote, Justice Scalia does not really get at the central question of whether corporations should be subject to tag jurisdiction or not, but instead suggests that individuals may not ever be subject to general jurisdiction based on systematic and continuous contacts outside of their home state, even though this method of asserting jurisdiction is applicable to corporations. Thus, this footnote offers no guidance on the relationship between tag jurisdiction and corporations and even explicitly disclaims expressing any "views" on the issue it does purport to address. Nevertheless, as discussed in Part IV, *infra*, lower courts have frequently contorted this footnote to avoid applying tag jurisdiction to corporations.

II. TAGGING CORPORATIONS: AN IDEA BOTH SIDES OF BURNHAM CAN EMBRACE

Burnham does not directly answer the question of whether tag jurisdiction applies to corporations; however, it does provide two methods of analysis to apply to that question. As discussed above, *Burnham*'s two principal opinions gave different justifications for the continuing vitality of tag jurisdiction: Justice Scalia's opinion relied on the well-established historical pedigree of tag jurisdiction, while Justice Brennan relied on the inherent fairness of tag jurisdiction.[70] While these methods of analysis are worlds apart when it comes to their larger implications for the Due Process Clause, they should both yield the same result here: tag jurisdiction should apply to business entities just as it applies to individuals.

A. Historical Justifications

Under Justice Scalia's method of analysis in *Burnham*, to determine whether a procedure for securing personal jurisdiction violates the Due Process Clause, courts must look to "the principles traditionally followed by American courts in marking out the territorial limits of each State's authority."[71] The most "crucial time" for the purposes of establishing what principals were "traditionally followed" by American courts with respect to personal jurisdiction is the period around "1868, when the Fourteenth Amendment was adopted."[72] Under this originalist approach, as long as a practice was common around the time of ratification, it is constitutional, even if the practice was less common prior to the ratification period.[73] If a practice is sufficiently "traditional" by this metric, then no further analysis is necessary and due process is satisfied.[74] However, if a practice is not so traditional, then it must be justified by an analysis of whether it comports with "traditional notions of fair play and substantial justice."[75]

69. *Burnham*, 495 U.S. at 610 n.1 (some citations omitted).
70. *See supra* Part II.B.
71. *Burnham*, 495 U.S. at 609.
72. *Id.* at 611.
73. *See id.* at 609–16.
74. *Id.* at 622.
75. *Id.*

Applying this test to the assertion of tag jurisdiction over corporations shows that this practice—although not as old as asserting tag jurisdiction over individual defendants—was, in fact, fairly common at the time of the Fourteenth Amendment's ratification. By that time, courts had already been engaged in several decades of expansion of jurisdiction over out of state corporations. This expansion went on two tracks. One is a familiar one where if a corporation conducted a sufficient amount of business in a state, it was considered "present" there for purposes of jurisdiction.

The other method is less well known, but was equally part of jurisdiction jurisprudence at that time: the idea that a corporation was subject to a forum's jurisdiction if its agent was served while engaged in corporate business there. This latter line of reasoning—present in several cases both before and after ratification of the Fourteenth Amendment—places the assertion of tag jurisdiction over corporations among those methods of acquiring personal jurisdiction "traditionally followed" by American courts under Justice Scalia's *Burnham* opinion.

1. Corporations Leave Home

Early in American history, corporations for the most part, were deemed to be present for jurisdictional purposes in only one place: their place of incorporation.[76] However, as interstate commerce and the role of corporations in American society grew, courts expanded the concept of corporate presence further, to prevent the inequitable result of allowing a corporation to do business in and utilize the courts of other fora without subjecting corporations to personal jurisdiction in those fora.[77]

One line of cases expanded the concept of corporate presence into what eventually became the *International Shoe* minimum contacts test. These cases analogized "doing business" in a state to the corporation being present in a state.[78] This was the beginning of the idea of constructive presence; if a corporation was conducting a certain level of commerce in a state, it could be considered "present"

76. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350, 354 (1882) ("Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered."); Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301, 305 (1841) ("By the common law, there is no process which can be served . . . upon foreign corporations, by which their appearance can be compelled in any court; for the reason, that [such corporations have] no corporate existence within [the state]. . . ."); GERARD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 77–79 (1918) ("Until toward the middle of the [nineteenth] century, the idea seems to have been widely prevalent that foreign attachment was the only process available against [non-resident corporations]. . . ."); *see also* Steven Mathew Wald, Note, *The Left-for-Dead Fiction of Corporate "Presence": Is It Revived by* Burnham*?*, 54 LA. L. REV. 187, 188 (1993) (footnote omitted) ("At the time of *Pennoyer v. Neff*, corporations were deemed to be present at their place of incorporation.").

77. *See, e.g.*, Wald, *supra* note 76, at 188–89; J.P.T., Annotation, *Service of Process upon Agent of Foreign Corporation in Action Based on Transactions Outside the State*, 30 AM. L. REP. 255 (1924) (citations omitted) ("Following the rule of the common law the early American cases held that a corporation was suable only in the courts of the sovereignty by which it was created. The rule was established at a time when the law relating to municipal corporations applied also to private corporations; the rule obviously could not maintain itself after the enormous growth of private corporations, and the extension of corporate activity into foreign jurisdictions.").

78. *See, e.g.*, Twitchell, *supra* note 21, at 621–22, 622 nn.56–58.

for jurisdictional purposes whether or not one of its agents was served while physically present in the forum.[79]

However, another distinct line of reasoning expanded the concept of corporate presence based on the physical presence of corporate agents. This line of reasoning arose in conjunction with the relatively new idea that corporations could act at all outside of their place of incorporation.[80] These courts held that a corporation could be considered *physically* present for service of process purposes when one of its agents was conducting business on the corporation's behalf in the forum. Such service was then sufficient to give courts of the forum personal jurisdiction over the corporation. Although this line of cases is often conflated with the rise of the constructive presence theory, they actually represent an entirely distinct way of asserting jurisdiction over corporations: One based on traditional notions of territorial power. These cases reflect that asserting tag jurisdiction over corporations is nearly as firmly rooted in our legal history as asserting tag jurisdiction over individuals.

As early as 1838, some courts were already asserting personal jurisdiction over corporations outside of their place of incorporation—and doing so on the basis of in-state service. In *Libbey v. Hodgdon*,[81] the New Hampshire Superior Court of Judicature[82] allowed the assertion of personal jurisdiction over an out-of-state corporation based on service on one of that corporation's employees while in the forum state on the corporation's behalf.[83] The court's reasoning drew a direct parallel to the assertion of tag jurisdiction over natural persons:

> If a citizen of another state is found here, and process is served on him personally, that gives the court jurisdiction. It may well be doubted, however, whether the casual presence of the principal officer of a foreign corporation here, and service upon him, would be sufficient. But if the corporation have estate here — or if it send its officer, upon whom by our law process is to be served, to reside here and transact business upon its account, we see not why an attachment of such estate, or service upon such officer, may not be sufficient.[84]

Thus, although service during a "casual visit"—that is, one for purposes unconnected to the corporation—by an officer to a state might be insufficient to confer jurisdiction, service during a visit made for the purpose of conducting corporate business is as valid a vehicle for asserting personal jurisdiction over the corporation as in-state service on an individual.

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79. *See id.* at 622 & n.61.

80. *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 136 & n.40, 137 & n.48 (2013); *see also infra* Part V.

81. 9 N.H. 394 (1838).

82. *See* Charles G. Douglas, III & Jay Surdukowski, *The New Hampshire Supreme Court: A History of Change*, N.H.B.J., Winter 2010, at 10, 11 (describing the New Hampshire Superior Court of Judicature as New Hampshire's highest appellate court in 1838).

83. *Libbey*, 9 N.H. at 396–97.

84. *Id.*

Decades later, in 1870, after a few more courts had followed suit,[85] the United States Supreme Court also began allowing the assertion of jurisdiction over non-resident corporations based on service of process upon corporate agents. That year, the Court decided *Railroad Co. v. Harris*,[86] where it allowed the exercise of jurisdiction over a non-resident corporation in the District of Columbia, where the corporation's president was served in the District.[87] Arguably, there is some ambiguity as to whether in-forum service was critical to the Court's analysis since the Court also observed that the corporation was conducting business in the District (by running a railroad there) and that the statute authorizing the corporation's operation in the District impliedly required that the corporation be amenable to suit there.[88] Nevertheless, the Court was squarely presented with the argument that service on the corporation's president was insufficient to confer jurisdiction over the corporation and rejected it without the benefit of the "minimum contacts" analysis, which was still several decades away.[89] Moreover, although *Harris* was not a constitutional case, it strongly suggests that the Court saw no constitutional problem with exercising jurisdiction in this manner since it was decided just two years after the ratification of the Fourteenth Amendment.[90]

2. The Difference Between Constructive & Actual Presence

After *Pennoyer*, the Supreme Court addressed the issue of asserting personal jurisdiction over corporations through its agents more explicitly in *St. Clair v. Cox*.[91] There, the Court held that the rule announced in *Pennoyer* applied equally to the assertion of personal jurisdiction over corporations.[92] However, the Court noted that there was one key difference between corporations and natural persons: "[a] corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them."[93] Although the Court acknowledged that historically corporate officers could only receive service of process on behalf of the corporation in the state of incorporation, the Court approved the requirement that a corporation appoint an agent to accept service of process, as a condition of doing business in a state.[94] The Court reasoned

85. *See, e.g.*, Thornburgh v. Savage Mining Co., 23 F. Cas. 1113, 1123 (C.C.D. Nev. 1867) (No. 13,986) ("If the corporation exercise powers in this state, it must do so through an officer or agent. If this officer or agent be competent to represent the corporation here in making contracts and holding property, why may he not be said to represent it when the enforcement of its liabilities is sought?").

86. 79 U.S. (12 Wall.) 65 (1870).

87. *Id.* at 69, 71, 83–84.

88. *See id.* at 83–84.

89. *See id.* at 71, 83–84.

90. *See Burnham*, 495 U.S. at 612–13 (citing many cases that pre-dated *Pennoyer* and that do not explicitly invoke constitutional limitations on jurisdiction, but rather rely on general common law and/or statutory principles); *see also id*. at 609 ("American courts invalidated, or denied recognition to, judgments [where the court lacked personal jurisdiction] long before the Fourteenth Amendment was adopted.") (collecting cases); *supra* note 12 (noting that in the years immediately following *Pennoyer*, not all courts understood it as establishing the broad constitutional rule it is known for today).

91. 106 U.S. 350 (1882).

92. *Id.* at 353.

93. *Id.*

94. *Id.* at 355–56.

that "[s]erving process on [a corporation's] agents in other states, for matters within the sphere of their agency, is, in effect, servicing process on it as much so as if such agents resided in the state where it was created."[95] Although the Court was approving a narrower consent-based practice, its acknowledgement that a corporation can "travel" for jurisdictional purposes from its home to another state by sending its agent there supports applying tag jurisdiction to corporations.

