BYU Law Review

Volume 1986 | Issue 4 Article 1

11-1-1986

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Earl M. Maltz

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Cases initially described as "landmark" decisions are in some ways analogous to the architectural landmarks which provide the metaphor. When initially constructed, the design of a particularly striking building might seem to be not only an innovation but also a substantial improvement on established practice. Such a building is likely to be praised effusively; indeed, critics may suggest that it will provide a model for transforming the entire skyline of its city.

With the passing of time, however, evaluation of the building's significance may change. Reexamination of the design might reveal flaws in its basic conception which should not be emulated. Later construction using quite different approaches might obscure the innovative building, diminishing its importance in the overall pattern of the city's appearance. Thus what initially seemed a dramatic advance in architectural technique may become simply another piece in the overall mosaic which creates the structure of a city.

The reputation of individual cases may undergo a similar evolution. Initially a particular style of reasoning may be characterized as not only sound, but also extraordinarily innovative, presaging a major change in the direction of the law. In time, however, flaws in the reasoning of the relevant opinion may become evident; moreover, subsequent cases may demonstrate that the impact of the new analysis is in fact quite limited. In such a situation it may become apparent that the first appraisals of the case overestimated its importance.

The initial scholarly reaction to *Shaffer v. Heitner*[1] reflected the widely shared belief that the case was a landmark which would dramatically change the law of personal jurisdiction.

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* Professor of Law, Rutgers University; B.A., 1972, Northwestern University; J.D., 1975, Harvard Law School. The author gratefully acknowledges the helpful comments of Allen Stein.

1. 433 U.S. 186 (1977).

Shaffer was the subject of many articles and numerous symposia.[2] Commentators were almost unanimously sympathetic to the central theme of *Shaffer*, which subjected all *in rem* actions to the minimum contacts standard initially established in *International Shoe Co. v. Washington.*[3] While less sanguine about the specific result in *Shaffer*, a number of commentators also saw its emphasis on the forum state's interest in adjudicating the dispute as a welcome development which would shape the future of jurisdictional analysis.

A decade has passed since *Shaffer* was decided, and the Supreme Court has had an opportunity to deal with the personal jurisdiction problem in a variety of contexts.[4] One can now reevaluate the case with the perspective only time can provide. This article will attempt such a reevaluation. Part I will briefly describe the facts and majority opinion in *Shaffer*. Part II will treat the problem of *quasi in rem* jurisdiction and conclude that the Court's analysis was seriously flawed. Part III will assess *Shaffer*'s impact on the minimum contacts standards generally, and conclude that the primary source of the standards which have been applied by the Court is not *Shaffer*, but rather the earlier case of *Hanson v. Denckla.*[5]

I. *Shaffer v. Heitner*—A SUMMARY

Shaffer was a derivative action initiated in Delaware state court by a shareholder of Greyhound, a Delaware corporation. The complaint alleged that a number of present and former officers of Greyhound and one of its subsidiaries had violated their respective duties to the corporation, with the result that Greyhound had been held liable for penalties and damages under the antitrust laws. Personal jurisdiction over the defendants was

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2. *See Commentaries on* Shaffer v. Heitner, 53 N.Y.U. L. REV. 33 (1978); *The Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273; *State-Court Judicial Jurisdiction After* Shaffer v. Heitner, 63 IOWA L. REV. 991 (1978); *Symposium on* Shaffer v. Heitner, 45 BROOKLYN L. REV. 493 (1979).

3. 326 U.S. 310 (1945). *See* Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 65 & n.174 (1978), and sources cited therein.

4. Since *Shaffer*, the Court has decided nine major personal jurisdiction cases: Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, 465 U.S. 770 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); and Kulko v. Superior Court, 436 U.S. 84 (1978).

5. 357 U.S. 235 (1958).

based on a *quasi in rem* theory; the property seized was their stock in Greyhound which, under Delaware law, was deemed "located" in that state.

Over the defendants' objection, the Delaware courts found the assertion of jurisdiction constitutional.[6] Applying the venerable rule of *Pennoyer v. Neff*,[7] the state courts held that they could appropriately seize any property of the defendant located in Delaware and base jurisdiction on that seizure. On appeal, the Supreme Court reversed.[8] Overruling *Pennoyer*, Justice Marshall's majority opinion argued that all assertions of personal jurisdiction should be subject to the "minimum contacts" standard established in *International Shoe Co. v. Washington*—even if jurisdiction were based on an *in rem* or *quasi in rem* theory. Applying that standard in *Shaffer*, the majority found that the due process clause prohibited the assertion of jurisdiction.

II. "Minimum Contacts" and *Quasi In Rem* Jurisdiction

A. The Opinion of the Court

On its face, Marshall's analysis of whether the *International Shoe* standards were applicable in *Shaffer* seems straightforward. He began by noting that any *in rem* action is essentially an adjudication of individual rights in the *res*. Given this conclusion, he argued that there is no reason to apply a standard different from that applied to other adjudications of individual rights such as those typically at issue in *in personam* cases.[9]

Marshall then turned to the impact of the property's location on minimum contacts. He conceded that "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction."[10] The opinion also noted a number of other situations in which the presence of property might be relevant.[11] But in *Shaffer*, the property which served as the basis for state court juris-

6. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976), *rev'd sub nom.*, Shaffer v. Heitner, 433 U.S. 186 (1977).

7. 95 U.S. 714 (1877).

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

9. *Id.* at 207.

10. *Id.* (footnote omitted).

11. *Id.* at 208.

diction was "completely unrelated to the plaintiff's cause of action . . . . [T]he only role played by the property [was] to provide the basis for bringing the defendant into court."[12] In such a case, the opinion concluded, the mere presence of property in a state does not provide the necessary minimum contacts to support even *quasi in rem* jurisdiction.[13]

B. Jurisdiction in Actions to Enforce Judgment Debts

One of the difficulties with Marshall's analysis is that on its face it threatens a mainstay of American jurisprudence—the concept that one can always enforce a judgment obtained against a defendant