Crucially, although the Court in *St. Clair* makes reference to the concept of "doing business" in the forum, it did so in the context of discussing the type of agency relationship that must exist for the proper assertion of jurisdiction, not in the context of anything resembling a modern "contacts" analysis. The Court held—in construing a Michigan statute authorizing service on non-resident corporate officers—that "service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state. This representation implies that the corporation does business, or has business in the *state for the transaction of which it sends or appoints an agent there*."[96] Thus, the Court was not asserting that a certain quantum of "business" must be conducted in the forums for the court to acquire jurisdiction, but rather that the agent of the corporation who is served in the forum must be there for the purpose of conducting some kind of corporate business in the forum.

Although *St. Clair* involved a statute requiring the appointment of an agent, the existence of such a statute was not required to hale a corporation into court based on in-state service on a corporate agent doing business in a forum. The South Carolina Supreme Court's decision in *Lipe v. Carolina, Clinchfield & Ohio Railway Co.*[97]is illustrative of this point. There, the court allowed the assertion of jurisdiction over a non-resident corporation when its employees were served[98] with process while doing business in South Carolina, even though the corporation had never consented to service on its agents in South Carolina and the cause of action was unrelated to any business the corporation had conducted in South Carolina.[99] The defendant relied upon a line of cases which held that a corporation that was only constructively present in a jurisdiction (i.e., subject to service via a statutory requirement)[100] was only amenable to suit for causes of action that were related to the corporation's activities within the state.[101] The court rejected that argument, and in doing so illustrated the key difference between the constructive presence doctrine and actual presence:

95. *Id.* at 356.

96. *Id.* at 358–59 (emphasis added); *see also* Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930) ("The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent it, and we can see no qualitative distinction between one part of its doings and another, so they carry out the common plan. If we are to attribute locality to it at all, it must be equally present wherever any part of its work goes on, as much in the little as in the great.").

97. 116 S.E. 101, 103 (S.C. 1923).

98. *Id.* (absenting the court noting the capacity in which the served employees were employed).

99. *Id.*

100. *Id.* at 102–03 (requiring that a corporation either be amenable to service via a statutorily appointed agent or a state official).

101. *Id.*

> But we are concerned here, not with the constructive presence of the defendant corporation, but with its actual presence in the state; not with the effect of service of process upon constructive agents, but upon actual agents within the jurisdiction of the court issuing the process. . . . In that state of the facts it is wholly immaterial whether the defendant had complied with statutory requirements as to designating an agent upon whom process could be served[.][102]

Thus, *Lipe* makes clear that when a corporation sends its agents into a forum to do business, the corporation is *actually* present in that forum, not just constructively present based on theories of consent or compliance with statutory requirements.[103]

Other courts reached similar conclusions in the late nineteenth and early twentieth centuries, equating sending an agent to do business in a forum with the corporation's actual presence in that forum. For example, in *Mohr & Mohr Distilling Co. v. Insurance Cos.*,[104] the Southern District of Ohio upheld the exercise of jurisdiction over a non-resident insurance company whose agents were served while physically present and doing business in Ohio, reasoning that such activity "constituted [the insurance company] personally within the district, in such a sense as that [it] may be said to be found by process when issued against [it] and served on these agents."[105] Similarly, in *Memphis & Cincinnati Packet Co. v. Pikey*, the Indiana Supreme Court allowed the assertion of jurisdiction over a non-Indiana riverboat transportation company based on service in Indiana upon two wharf masters of the company.[106] The court noted that the wharf masters were "agents of [the] defendant . . . who received and discharged freight for defendant, and who made contracts [in the cities where they were served] for and on account of defendant. . . . "[107]

Just like in *St. Clair*, in each of these cases the key to the jurisdictional inquiry was not that the defendant was "doing business" in the forum at issue in some generalized sense, but rather the inquiry turned on whether the defendant's agent was doing the corporation's business when he was served with process in the forum, such

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102. *Id.* at 103.

103. Barrow S.S. Co. v. Kane, 170 U.S. 100, 107–108, 112–13 (1898) (affirming the exercise of jurisdiction by a federal court in New York over a corporation based in Great Britain based on service of the corporation's agent in New York even though New York had no statute requiring that foreign corporations operating in New York be amenable to such service, making even clearer the validity of acquiring jurisdiction by service upon an agent of a foreign corporation independent of a statute establishing some kind of required consent); *see also* Brown v. Tex. & Pac. Ry. Co., 18 F.2d 677, 678 (W.D. La. 1927) ("Even in the absence of a specific statute of the particular state or jurisdiction where the suit is brought, if the foreign corporation is doing business in that particular place, it can be brought into court through service upon its president, although the cause of action arises in another state."); Moch v. Va. Fire & Marine Ins. Co., 10 F. 696, 700 (C.C.E.D. Va. 1882) ("That a corporation doing business in a state other than that from which its charter is derived . . . through the agency of natural persons- may be sued and brought into court in that state by the service of process on its agent there, independently of any statute law or warrant of attorney expressly authorizing such service, has been very authoritatively decided.").

104. 12 F. 474 (C.C.S.D. Ohio 1882).

105. *Id.* at 475–76 (emphasis added).

106. 40 N.E. 527, 530 (Ind. 1895).

107. *Id.*

that the agent's presence could render the defendant itself present in the forum.[108] Thus, when a corporation sends such agents into a forum to do business, "it stands on the same footing with a natural person" with respect to jurisdiction and service.[109]

An important corollary principal is that the person acting as the "agent" of the corporation in the state must be more than an "agent" in the broad legal sense of the term. Instead, the person must have some authority over the business operations of the corporation, either because they are an officer, or because they are delegated that authority as a "managing agent."[110] This limitation is necessary because an agent who is delegated a discrete task cannot be said to represent the corporation in such a way that establishes the corporation's actual presence in a forum.[111]

108. *Cf.* Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265–66, 268 (1917) (refusing to uphold the exercise of jurisdiction over a non-resident corporation where the corporation's president was served while in the forum "engaged exclusively on personal matters unconnected with the company's affairs" and the company did no other business in the forum). The fact that courts of this era were applying tag jurisdiction to corporations is even more evident in cases that applied a version of tag jurisdiction to intra-state disputes where corporate officers were served within a county different from the one where the corporation was based. *See* Badger Oil Co. v. Clay, 200 P. 433, 435 (Okla. 1921) ("The president of this company was served with summons in Grady county. He was there voluntarily, not induced to come to Grady county by any artifice, trick, or fraud, nor was he there in attendance on court or in obeyance to any subpœna. Under the statute, the service upon the president was service upon the corporation, and, being regularly served with summons, the court had jurisdiction.").

109. Merchants' Mfg. Co. v. Grand Trunk Ry. Co., 13 F. 358, 359 (C.C.S.D.N.Y. 1882); *see also* N. Missouri R.R. Co. v. Akers, 4 Kan. 453, 469–70 (1868) ("A natural person, who goes into another State, carries along with him all his personal liabilities, and if a corporation chooses to exercise its power in another state, it ought of necessity to become amenable to its laws. . . ."); Moulin v. Trenton Mut. Life & Fire Ins. Co., 25 N.J.L. 57, 65–66 (N.J. Sup. Ct. 1855) (Elmer, J.) (rejecting a collateral attack on the judgment of a New York court entered against a New Jersey corporation which had previously conducted business in New York but had ceased doing so whose president was served while in New York for reasons unrelated to the corporation); *Id.* (One Justice's opinion argued that the president "having been once avowedly sent into the state upon [the corporation's] business, it requires no straining to hold, that if afterwards in the state at all, he ought to be considered as still clothed with his official character, so far as the business formerly transacted therein is concerned."); Pope v. Terre Haute Car & Mfg. Co., 87 N.Y. 137, 139–40 (1881) (affirming the exercise of jurisdiction over a non-resident corporation based on service upon its president while in the forum "for purposes of his own, on his way to a seaside resort, and not in his official capacity or upon any business of the defendant" because once the president was served "it became his duty, as its officer, to take notice of the commencement of the suit, or to convey such notice in some proper way to the defendant; and that he would do so could reasonably be presumed and expected").

110. *See, e.g.*, Maxwell v. Atchison, 34 F. 286, 289–90 (C.C.E.D. Mich. 1888) (refusing to exercise jurisdiction over a non-resident corporation when the employee served "was not an officer and managing agent, or even a ticket agent of the company[,] had no independent office or place of business, . . . [and] [h]is authority was limited to soliciting business . . . "); *see also* Honerine Mining & Milling Co. v. Tallerday Steel Pipe & Tank Co., 88 P. 9, 11 (Utah 1906) (holding that an agent served with process "must at least belong to that class of agents who have been appointed by the corporation to represent it in its business affairs, or who are by it recognized as its agents, and intrusted [sic] with some of its property which in some way has connection with its general business affairs" in order for service to be sufficient to confer jurisdiction).

111. This illustrates yet another difference between the physical presence analysis these courts were engaging in and the constructive presence analysis that became modern minimum contacts jurisprudence. The actions of a corporation's agents without substantial authority could certainly contribute to a finding that a corporation is *constructively* present in a jurisdiction via minimum contacts. *See, e.g.*, Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir. 1990) ("The contacts at issue here . . . [including] substantial repairs by [the defendant's employees] in New Jersey on two occasions . . . properly come under what the

3. *Cases Conflating Constructive & Actual Presence*

To be sure, not every case from this era points in the same direction. Some contemporary courts conflated the concept of constructive presence and actual presence by requiring both that an agent be present in the state *and* that the defendant conduct some quantum of business above and beyond the business being conducted by that agent.[112] After the turn of the century, this confusion led to some courts explicitly rejecting the assertion of tag jurisdiction over corporations; instead, replacing it entirely with the doctrine of constructive presence based on business related contacts.[113]

The most prominent rejections of tag jurisdiction over corporations during this period were the Supreme Court's decisions in *Rosenberg Brothers & Company v. Curtis Brown Company*[114] and *Consolidated Textile Corporation v. Gregory*.[115] In *Rosenberg*, the Court rejected New York's assertion of jurisdiction over an Oklahoma company when the company's president was served while purchasing supplies on the company's behalf in New York.[116] In *Consolidated Textile*, the Court rejected Wisconsin's assertion of jurisdiction over an out of state company where the president was served while in Wisconsin for the purpose of negotiating on the company's behalf in settlement talks related to the dispute that gave rise to the lawsuit before the Court.[117] In both cases, the Court found that even though the officers were served in the forum, the corporate defendants were not "doing business" there and therefore could not be subject to the state's jurisdiction.[118]

Both cases were decided with almost no supporting analysis, and neither provides much modern support for exempting corporations from tag jurisdiction. *Consolidated Textile* has mostly been cited in subsequent years for its unrelated holding that a subsidiary's contacts with a forum ordinarily cannot be imputed to the

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Supreme Court describes as contacts 'that create a substantial connection with the forum state.' The connection was one in which [the defendant], through its mechanics, availed itself of the privilege of conducting activities in New Jersey.") (citation omitted).

112. *See, e.g.*, United States v. Am. Bell Tel. Co., 29 F. 17, 35 (C.C.S.D. Ohio 1886) ("[T]hree conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amendable to suit there as a condition, express or implied, of doing business in the state.").

113. *See, e.g.*, Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917–18 (1917) ("Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents."); Nelson v. W. Coast Grocery Co., 5 Alaska 59, 61–62 (D. Alaska 1914) (emphasis added) (citations omitted) ("It is said . . . that by a long and unbroken line of decisions in the federal courts it has been held that, when a foreign corporation 'does no business within the state, service upon an officer or agent of such corporation, temporarily within the jurisdiction upon private business of his own *and on that of the corporation*, will not bind the corporation.").

114. 260 U.S. 516 (1923).

115. 289 U.S. 85 (1933).

116. 260 U.S. at 517–18.

117. 289 U.S. at 87–88.

118. *Id.* at 88; *Rosenberg*, 260 U.S. at 518.

parent corporation.[119] Similarly, *Rosenberg* has only been relied on for the idea that a few isolated transactions are not sufficient to confer jurisdiction under the minimum contacts analysis, not its apparent rejection of tag jurisdiction.[120] Tellingly, no court rejecting the assertion of tag jurisdiction over corporations after *Burnham* has cited either *Consolidated Textile* or *Rosenberg* to support its argument.

In any event, *Consolidated Textile* and *Rosenberg* were decided long after the Fourteenth Amendment was ratified, and therefore, under Justice Scalia's methodology in *Burnham*, are not as persuasive on the question of whether the assertion of tag jurisdiction over corporations is consistent with due process as earlier cases.[121] Instead of reflecting any historical practice, these cases likely represent the confusion associated with the rise of the use of business contacts as a form of corporate constructive presence at the same time courts were beginning to recognize that corporations could *actually* move and act outside the borders of their home states. Indeed, in another case earlier in the twentieth century, the Supreme Court seemed to imply a separation between acquiring jurisdiction by serving an officer present in a forum on corporate business and acquiring jurisdiction by measuring the quantum of business the corporation was doing in the forum:

> [T]he mere fact that an officer of a corporation may temporarily be in the state or even permanently reside therein, if not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such state, affords no basis for acquiring jurisdiction[.][122]

Thus, even at that late date the Court still drew a distinction between situations where an officer was served outside of the corporation's home state while there for reasons unrelated to corporate business and situations where the officer enters a forum to act on the corporation's behalf.[123] It was not until later in cases like *Consolidated Textile* and *Rosenberg* that the Court began to reject tag jurisdiction over corporations by erroneously absorbing it into what would become minimum contacts analysis.

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119. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 n.* (1988); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984).

120. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. at 417–18; Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). *See* Dynamo v. Warehouse of Vending & Games, 168 F. Supp. 2d 616, 620 n.2 (N.D. Tex. 2001) (citing *Helicopteros*, 466 U.S. at 418 n.12) (calling into question even this aspect of *Rosenberg's* holding when it comes to specific jurisdiction). Although the Supreme Court has suggested that the continuing validity of *Rosenberg* with respect to an assertion of specific jurisdiction might be questioned, it has not yet addressed that issue.

121. *See Burnham*, 495 U.S. at 611. Disregarding early twentieth century Supreme Court cases in favor of nineteenth century judicial trends is a familiar outcome of an originalist approach to constitutional analysis. *See* Harmelin v. Michigan, 501 U.S. 957, 983–85, 990–94 (1991) (Scalia, J., plurality) (rejecting a 1910 Supreme Court case approving Eighth Amendment proportionality analysis in part by relying on nineteenth century cases rejecting such analysis).

122. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 195.

123. *See also* Goldey v. Morning News of New Haven, 156 U.S. 518, 521–22 (1895) ("[A] judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, *and not charged with any business of the corporation there*.") (emphasis added) (citations omitted).

* * * * *

Therefore, under Justice Scalia's opinion in *Burnham*, because in-state service on an officer engaged in corporate business was an accepted way to obtain personal jurisdiction over corporations at the time of the Fourteenth Amendment's ratification, tag jurisdiction should be valid today under the Due Process Clause.[124]

B. Fairness Justifications

Under Justice Brennan's *Burnham* opinion, every method of asserting personal jurisdiction "must comport with contemporary notions of due process."[125] The factors Justice Brennan considered that drove him to conclude that tag jurisdiction was generally[126] consistent with contemporary notions of due process, were (1) the reasonable expectations of defendants, (2) whether defendants avail themselves of the benefits of the fora, and (3) whether there is a great burden on defendants in having to litigate in the fora.[127] All of these factors strongly support the assertion of tag jurisdiction over corporations, perhaps even more so than they do the assertion of such jurisdiction over individual defendants.

1. Corporations Should Reasonably Expect To Be Subject To Jurisdiction In Fora Where Executives Travel To Conduct Corporate Business

Justice Brennan concluded that individual defendants should reasonably expect to be subject to jurisdiction in any forum where they travel because "American courts have announced the rule for perhaps a century" which "provides a defendant voluntarily present in a particular State today clear notice that [he] is subject to suit in the forum."[128] Applying this justification to corporations is difficult because there is a question about the level of generality at which the "rule" is defined: if the rule is tag jurisdiction in general, then corporations would be subject to the same level of notice as everyone else, but if the rule is tag jurisdiction as applied to individuals, then corporations would need to be on some kind of separate notice that tag jurisdiction applies to entities. Assuming the latter method of defining the rule,

124. Another part of Justice Scalia's opinion does suggest that even traditional practices may be subject to invalidity (or at least closer scrutiny) if the method of obtaining jurisdiction has been abandoned by most states. *See Burnham*, 495 U.S. at 622. However, although the validity of asserting tag jurisdiction over corporations has not been analyzed by many contemporary state court decisions, many state statutes allow for in-state service on out-of-state corporations by virtue of serving a corporate officer who happens to be present in the state. *See* 19 C.J.S. *Corporations* § 807 n.2. *See also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1068 n.12 (collecting citations to states with long-arm statutes extending to the limits of what is allowable under the federal Constitution).

125. *See Burnham*, 495 U.S. at 632 (opinion of Brennan, J.).

126. The only situations in which Justice Brennan suggested such an exercise may not be valid are cases where the defendant was brought to the forum involuntarily. *See id.* at 637 n.11. Of course, this exception has long been a feature of tag jurisdiction. *See id.* at 613 (opinion of Scalia, J.) (noting that in the nineteenth century, "[m]ost States . . . had statutes or common-law rules that exempted from service of process individuals who were brought into the forum by force or fraud, or who were there as a party or witness in unrelated judicial proceedings.") (citations omitted).

127. *See id.* at 635–39 (opinion of Brennan, J.).

128. *Id.* at 636–37 (quotations and citation omitted).

although there are some courts that have applied tag jurisdiction to corporations at some periods in American history, it would be difficult to argue that courts have applied it to corporations with the same consistency as they have to individuals. However, there are other reasons corporations should reasonably expect to be subject to jurisdiction in forums where their officers travel to conduct business.

First, many state statutes require corporations to appoint an in-state agent to receive service of process as a condition of doing business in those fora.[129] Courts have long approved these statutes on the theory that "[w]hen [a corporation] avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon an agent, its assent to that mode of service is implied."[130] This consent justification could just as easily serve as a notice justification in this context. If a corporation sends an officer to conduct business in a forum with a statute authorizing service on that officer, it would be reasonable for the corporation to be aware that it may be subject to jurisdiction in that forum.

Second, corporations are more likely to be familiar with the laws of a state where it sends an officer to do business than an individual defendant simply traveling to a different state. Some corporations are highly sophisticated companies with legions of in house and external lawyers at their disposal for the express purpose of investigating every possible legal risk those companies face[131] Obviously, for one of those companies it would be much easier to anticipate where it might be subject to jurisdiction when deciding where to send its officers to conduct business than it would be for an ordinary person making travel plans.[132]

Of course, not all corporations are huge conglomerates. But, even the smallest of corporations has to demonstrate minimal familiarity with the legal system to bring itself into existence. Setting up a corporation requires registration with the state in the form of filing articles of incorporation that comply with statutory requirements and obtaining a certificate of incorporation.[133] It can also require the filing of other documents "such as underwriting agreements, stock subscription agreements, registration statements required by federal and state securities laws, and reservation and registration of corporate name forms."[134] The same is true for other entities such as limited liability companies which have to file compliant articles of organization with state government officials.[135] Thus, even the smallest of corporations, by their very existence, have demonstrated more familiarity with the

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129. *See* 18 Fletcher Cyc. Corp. § 8728.

130. *See, e.g.*, Merchants' Mfg. Co. v. Grand Trunk Ry. Co., 11 Abb. N. Cas. 183, 13 F. 358, 359 (C.C.S.D.N.Y. 1882).

131. Indeed, a disproportionate number of major corporate CEOs—and probably other officers—are lawyers themselves. *See* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* 7 n.8 (HLS Program on the Legal Profession Research Paper No. 2013-6), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

132. *Cf.* Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 770–73 (2015) (describing the inherent advantages corporations have over natural persons in litigation).

133. *See, e.g.*, 1A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §§ 129, 137–46, 166 (perm. ed., rev. vol. 2010).

134. *See, e.g.*, *id.* § 135.

135. *See, e.g.*, *id.* § 137.

legal system than the average natural person and, therefore, are more likely to be on notice of the implications of sending an officer to another forum to conduct business.

Thus, even aside from their awareness of the general validity of tag jurisdiction, the existence of state statutes authorizing service on foreign corporations through their officers, combined with corporations' inherent increased awareness of legal risks, makes it reasonable for corporations to anticipate being subject to tag jurisdiction.[136]

2. *Corporations Avail Themselves Of Forum Benefits When They Send Officers Into Fora To Conduct Corporate Business*

The second factor on which Justice Brennan relied in approving tag jurisdiction was the benefits that even transient visitors obtain from visiting other states. He noted that a visitor to a state has his or her "health and safety . . . guaranteed by the State's police, fire, and emergency medical services[,] . . . is free to travel on the State's roads and waterways [and] likely enjoys the fruits of the State's economy as well."[137] The opinion also relied on the protection the Privileges and Immunities Clause of Article IV offers to out of state residents from discrimination in access to other state's courts.[138] Justice Brennan argued that without tag 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."[139]

A corporation sending its officer into a state enjoys all of these benefits and much more. Not only does the corporation—through its traveling officer—enjoy the benefits of the emergency personnel and transportation routes Justice Brennan listed, the corporation almost certainly will in some capacity or another enjoy "the fruits of the state's economy." This is because tag jurisdiction can *only* be asserted over a corporation when the officer is traveling into the forum in order to do something on the corporation's behalf.[140] This is in contrast to an individual defendant who may enter a forum for any number of non-economic reasons.[141] Thus, the corporation sending its officer into a forum will usually derive more benefits from the forum than a transient individual defendant.

Although the Privileges and Immunities Clause of Article IV does not apply to corporations, corporations nevertheless are protected from irrational discrimination when traveling to other states by the Equal Protection Clause of the

136. Of course, this factor is in some sense circular since if the Supreme Court or additional circuit courts and state supreme courts were to declare tag jurisdiction applicable to corporations that would obviously heighten corporations' awareness of the likelihood of being subject to tag jurisdiction. *Cf.* Burnham v. Sup. Ct. of Cal., 495 U.S. 604, 625 (1990) (opinion of Scalia, J.) ("Justice Brennan's long journey is a circular one, leaving him, at the end of the day, in complete reliance upon the very factor he sought to avoid: The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition.").

137. *Id.* at 637–38 (opinion of Brennan, J.).

138. *Id.* at 638.

139. *Id.*

140. *See supra* Part III.A.

141. *See, e.g.*, Rutherford v. Rutherford, 971 P.2d 220, 220–21 (Ariz. Ct. App. 1998) (asserting tag jurisdiction over a non-resident defendant who entered the state to visit his children and friends).

Fourteenth Amendment.[142] They also enjoy a further constitutional protection not enjoyed—or at least not enjoyed to the same degree—by individuals: the protection of the dormant Commerce Clause.[143] The dormant Commerce Clause doctrine provides a strong bar against states treating businesses based outside of their borders differently from local businesses. This protection facilitates the operation of corporations across state lines — a protection that corporations take direct advantage of when they send an officer to another state to conduct business on their behalf.

Finally, corporate immunity to tag jurisdiction also would create substantial "asymmetry," but of a far more insidious kind than what Justice Brennan was concerned with in *Burnham*. Just like natural persons could in the absence of tag jurisdiction, corporations could freely enter other fora and utilize their courts while retaining immunity from the authority of those courts as defendants. But, exempting corporations from tag jurisdiction after *Burnham* also would create an even greater asymmetry — corporations would be able to travel freely in other jurisdictions without subjecting themselves to jurisdiction while natural persons would not. The inherent unfairness of this discrepancy is obvious. When a natural person can be subject to personal jurisdiction for such unplanned "visits" to a state such as being on a plane that stops in a state to refuel,[144] being on a ship that docks in a state's port,[145] or even being on a flying plane that happens to be passing over the state,[146] it would be unfair if a corporation's calculated decision to send an officer into a forum to conduct corporate business carried no jurisdictional consequences.

3. *The Burden On Corporations To Litigate In Fora Where Officers Are Tagged Is Minor*

The final factor that drove Justice Brennan to find tag jurisdiction consistent with contemporary notions of due process was that the burdens on the defendant to litigate in a forum in which he has already traveled "are slight."[147] In support of that conclusion, Justice Brennan pointed out that "[m]odern transportation and communications have made it much less burdensome for a party sued to defend

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142. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 656, 667–68 (1981). Moreover, the rule barring corporations from protection under the Privileges and Immunities Clause has been subject to consistent criticism since at least the early twentieth century. *See* Brian Kalb, Comment, *Unincorporated Businesses Under the Privileges and Immunities Clause*, 25 S. ILL. U. L.J. 585, 585 n.3 (2001) (collecting sources).

143. Under the dormant commerce clause doctrine:

> [t]he Commerce Clause operates as an implicit restraint on state authority, even in the absence of conflicting federal statute. In a dormant Commerce Clause analysis, the court must inquire whether the challenged law discriminates against interstate commerce, in which case the law is virtually per se invalid, and survives only if it advances legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Absent discrimination against interstate commerce, the law is upheld unless the burden imposed on interstate commerce is clearly excessive in relation to putative local benefits.

James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3—Supreme Court Cases*, 41 A.L.R. Fed. 2d Art. 1, § 2 (2009).

144. *See In re* Gonzalez, 993 S.W.2d 147, 151–52 (Tex. App. 1999).

145. *See* Peabody v. Hamilton, 106 Mass. 217, 222 (1870).

146. *See* Grace v. MacArthur, 170 F. Supp. 442, 443, 448 (E.D. Ark. 1959).

147. Burnham v. Superior Court of California, 495 U.S. 604, 638 (1990).

himself in a State outside his place of residence," that the defendant's presence in the forum for service was "an indication that suit in the forum likely would not be prohibitively inconvenient[,]" and that "any burdens that do arise can be ameliorated by a variety of procedural devices" such as motions to dismiss and inexpensive forms of discovery that can be conducted over great distances.[148]

All of these reasons offered by Justice Brennan apply (at least) equally to corporations. Modern methods of transportation and communication have obviously become even more helpful in litigating cases across state lines than they were in 1990 when *Burnham* was decided. A corporation's decision to send an officer into a forum to conduct business also indicates—probably more than a natural person's fortuitous presence might—that the corporation has the ability to defend itself in that forum without undue inconvenience. Finally, the same procedural devices that help natural persons litigate at great distances are equally available to corporations.[149]

At least two other factors also lessen the burden on corporations to litigate in fora where their officers are tagged. First, corporations usually cannot appear pro se,[150] and therefore will need to hire an attorney to represent them in court no matter where a case is litigated. Thus, unlike a natural person, a corporation's officers do not need to travel for the purpose of appearing to defend the corporation in court in a distant forum. Second, the traditional safeguards against tag jurisdiction being unfairly applied to individuals would also apply to corporations acting through their officers: a corporation would not be subject to tag jurisdiction under circumstances where the corporate officer's presence in the forum was not voluntary or was compelled by judicial process.[151]

To be sure, there will certainly be some burdens associated with a corporation having to litigate in a forum that is not its home and with which it might not have any significant contacts other than the officer's trip that triggered the exercise of jurisdiction. However, as one court put it in 1882, "every natural person who journeys through these states is liable to a similar hardship, and I am not persuaded that the hardship is likely to be so great that such a condition is to be pronounced unreasonable, or that any rule of public policy forbids it."[152]

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It may be questionable whether the idea of tag jurisdiction is actually consistent with contemporary notions of fairness as Justice Brennan argued.[153]

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148. *Id.* at 638–39, 639 n.13 (citations and quotations omitted).

149. *See, e.g.*, Bartholomew, *supra* note 132, at 745–46 (noting the advantage to corporate defendants provided by procedural barriers to actions such as dispositive motions).

150. *See, e.g.*, 19 C.J.S. *Corporations* § 796 (2007).

151. *See, e.g.*, Brown v. Texas & P. Ry. Co, 18 F.2d 677, 681(W.D. La. 1927) ("There is no issue here of the president of the defendant company having been fraudulently induced to enter the jurisdiction of this court, or that he was compelled to appear by judicial process, such as summons or the defense or prosecution of other litigation. So far as the record shows, he was voluntarily in the city of Shreveport, and presumably upon business of the defendant corporation.").

152. Carstairs v. Mechs.' & Traders' Ins. Co., 13 F. 823, 826 (C.C.D. Md. 1882).

153. *See* Freer, *supra* note 27, at 577–78; Stanley E. Cox, *Would That* Burnham *Had Not Come to Be Done Insane? A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction is Unconstitutional*, *and Some Thoughts About Divorce Jurisdiction*

However, in a post-*Burnham* world where tag jurisdiction is applicable to natural persons, it is certainly consistent with fundamental fairness to apply tag jurisdiction to corporations as well.

III. LOWER COURTS' RELUCTANCE TO TAG CORPORATIONS

Despite the reasoning of both *Burnham* opinions pointing in the direction of imposing tag jurisdiction on corporations, lower courts have been largely reluctant to do so.[154] Instead, lower courts have offered a variety of justifications for departing from *Burnham* when it comes to non-individuals. Some courts have contorted *Burnham* to argue that it somehow exempted corporations from its analysis. Other courts have pointed to the Supreme Court's 1952 decision *Perkins v. Benguet Consolidated Mining Co.*[155] as purportedly establishing that corporations are only subject to minimum contacts analysis. At least one court has argued that pre-*International Shoe* case law excludes corporations from tag jurisdiction. Finally, some courts have attempted to essentially limit *Burnham* to its facts or argue that tag jurisdiction should not be applied to corporations because doing so would be bad policy.

As the next subsection explains, each of these justifications is ultimately unpersuasive. Moreover, as described in the following subsection, a minority of courts have actually embraced the application of tag jurisdiction to business entities, albeit without providing a theoretical foundation for doing so.

A. Courts Rejecting Tag Jurisdiction Over Corporations

1. Courts Finding Burnham Counsels Against Applying Tag Jurisdiction to Corporations

The primary justification courts have offered for departing from tag jurisdiction in the business entity context is that *Burnham* itself somehow suggested that its holding did not apply to business entities. In *Martinez v. Aero Caribbean*, for example, the Ninth Circuit held tag jurisdiction was inapplicable to corporate defendants.[156] That case, which originated in the Northern District of California, involved four individual plaintiffs asserting product liability claims against various defendants arising from a plane crash that occurred in Cuba.[157] One of the

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in a Minimum Contacts World, 58 TENN. L. REV. 497, 547–52 (1991); Robert Taylor-Manning, Note, *An Easy Case Makes Bad Law*-Burnham v. Superior Court of California*, 110 S.Ct. 2105 (1990)*, 66 WASH. L. REV. 623, 638–39 (1991).

154. There has been almost no scholarship on this precise question since *Burnham* was decided. *But see* Wald, *supra* note 76, at 202–06 (arguing that transient jurisdiction should not apply to corporations). However, at least one influential treatise has rejected the application of tag jurisdiction to corporations. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1102 (3 ed. 2002) ("Service made upon a corporation, partnership, or other unincorporated association simply by delivering process to a corporate or comparable officer who happens to reside or be physically present in the state at the time the documents are served will not be effective to establish in personam jurisdiction, unless that entity also is doing business so as to be amenable to service of process and the assertion of jurisdiction in the forum state.").

155. 342 U.S. 437 (1952).

156. 764 F.3d 1062, 1071 (9th Cir. 2014).

157. *Id.* at 1064–65.

defendants, a French aviation company called Avions de Transport Régional ("ATR"), had limited contacts with the state of California (and no contacts related to the crash).[158] The plaintiffs served a copy of the summons and complaint on ATR's Vice President of Marketing while he was in California attending a conference on ATR's behalf.[159]

The Ninth Circuit held that service of process on ATR's Vice President while he was in California on company business was insufficient to give rise to personal jurisdiction over ATR in California.[160] The court reasoned that "[a]n officer of a corporation is not the corporation, even when the officer acts on the corporation's behalf. While a corporation may in some abstract sense be 'present' wherever its officers do business, such presence is not physical in the way contemplated by *Burnham*."[161] The court also argued that the Supreme Court never suggested tag jurisdiction applied to corporations in *Burnham*, and, like other courts that have reached this conclusion, supported that proposition by citing Justice Scalia's footnoted observation that "corporations have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'"[162]

Neither of these arguments is convincing. The first argument echoes early twentieth century courts in conflating the distinction between constructive corporate presence (what *Martinez* calls "abstract" presence) and actual corporate presence.[163] Constructive presence does *not* turn on actual physical presence whether applied to corporations or natural persons; instead, it depends on the overall level of contact the defendant has with the forum (i.e., minimum contacts).[164] It is quite unremarkable that ATR sending its executive into California on one occasion was insufficient to establish constructive presence. However, the officer's presence in California should

158. *Id.*

159. *Id.* at 1065. This method of process is valid under California law which allows service on any vice president of a corporation. *See* CAL. CIV. PROC. CODE 416.10(b).

160. *Martinez*, 764 F.3d at 1067–69.

161. *Id.* at 1068 (citations omitted); *See, e.g.*, Mission West Properties, L.P. v. Republic Properties Corporation, 873 A.2d 372, 384 (2005), *aff'd,* Republic Properties Corp. v. Mission W. Properties, LP, 895 A.2d 1006 (2006) (arguing that *Burnham* cannot support jurisdiction here "because no one has ever acted on [the defendant's] behalf in Maryland sufficient to justify the fiction that [the defendant] has been present in the jurisdiction.").

162. *Martinez*, 764 F.3d at 1068 (quoting *Burnham*, 495 U.S. at 610 n.1). *See, e.g.*, N. Ins. Co. of New York v. Constr. Navale Bordeaux, No. 11-60462-CV, 2011 WL 2682950, at *2 (S.D. Fla. July 11, 2011) ("[T]he main plurality opinion's only reference to foreign corporations appears to state that the Court expresses no views 'with respect to these matters,'—presumably whether service upon a corporate officer is sufficient for jurisdiction without a contacts-based analysis."); Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. de Equip. Medico, No. 07-CV-309 LAJB, 2008 WL 789925, at *6 (S.D. Cal. Mar. 21, 2008) (citing Justice Scalia's footnote to argue that "in *Burnham* [tag jurisdiction] was applied only to an individual in his individual capacity. It has not been applied to corporations."), *rev'd on other grounds sub nom.* Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico, 563 F.3d 1285 (Fed. Cir. 2009).

163. *See supra* Part III.A.3.

164. *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221–24 (1957) (subjecting defendant insurance company to personal jurisdiction in California where it had no employees in California).

have instead established the *physical* presence of ATR, and thus its amenability to tag jurisdiction.[165]

As for Justice Scalia's footnote, at least a few courts have recognized that—when read in context—it merely stands for the proposition that general jurisdiction under *International Shoe* may *only* apply to corporations, and not to individuals.[166] In other words, the footnote suggested a limit to the assertion of personal jurisdiction over individuals because of the differences between individuals and corporations, not a limit to the assertion of jurisdiction over corporations.

2. *Courts Arguing Perkins Precludes Exercising Tag Jurisdiction Over Entities.*

Many courts, including the Ninth Circuit in *Martinez*, and the Fifth Circuit in *Wenche Siemer v. Learjet Acquisition Corporation*,[167] have also argued that the

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165. At least one court has argued that the presence of one partner acting on the partnership's behalf does not make a partnership "present" for jurisdictional purposes under the theory that a partnership has an existence independent from the partners themselves (known as the entity theory). *See Mission West*, 873 A.2d at 384; 68 C.J.S. *Partnership* § 100 (2014). However, this does not change the calculus, it merely puts partnerships on the same footing as corporations—as independent entities that still act through their partners and directors respectively. *See* 68 C.J.S. *Partnership* § 140 (2014); *see also* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 466 (1st Cir. 1990) ("The general rule is that jurisdiction over a partner confers jurisdiction over the partnership. Primarily, this comes about because a partner is deemed by law and contract to be the partnership's general agent."); Bowles v. Marx Hide & Tallow Co., 4 F.R.D. 297, 299 (W.D. Ky. 1945) ("Process against the partnership under its partnership name, and service on one of the partners brings the partnership and the partnership assets before the Court.") (collecting cases). In fact, thinking of partnerships as entities independent from their partners may *strengthen* the case for the assertion of tag jurisdiction over them because it brings them closer to the status of natural persons. *See infra*, Part V.

166. *See* Friedfertig Family P'ship 2 v. Lofberg, CIV.A. No. 13-1546 JLL, 2013 WL 6623907, at *7 (D.N.J. Oct. 24, 2013) ("The United States Supreme Court has indicated that the 'continuous and systematic contacts' standard has been applied to cases involving corporate defendants, but is not extended to individual defendants.") (citation omitted) *report and recommendation rejected on other grounds*, CIV.A. No. 13-1546 JLL, 2013 WL 6623896 (D.N.J. Dec. 13, 2013); Sportrust Associates Int'l, Inc. v. Sports Corp., 304 F. Supp. 2d 789, 792 (E.D. Va. 2004) ("Although it declined to decide the issue, the Supreme Court has questioned whether this type of general jurisdiction can ever apply to individuals, rather than corporations.") (citing *Burnham*, 495 U.S. at 610 n.1).

167. 966 F.2d 179 (5th Cir. 1992). *Wenche Siemer* differed from *Martinez* in at least one important respect. In *Wenche Siemer*, the plaintiffs did not serve an officer of the corporate defendant but instead merely served an agent designated for service of process by the company as a condition of doing business in Texas. *Id.* at 181–83. Many—but not all—courts facing situations where a corporate agent registered pursuant to state law to receive service of process was served have agreed that such service is not alone sufficient to establish personal jurisdiction. *See, e.g.*, WorldCare Corp. v. World Ins. Co., 767 F. Supp. 2d 341, 352–54 & n.21 (D. Conn. 2011) (following *Wenche Siemer* on this point and collecting other cases doing the same); Conner v. ContiCarriers & Terminals, Inc., 944 S.W.2d 405, 412–17 (Tex. App. 1997) (same) *but see* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) ("A defendant may voluntarily consent or submit to the jurisdiction of a court which otherwise would not have jurisdiction over it. One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.") (citation omitted). Even if service on a corporate agent required to be designated by statute is insufficient to confer personal jurisdiction, the same reasoning does not necessarily apply to a corporate officer acting on the corporation's behalf in the forum. *See infra*, Part IV.3; *cf.* Allied Carriers Exch., Inc. v. Alliance Shippers, Inc., No. CV 98-WM-2744, 1999 WL 35363796, at *3 (D. Colo. Sept. 22, 1999) ("As Justice Brennan explained: 'By visiting the forum State, a transient defendant actually 'avail[s]' himself, of significant benefits provided by the State.' Where, as here, a

Supreme Court's decision in *Perkins*,[168] precludes the application of tag jurisdiction to non-individuals. In *Perkins*, the Court conducted an analysis of the corporate defendant's forum related contacts even though the plaintiffs had personally served the defendant's president in the forum at issue.[169] *Wenche Siemer* and *Martinez* argue this analysis in *Perkins* suggests that personal service on the defendant's officer alone was insufficient to give rise to jurisdiction.[170] However, as at least one court has pointed out, the fact that the defendant's president in *Perkins* was served in the forum *and* the defendant had significant contacts with the forum cuts both ways: because the Supreme Court "found that the foreign corporation was engaged in 'continuous and systematic' business in Ohio, . . . the Court was not presented with the issue of whether due process allowed transient jurisdiction over a corporation where such extensive contacts were lacking."[171]

In *Mission West Properties, L.P. v. Republic Properties Corporation* (*Mission West*),[172] the Maryland Court of Special Appeals held a partnership could not be subject to jurisdiction in Maryland based on in-state service of one of the partners.[173] The court relied in part on dicta from *Perkins* stating that:

> [I]f an authorized representative of a foreign corporation [is] physically present in the state of the forum and . . . engaged in activities appropriate to accepting service or receiving notice on its behalf, . . . there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative. This has been squarely held to be so in a proceeding in personam against such a corporation, *at least in relation to a cause of action arising out of the corporation's activities within the state of the forum.*[174]

The citation of this passage is puzzling since, if anything, the first sentence seems to *support* the assertion of tag jurisdiction over corporations because it endorses the idea that if an officer is physically present in the forum engaged in corporate activities, the corporation may be subject to service through the officer. The second sentence simply points to one example of a situation where this has been "squarely

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corporation merely applies to do business in the forum state, but actually conducts no business there, it has not actually availed itself of the benefits provided by the forum state.") (citations omitted).

168. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

169. *Id.* at 438, 442–49.

170. *See, e.g.*, *Wenche Siemer*, 966 F.2d at 183 ("In *Perkins*, the Supreme Court upheld general jurisdiction over a Philippine corporation that had been served in Ohio by serving its president while he was conducting the corporation's business in the state, but only after a thorough 'minimum contacts' and fairness analysis."); *Martinez*, 764 F.3d at 1068–69 ("If tag jurisdiction had been available, that alone would have resolved the case. But the Court upheld jurisdiction only after deciding whether "the business done in Ohio . . . was sufficiently substantial" to allow jurisdiction over claims unrelated to the company's Ohio contacts."); *See also Navale Bordeaux*, No. 11-60462-CV, 2011 WL 2682950, at *2 ("*Perkins* . . . did not hold that service in a state upon an officer of a corporation obviates the need to do a minimum contacts analysis.").

171. Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 956 F. Supp. 1131, 1137 n.3 (S.D.N.Y. 1997).

172. 873 A.2d 372 (2005)

173. *Id.* at 37–38.

174. *Id.* at 31 (quoting *Perkins*, 342 U.S. at 444–47) (emphasis in original).

held" to be so—in a situation where forum-based activities relate to the cause of action. The second sentence does not offer any limitation on where the principal in the first sentence could apply (hence the use of "at least").

3. *Mission West: Reliance on Pre-International Shoe Cases*

The *Mission West* court was unique in that it buttressed its argument with what purported to be a more thorough analysis of the historical record than the other courts reaching the same conclusion. The court based its conclusion, in part, on a few pre-*International Shoe* Supreme Court cases: *James-Dickinson Farm Mortgage Co. v. Harry*,[175] *Kendall v. American Automatic Loom Co.*,[176] and *St. Clair v. Cox*.[177] In *James-Dickinson*, the Court rejected Illinois' exercise of jurisdiction over a non-resident corporation where its president was served in Illinois while there "on business of the corporation."[178] In *Kendall*, the Court rejected New York's assertion of jurisdiction over a West Virginia corporation through service on the corporation's treasurer in New York.[179] In *St. Clair*, the Court favorably described a Michigan case rejecting the assertion of jurisdiction over a non-resident defendant corporation based on service of its officer who was only "casually" present in the state.[180]

However, other than quoting superficially supportive passages, the *Mission West* court did not provide a detailed explanation of why these cases supported its conclusion, and in fact, all of them are of little weight or distinguishable upon closer examination. As the *Mission West* court admitted, the holding in *James-Dickinson* was terse and supported by virtually no reasoning.[181] Moreover, *James-Dickenson*'s holding appears to be premised on the idea that a corporation cannot ever be subject to jurisdiction in a place where it has no "place of business," a proposition that is obviously inconsistent with modern personal jurisdiction doctrine and modern conceptions of the corporate personality.[182] Finally, *James-Dickenson* was not decided until 1927, many decades after the ratification of the Fourteenth Amendment and during a period where—as discussed in Part III.A.3, *supra*, courts erroneously conflated the distinction between physical corporate presence and constructive corporate presence.

Both *Kendall* and the Michigan case discussed in *St. Clair*[183] involved situations where the officers were served during a time when they were not acting

175. 273 U.S. 119 (1927).

176. 198 U.S. 477 (1905).

177. 106 U.S. 350 (1882). *St. Clair* is discussed in more detail in Part III.A.2.

178. 273 U.S. at 122.

179. 198 U.S. at 482–83.

180. 106 U.S. at 357–58 (citing Newell v. Great W. Ry. Co., of Canada, 19 Mich. 336 (1869)).

181. *See* 873 A.2d 372, 381 (Md. Ct. Spec. App. 2005) (characterizing the holding in Jackson-Dickenson as being declared "without much discussion").

182. *See, e.g.*, *McGee*, 355 U.S. at 222–24 (subjecting defendant insurance company to personal jurisdiction in California where it had no offices in California). *See also infra* Part V (discussing the evolution of the corporate person from a creature of the state to an independent entity).

183. As discussed in *supra* Part III.A.2, *St. Clair*'s discussion of the history of the assertion of jurisdiction over corporations actually *supports* the exercise of tag jurisdiction over corporations.

on the corporation's behalf while present in the forum.[184] The question posed by an officer who *is* acting on behalf of the company at the time of in-forum service is a very different one. Tag jurisdiction has always required *voluntary* presence in the forum.[185] When an officer travels for reasons totally unrelated to the company, his or her choice to enter a forum cannot be imputed to the corporation, and the corporation cannot be said to have traveled to that forum voluntarily.[186] In contrast, when an officer is directed by the corporation to enter another forum to act on the corporation's behalf, the corporation is making a voluntary choice to enter the forum that is analogous to the choice made by traveling natural persons.[187]

4. *Courts Giving Other Reasons For Declining To Apply Tag Jurisdiction to Corporations*

Other courts have not found any aspect of *Burnham* or earlier cases controlling, but have nevertheless independently concluded that tag jurisdiction should not be applied to corporations. For example, in *C.S.B. Commodities, Inc. v. Urban Trend (HK) Ltd.*,[188] the president of the defendant, a corporation based in Hong Kong, was served while attending a trade show in Chicago on behalf of the company.[189] The *C.S.B.* court acknowledged that *Burnham* "left unresolved" the question of whether tag jurisdiction applied to corporations and—to its credit—recognized that Justice Scalia's footnote was not controlling since it was "made in

184. In the Michigan case discussed in *St. Clair*, the court explicitly recognized that the officer was only "casually" in Michigan and not there on any business of the corporation. 106 U.S. at 357–58 (citing Newell v. Great W. Ry. Co., of Canada, 19 Mich. 336 (1869)). In *Kendall*, 198 U.S. at 479, it is less clear from the facts what the officer was doing in New York when he was served with process, but it appears that at the time he was served the corporate defendant had effectively been defunct for several years making it unlikely he was in New York on corporate business. *See id.* ("[S]ince August 10, 1901, there had been no meeting, either of the stockholders or of the directors; and on the last-mentioned date the stockholders were notified that the company had no funds with which to pay the franchise taxes which were due to the state of West Virginia. . . . The sole assets of the company consisted of two automatic looms and tools and machinery employed in the making thereof and its patents. . . . The company had no bank account, no office force, and no employees. It had never reached the stage of the active transaction of business[.]").

185. *See supra* Part III.A.3 and note 151.

186. When an officer of an entity is served while in a forum for reasons unrelated to his or her status as an officer, courts unsurprisingly nearly always reject the assertion of personal jurisdiction over the entity. *See, e.g.*, Peguero y otros v. Hernandez Pellot, P.R. Offic. Trans. 14 & n.13 (Nov. 14, 1995) (rejecting the assertion of jurisdiction over a corporation based on service of process on an officer present in the forum for non-business reasons but explicitly declining to decide whether the court would reach the same conclusion of the trip were on corporate business); *see also* Rocky Mountain Chipseal, LLC v. Sherman Cnty., Kan., 841 F. Supp. 2d 1224, 1229 (D. Colo. 2012) ("When a corporate officer is served in the forum state while she was there for reasons unrelated to the defendant-corporation, and that corporation lacks minimum contacts with the forum state, serving that officer did not confer the forum state with jurisdiction over the corporation."); O'Brien v. Eubanks, 701 P.2d 614, 617 (Colo. App. 1984) ("Because there were no other contacts between Kemco and Colorado, the transitory and non-business related presence of its president could not support finding the corporation's presence within the state to be sufficient to confer jurisdiction.").

187. *See infra* Part V (discussing an officer's ability to act on the corporation's behalf in other areas of constitutional law).

188. 626 F. Supp. 2d 837 (N.D. Ill. 2009).

189. *Id.* at 842, 849.

response to a different question—whether individual defendants can ever be subject to general jurisdiction based on their 'continuous and systematic' contacts in a state and in any event Justice Scalia made clear that the Court was expressing no views on the matter."[190] Analyzing the issue for itself, the court found that

> Permitting service on any employee or agent of a corporation to create general jurisdiction on the theory that a corporation is therefore "present" would create the same issues minimum contacts hoped to resolve. A traditional minimum contacts analysis removes the necessity of drawing bright but arbitrary lines of where a non-physical entity is present and ensures that due process is satisfied.[191]

The court did not explain why this same reasoning would not apply with equal or even greater force to individual persons. Moreover, the court seemed to assume that the "arbitrary" line drawing associated with presence based jurisdiction would somehow replace minimum contacts with respect to corporations if such jurisdiction were permitted. However, as *Burnham* made clear with respect to individual defendants, it would do no such thing, but rather would only *supplement* the existing contacts-based regime.

Other courts have explicitly found *Burnham* not binding either because it produced no majority opinion[192] or simply because it did not involve a corporation.[193] For example, in *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*,[194] the Washington Court of Appeals rejected the exercise of jurisdiction over a non-resident corporate defendant whose vice-president was served with process while present in Washington representing the corporation at a trade show.[195] The court reasoned that *Burnham* was "limited to its facts" because no opinion garnered majority support, but that "[i]n any event, the nonresident defendant in *Burnham* was a natural person."[196] Thus, the court concluded—without explaining why this distinction was significant—"service of process on an agent of a nonresident

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190. *Id.* at 849.

191. *Id.* at 850.

192. *See* MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc., 804 P.2d 627, 631 n.3. (Wash. Ct. App 1991) (finding *Burnham* "limited to its facts"); Conner v. ContiCarriers & Terminals, Inc., 944 S.W.2d 405, 413 (Tex. App. 1997) ("*Burnham* is a plurality opinion and does not provide the persuasive, binding authority the [plaintiffs] attribute to it.").

193. *MBM Fisheries*, 804 P.2d at 631 n.3; Krishanti v. Rajaratnam, No. 2:09-CV-05395 (JLL)(JAD), 2014 WL 1669873, at *5 (D.N.J. Apr. 28, 2014) ("Plaintiffs' reliance on *Burnham* is misplaced, as the holding in *Burnham* only applies to individuals, not corporations."); Overseas Partners, Inc. v. PROGEN Musavirlik ve Yonetim Hizmetleri, Ltd. Sikerti, 15 F. Supp. 2d 47, 50 n.4 (D.D.C. 1998) ("There is nothing in the *Burnham* opinion which indicates that the traditional minimum contacts test should be abandoned when an official of a corporation is served within the relevant jurisdiction"); James v. Illinois Cent. R.R. Co., 965 S.W.2d 594, 600 (Tex. App. 1998) ("*Burnham* involved a non-resident *individual*, and the Court specifically omitted any reference of personal jurisdiction regarding corporations."); *Conner*, 944 S.W.2d at 413 ("*Burnham* does not speak to personal jurisdiction over foreign corporations.").

194. 804 P.2d 627 (1991).

195. *Id.* at 630, 632.

196. *Id.* at 631 n.3.

corporation who is merely 'present' in Washington does not, without more, comport with due process."[197]

Of course, it is true that the defendant in *Burnham* was a natural person rather than a business entity. However, that fact merely demonstrates that a question exists; it does not provide the answer. While it is also true that no single opinion in *Burnham* garnered five votes, that objection rings hollow since at least eight justices so clearly agreed on the continuing validity of tag jurisdiction, even if they did so for different reasons. Indeed, a straightforward application of the test from *Marks v. United States*,[198] which asks lower courts to divine a binding rule from a decision with no majority opinion by adhering to the "position taken by those Members [of the Court] who concurred in the judgment on the narrowest grounds,"[199] yields at least the conclusion that *Burnham* means tag jurisdiction remains generally valid.[200] Indeed, it is telling that no court appears to have used this justification to refrain from applying tag jurisdiction to any individual defendant.[201]

B. Courts Applying Tag Jurisdiction To Corporations

Although the courts refusing to apply tag jurisdiction to corporations are in the majority, a few courts have readily cited *Burnham* to apply tag jurisdiction to corporations.

For example, in *Allied-Signal Inc. v. Purex Industries*, *Inc.*,[202] the Appellate Division of the New Jersey Superior Court allowed the exercise of jurisdiction over a non-resident corporation based solely on the in-state service of that corporation's registered in-state agent.[203] Citing *Burnham*, the court reasoned that although due process ordinarily "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."[204] The court also rejected the argument that Justice Scalia's footnote somehow precluded the exercise of jurisdiction over corporations. The court argued that "Justice Scalia was not there

197. *Id.* Other courts have simply assumed *Burnham* does not apply to corporations with even less reasoning than in *MBM Fisheries*. *See, e.g.*, Golden Scorpio Corp. v. Steel Horse Saloon I, No. CV-08-1781-PHX-GMS, 2009 WL 976598, at *3 n.4 (D. Ariz. Apr. 9, 2009) (dismissing the possibility of tag jurisdiction over a company in a footnote citing other cases doing the same); Gonzalez v. Vlassios Carriers, No. 90 CIV. 7979 (PNL), 1992 WL 350084, at *2 (S.D.N.Y. Nov. 12, 1992) ("While it is true that such service on a natural person would confer the requisite personal jurisdiction, the same rule does not apply to corporations, whose personnel do not—as do those to be served for a partnership or association—carry the corporation around with them.") (quotations and citations omitted).

198. 430 U.S. 188 (1977).

199. *Id.* at 193 (quotations and citations omitted).

200. Although the *Marks* test has been criticized, *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 325 (2003), it has never been explicitly overruled and remains good law. *See, e.g.*, Jackson v. Danberg, 594 F.3d 210, 222–23 (3d Cir. 2010) (applying the *Marks* test).

201. *See* C.S.B. Commodities, Inc. v. Urban Trend LTD, 626 F. Supp. 2d 837, 846 (N.D. Ill. Jan. 7, 2009) ("Since *Burnham* was decided, there does not appear to be a single published opinion in which a court has found jurisdiction lacking where an individual was served in the forum.").

202. 576 A.2d 942 (N.J. Super. Ct. App. Div. 1990).

203. *Id.* at 944–945.

204. *Id.* at 944 (citing Burnham v. Super. Ct. of Cal., 495 U.S. 604, 607–09 (1990)) (additional citation omitted).

referring to circumstances *limiting* state jurisdiction, but to circumstances *expanding* state jurisdiction and possibly unique to corporations, which obviously have no personal presence anywhere."[205] The court's analysis did not turn on the existence of the registration statute, rather the court explicitly endorsed the idea that the principle in *Burnham* applies to corporations.[206]

Other courts have accepted tag jurisdiction over entities, but done so with less analysis. For example, in *First Am. Corp. v. Price Waterhouse LLP*,[207] the Second Circuit held that tag jurisdiction was applicable to a partnership where a partner was served while doing business on behalf of a related partnership in New York.[208] The court did not delve too deeply into the implications of subjecting partnerships to tag jurisdiction, but did note that the New York had a long history of subjecting partnerships to jurisdiction on that basis, which accorded with Justice Scalia's emphasis in *Burnham* on historical pedigree.[209] In *Northern Light Technology, Inc. v. Northern Lights Club*,[210] the First Circuit allowed the assertion of personal jurisdiction over a corporation through in-state service on a corporation's president.[211] The court did not fully analyze the constitutional issue and instead relied on Federal Rule of Civil Procedure 4(h)(1)'s provision allowing personal service on the officer of a corporation to support its holding.[212] Likewise, in *Oyuela v. Seacor Marine (Nigeria), Inc.*[213], the Eastern District of Louisiana rejected the argument that tag jurisdiction could not be applied to a Bahamian corporation whose officer was served while present in Louisiana.[214] The court simply noted that "*Burnham*'s reassertion of the general validity of transient jurisdiction provides no indication that it should only apply to natural persons."[215] At least one other court, although not explicitly endorsing tag jurisdiction over corporations, has cited *Burnham* for the proposition that the physical "presence" of a corporation through its occupation of office space can support the assertion of jurisdiction over that corporation.[216]

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205. *Allied-Signal*, 576 A.2d at 944–945.

206. *Id.* at 944.

207. 154 F.3d 16 (2d Cir. 1998).

208. *Id.* at 20–21.

209. *Id.* at 20 ("The rule that service upon a partner in New York subjects a partnership to personal jurisdiction is a venerable one.").

210. 236 F.3d 57 (1st Cir. 2001).

211. *Id.* at 63 n.10.

212. *Id.* The court also noted that in any event the defendants had waived the argument that service on the corporation's president (who was also a defendant personally in the action) failed to establish service on the corporation. *Id.*

213. 290 F. Supp. 2d 713, 720 (E.D. La. 2003).

214. *Id.* at 719−20.

215. *Id.* at 720. The court in *Oyuela* also rested its holding on the alternative ground that the defendant satisfied the *International Shoe* test. *Id.* at 721–22. Curiously, the court did not cite or distinguish *Wenche Siemer* even though it was decided over a decade earlier and at least appears to suggest in dicta that the Fifth Circuit would not apply tag jurisdiction to corporations. *See supra*, Part IV.A.

216. *See* Demirs v. Plexicraft, Inc., 754 F. Supp. 250, 254 (D.R.I. 1990) ("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. *See Burnham* . . . . 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.") (footnote omitted).

While these courts reached the correct conclusion, they failed to adequately flesh out the doctrinal and theoretical justifications for applying tag jurisdiction to corporations. As the previous section explained, the doctrine as announced by the Court in *Burnham* provides strong support for the application of tag jurisdiction to corporations. However, as the next section will argue, the theoretical framework under which corporations have been granted constitutional rights on par with natural persons also augurs for subjecting corporations to tag jurisdiction.

IV. CORPORATIONS AS PEOPLE

The idea of holding corporations to similar standards of personal jurisdiction as natural persons may seem odd since there are obvious differences between natural persons and corporations. However, in many areas of the law, and in constitutional law in particular, the distinctions between corporations and natural persons has been eroded significantly. Since corporations now enjoy many of the benefits of constitutional personhood, it makes sense that they should also be treated similarly to natural persons for purposes of personal jurisdiction analysis under the Due Process Clause.[217]

A. Corporations Become People

Corporations were not always thought of as equivalent to natural persons in the law. During the era immediately after the founding, courts still considered corporations creatures of the state's creation that could not have any political rights.[218] For example, in one early case the Supreme Court found that corporations could not even utilize federal courts.[219] The Court found that as an "invisible, intangible, and artificial being," a corporation was "certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States."[220] This vision of a corporation was consistent with the idea in very early case law, discussed in Part III.A, *supra*, that a corporation, as a creature of the state, could not leave its state of incorporation for jurisdictional purposes.

However, that attitude began to change as the role of corporations in society began to expand dramatically. At the time of the founding, there were only six non-bank corporations in existence in the United States.[221] By the time the Fourteenth

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217. *Cf.* Michalski, *supra* note 80, at 130 ("[A] more robust understanding of corporate citizenship and corporate rights correlates with a more robust ability of the state to exercise jurisdiction over corporations.").

218. *See, e.g.*, Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby*,* Conestoga Wood*, the Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U.J. HEALTH L. & POL'Y 201, 212 (2014) ("[P]rior to adoption of the Fourteenth Amendment, corporations had limited protection from state regulation."); Michalski, *supra* note 80, at 132 ("Early case law in the young Republic did not conceive of corporations as persons or citizens.").

219. Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86–87 (1809).

220. *Id.*

221. Michalski, *supra* note 80, at 133 n.24 (citing WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 49 (1997)).

Amendment was ratified, the corporate form had exploded in popularity, particularly for larger businesses.[222]

Perhaps in response to these changes, the courts began to expand their conception of a corporation's role under the law. No longer were corporations thought of as creatures of the state, but rather they were reconceived as the creation of a collection of private individuals.[223] Scholars refer to this as the "aggregate theory" of corporate personhood.[224] Under this "aggregate theory," corporations could be more easily conceptualized as being present in places other than their place of incorporation since the people who make up a corporation can travel at will. This understanding led to the increasing acceptance of service of process on corporate agents present in other states on corporate business as a valid method for acquiring personal jurisdiction over corporations as discussed in Part III.A, *supra*.[225]

However, while the prominence of the aggregate theory around the time of the ratification of the Fourteenth Amendment supports the application of tag jurisdiction to corporations under an originalist methodology,[226] the relationship between corporations and the Constitution did not stop evolving there. Since that time, corporations have gone from being thought of as mere aggregations of natural persons, to entirely independent entities on virtually the same constitutional footing as natural persons.

Starting in the late nineteenth and early twentieth century, a theory of corporations as entities independent of the natural persons that make them up began to emerge.[227] This theory is sometimes called the "real entity" theory by scholars.[228] In this era, courts began to accord corporations many constitutional rights including protection under the Equal Protection Clause[229] and Due Process Clause[230] of the

222. *See, e.g.*, Michalski, *supra* note 80, at 139 (noting the "massive expansion of corporations in the late nineteenth century"); Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 486 (2013) ("[A]fter the American Revolutionary War, there was a significant numerical increase in the number of corporations chartered by the states."); *see also* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 425–27 (2003) (explaining that the rapid growth of general incorporation statutes during the early to mid-nineteenth century facilitated the growth of corporations and hypothesizing that the demand for such corporations was driven by the desire of businesses to "expand their operations beyond what a few individuals could fund, manage, and carry out").

223. *See, e.g.*, Michalski, *supra* note 80, at 136–39.

224. *See, e.g.*, Harkins, *supra* note 218, at 220; Michalski, *supra* note 80, at 136–39; Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1154 (2012).

225. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350, 353 (1882) ("A corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them.").

226. *See supra* Part III.A.

227. *See* Michalski, *supra* note 80, at 139–40; Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FLA. ST. U. BUS. REV. 1, 33–34 (2013).

228. *See, e.g.*, Brown, *supra* note 227, at 33–34.

229. *See* Pembina Consol. Silver Mining & Milling Co. v. Com. of Pennsylvania, 125 U.S. 181, 187– 89 (1888).

230. *See* Covington & L. Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896).

Fourteenth Amendment,[231] the Free Speech Clause of the First Amendment,[232] and the Fourth Amendment's prohibition against unreasonable searches and seizures.[233] Under this conception, corporations became nearly indistinguishable for constitutional purposes from actual persons.

The trend of according corporations constitutional rights similar to natural persons has only accelerated in recent years.[234] Most prominently, in *Citizens United v. FEC*,[235] the Supreme Court held that a law prohibiting corporations from broadcasting electioneering communications in the days leading up to federal elections violated the First Amendment,[236] overruling several earlier decisions allowing similar practices, including *Austin v. Michigan Chamber of Commerce*.[237] Although the Court had held before that the First Amendment protects speech by corporations,[238] the Court's reasoning in *Citizens United* strongly drove home the point that any differential treatment by the government of corporate speakers versus natural person speakers is invalid.[239] The Court reinforced the idea that a corporation is much more than an aggregation of its owners; rather, it is a completely independent entity with its own right to influence the political process. The Court's rejection of two of the government's arguments in particular reflects its endorsement of this premise.

First, the Court rejected the argument that a corporation's ability under the statute to speak through an independent political action committee obviated the need to allow it to speak directly. The Court reasoned that "[a] PAC is a separate association from the corporation. So the PAC exemption from [the] expenditure ban does not allow the corporation to speak."[240] In essence, even though the PAC would have been controlled by the same people who controlled the corporation, it was no substitute because the PAC was not the same "person" as the corporation. Second, the Court rejected the argument that the government had an interest in preventing corporate speech that may be opposed by some of the corporation's shareholders.[241] If a corporation were understood to be an aggregate of individuals, than its speech

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231. For a fascinating account of how the Fourteenth Amendment's first section came to be recognized as protecting corporations *see* Harkins, *supra* note 218, at 245−71.

232. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936).

233. *See* Hale v. Henkel, 201 U.S. 43, 76 (1906), *overruled in part on other grounds by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).

234. *See* Michalski, *supra* note 80, at 144–48.

235. 558 U.S. 310 (2010).

236. *Id.* at 336–41, 365–66.

237. 494 U.S. 652 (1990).

238. *See Citizens United*, 558 U.S. at 342 (collecting cases).

239. *See, e.g.*, Brown, *supra* note 227, at 5 ("[T]he [*Citizens United*] decision obliterated many of the existing distinctions between corporations and unions, media and non-media companies, and nonprofit and for-profit entities. By casting these historical distinctions aside, it became possible to render corporate political speech as constitutionally equivalent to the speech of ordinary human beings."); David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 698 (2011) ("*Citizens United* is one of the most far-reaching opinions on the rights of corporations in Supreme Court history.").

240. *Citizens United*, 558 U.S. at 337–38 (citations omitted).

241. *Id.* at 361–62.

rights and interests would merely be contiguous with that of its shareholders.[242] Instead, the Court advised aggrieved shareholders to take it up with the corporation's governing structure—i.e., its officers and directors—if shareholders disagreed with the corporation's speech.[243] Thus, the Court strongly stood behind the view of corporations as constitutional persons with a right to express themselves through the officers and directors who control them, independent of even the corporation's owners.

But the Court did even more in *Citizens United* than firmly shut the door on the aggregate theory of corporate existence. The Court also rejected the idea that because the law is the source of a corporation's existence the government may curtail corporate rights:

> Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." . . . This does not suffice, however, to allow laws prohibiting speech. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.[244]

This statement reflects the long journey corporations have made from being mere creatures of the state that could be regulated at will and could not even leave their home state in the founding era,[245] to being entities that are not merely independent of the sovereign that gave them "life," but are in fact *protected* from that sovereign (and the federal government) by the Constitution.[246]

Citizens United is no outlier. Other recent cases in the Supreme Court and lower courts have adopted similar views in granting corporations constitutional protection including 'negative' free speech rights,[247] rights under the Free Exercise

242. *See* Brown*, supra* note 227, at 38 (noting that the real entity theory of corporate personhood was attractive to its proponents in part because "it resolved the aggregate theory problem of having no sharp practical divide between the shareholder owners of the company and those actually controlling the board. It fixed this problem by re-describing the 'will' or 'intent' of the corporation and its shareholders as the collective 'will' of its managers.").

243. *See Citizens United*, 558 U.S. at 361–62 ("There is . . . little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.") (quotations and citation omitted).

244. *Id.* at 350–51 (quotations and citation omitted).

245. *See id.* at 427 (Stevens, J., dissenting) (noting that at the time of the founding "[c]orporations were created, supervised, and conceptualized as quasi-public entities, designed to serve a social function for the state") (quotations and citations omitted).

246. *See* Brown *supra* note 227, at 37 ("By invoking the counterintuitive idea that corporations are natural and independent entities, proponents [of the real entity theory] sought to establish that '[t]he law does not create corporations but merely recognizes their independent existence.'").

247. That is, the right not to be compelled to be associated with speech with which the speaker disagrees. *See* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

Clause,[248] protection under the Fifth Amendment's Double Jeopardy Clause,[249] the Sixth Amendment right to a jury trial in criminal cases,[250] and the Seventh Amendment right to a jury trial in civil cases.[251] In addition, corporations have been afforded important statutory protection under several civil rights laws.[252] Scholars have suggested that the list of rights afforded corporations may grow further as this new understanding of the corporation is applied to other constitutional provisions.[253]

B. Corporate Constitutional Persons Are Subject To Tag Jurisdiction

The expansion of corporate rights via an embrace of the natural entity theory of the corporation supports the application of tag jurisdiction to corporations for at least two reasons. First, the understanding of a corporation as an entity independent of its shareholders or the state is consistent with the idea of corporations being present wherever their officers are conducting corporate business. Second, it would be fundamentally unfair and inconsistent with the precedents expanding corporate rights to afford corporations *greater* rights than natural persons enjoy under the Due Process Clause by exempting corporations from tag jurisdiction.

As described above, recent cases have embraced the idea that corporations are independent entities rather than aggregations of their shareholders or creatures of the state's creation. This theory of corporate personhood logically aligns with the application of tag jurisdiction to corporations. In *Citizens United* the Court did not equate the political views of a corporation with those of its shareholders (or employees) but rather with the views of those running the corporation (i.e., its officers and directors). Tag jurisdiction similarly equates the presence of a corporation to the presence of its officers or directors, rather than to the presence of employees or shareholders. Just as officers can make decisions about what a corporation will say[254] for constitutional purposes, so too can they make decisions about where a corporation will be.

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248. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133–37 (10th Cir. 2013) (en banc), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

249. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

250. *See, e.g.*, United States v. Troxler Hosiery Co., 681 F.2d 934, 935–936 (4th Cir. 1982).

251. *See* Ross v. Bernhard, 396 U.S. 531, 539 (1970).

252. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) ("[A] federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]"); Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 16 (1st Cir. 1979) ("Corporations are persons whose rights are protected by 42 U.S.C. § 1983.").

253. *See* Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 890 (2011) ("[T]he Court's repeated reference to the First Amendment as an interpretive analog for the Second would seem to augur for some level of corporate Second Amendment rights."); Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1316 (1996) (arguing that the Eighth Amendment "fits squarely within the Court's precedent for extending rights to corporations"). *See also* Howard Sec. Servs., Inc. v. Johns Hopkins Hosp., 516 F. Supp. 508, 513 n.10 (D. Md. 1981) (finding it "at least arguable" that corporations could be protected by the Thirteenth Amendment).

254. And, perhaps, believe. *See Hobby Lobby*, 134 S. Ct. at 2774–75 (dismissing concerns about disputes among the owners of a corporation related to religious exercise because "[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure").

The entity theory of corporate personhood also eliminates any meaningfully distinction between corporations and natural persons in terms of their ability to travel between fora. If corporations were mere creations of their state of origin, it might be reasonable to argue that a corporation would need to do something more comprehensive than a natural person in order to "leave" that state and enter another one. However, though corporations may still be created by states, they now enjoy the ability to come and go as they please. Moreover, unlike in the past, a corporate officer can now, in a very real sense, carry her authority as a corporate officer with her when she conducts business in another state. This is particularly true in jurisdictions that follow the fiduciary shield doctrine, forbidding courts from exercising jurisdiction over corporate agents based on the actions agents take while present in a forum solely as agents of the corporation.[255] Thus, the officer is in some instances not himself or herself at all for jurisdictional purposes when he or she enters a forum on the corporation's behalf, but instead becomes entirely a vessel for corporate presence. Once an officer traveling at the corporation's behest is understood this way, it would be inconsistent with the notions of state sovereignty undergirding recent Supreme Court personal jurisdiction cases[256] to allow a corporation to travel deliberately from one state to another while avoiding the sovereign authority of the destination state.

As many scholars have recognized, the expansion of corporate rights and the embrace of the natural entity theory also augurs for increased corporate responsibility in other areas of law.[257] In the personal jurisdiction context, Professor Roger Michalski has argued that the increased protection corporations have received under the Constitution should be taken into account in examining personal jurisdiction under the *International Shoe* framework.[258] Professor Michalski proposes that the exercise of the political rights granted by these recent court decisions should be a relevant "contact" for purposes of determining whether the minimum contacts test is satisfied[259]

This makes sense in the context of the *International Shoe* framework: the contacts made when exercising political rights are just as probative a measure of a corporation's connection to the forum as business contacts. Indeed, under current

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255. Sonja Larsen, Annotation, *Validity, Construction, and Application of "Fiduciary Shield" Doctrine—Modern Cases*, 79 A.L.R.5th 587 (originally published in 2000); *see also* C.S.B. Commodities, Inc. v. Urban Trend Ltd., 626 F. Supp. 2d 837, 847 (analyzing whether the fiduciary shield doctrine might prevent the exercise jurisdiction even though the defendant was served while physically present in the forum).

256. *See, e.g.*, Rhodes, *supra* note 8, at 415; John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on* J. Mcintyre Machinery v. Nicastro, 16 LEWIS & CLARK L. REV. 827, 844 (2012).

257. *See, e.g.*, Michalski, *supra* note 80, at 141 ("The natural entity theory of the corporation thus provides a theoretical basis for corporate social responsibility."); Beth Stephens, *Are Corporations People? Corporate Personhood Under the Constitution and International Law*, 44 RUTGERS L.J. 1, 17 (2013) ("This textured, multi-faceted view of corporations, their role in society, and their personhood leads the courts to conclude that constitutional protections apply to corporations, even though the Constitution does not mention them. As I turn to look at corporations and human rights accountability, I suggest that, if the courts engaged in the same analysis of the nature of corporations when they interpreted international law, they would recognize that corporations can and should be held liable for genocide and similar human rights abuses.").

258. *See* Michalski, *supra* note 80, at 162–63.

259. *See id.* at 186–88.

doctrine, it is likely already the case that a corporation's political activity would be a relevant contact in determining personal jurisdiction.[260] Professor Michalski soundly argues that such activities are a legitimate consideration in personal jurisdiction based on a hypothetical consent theory in which "artificial and real persons acquire political obligations because they would have agreed to take on these obligations, if asked, in order to secure [their] rights and freedoms."[261]

However, it is important to recognize that my argument is distinct from this one. Corporations should not bear the burden of tag jurisdiction because of a hypothetical trade they have made for the "benefit" of constitutional rights. Rather, corporations should be subject to tag jurisdiction because of the methodological approach courts took in order to afford corporations constitutional rights: equating corporations with natural persons.[262]

If corporations are equals to natural persons, then they should be afforded (at most) equivalent constitutional rights to natural persons, not greater rights. The holding in *Burnham* is that the Due Process Clause does not protect a natural person from being subject to jurisdiction on the basis of only their temporary presence in another state. Since corporations are now considered the equivalent of a natural person for purposes of most constitutional provisions (including the Due Process Clause), there is no reason why they should be given greater protection under the Due Process Clause than that to which a natural person is entitled—including in the context of tag jurisdiction.

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260. *See* Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1174–75 (9th Cir. 2006) ("But, jurisdiction here is not predicated on sales, or even the notion of substantial sales, alone. The minimum contacts are established by the confluence of Reynolds' physical, economic, and political presence and the company's myriad other activities in the state.").

261. Michalski, *supra* note 80, at 179. Professor Michalski has also argued in another article that corporations should be treated separately from natural persons for purposes of jurisdictional rules. *See* Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321, 392 (2014) ("A natural conclusion of this argument is to bifurcate the doctrine into two parts: personal jurisdiction and entity jurisdiction. This would allow courts to recognize the fundamental differences between natural and artificial persons and craft rules uniquely suited for each."). I agree that, in some instances, the differences between corporations and natural persons may justify affording corporations *less* protection under the Due Process Clause than individual persons. *Cf.* Burnham v. Super. Ct. of Cal., 495 U.S. 604, 610 n.1 (1990) ("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[.]") (citation omitted). However, I do not believe any of these differences justify affording corporations *greater* Due Process Clause protection from exercises of personal jurisdiction.

262. *See* Matambanadzo, *supra* note 222, at 502 (describing the metaphors tied to the human body courts have used in the entity theory era to analyze corporate personhood issues and noting that this "embodiment theory of corporate personhood rests upon the metaphorical notion that a corporation, a disembodied, legally constructed entity, is identical to, or at least similarly situated to, an embodied human being").

V. CONCLUSION

As many have argued, it may be unfair or otherwise bad policy to continue to have tag jurisdiction.[263] It also may be unwise or even a threat to democracy to continue to afford corporations constitutional rights akin to natural persons.[264] But, as long as we are going to have tag jurisdiction and corporate constitutional persons, corporations should be subject to tag jurisdiction just like the rest of us.[265]

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263. *See, e.g.*, Cox, *supra* note 153, at 518 ("*Burnham* is most glaringly wrong, however, in its primary conclusion, shared by all the Justices, that transient presence jurisdiction is under most circumstances constitutional."); Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 659–60 (1991) ("Neither of these minority opinions satisfactorily confronts the aspect of service jurisdiction that most troubles me: that gives a state general jurisdiction over a defendant based on the happenstance of his being found and served in the state."); Barbara Surtees Goto, Note*,* International Shoe *Gets the Boot:* Burnham v. Superior Court *Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851, 899 (1991) ("A correct application of the minimum contacts analysis to the transient rule of jurisdiction would highlight the inherent unfairness of the rule and mandate its destruction."); Michael Rose, Note, Burnham v. Superior Court *and the (Partial) Vindication of Transient Jurisdiction*, 28 HOUS. L. REV. 899, 915 (1991) ("The transient jurisdiction rule has clearly outlived its usefulness. Moreover, in its pristine form, it is capable of working surprise and hardship."); Eliot D. Prescott, *Transient Jurisdiction is Here to Stay:* Burham v. Superior Court of California, 23 CONN. L. REV. 1125, 1158 (1991) ("Transient jurisdiction should be stricken from American jurisprudence, not only because it is unconstitutional in its violation of an individual's due process rights, but also because as a rule, it is not jurisprudentially sound.").

264. *See, e.g.*, Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 726 (2011) ("This new era of corporate rights dominating the rights of natural persons may lead to a new period of tiered legal personhood in our democracy, an outcome that is inconsistent with the vision of rights under our modern Constitution."); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 524 (2010) ("[T]he concept of corporate personhood . . . has been employed to accord corporations rights under the Bill of Rights in spite of the fact that such rights were created only for individuals."); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 655 (1990) ("The treatment of corporations as persons under the Bill of Rights is intuitively problematic. The personification of the corporation also broadly enhances the power of corporate management in a manner inconsistent with most modern schools of thought on constitutional law."); Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1859–60 (1981) ("If liberal democratic principles are retained, however, the recognition of corporate rights makes the coexistence of vigorous democracy and vigorous individual rights of all sorts unnecessarily problematic.").

265. This article was edited by New Mexico Law Review Manuscript Editor Elliot Barela.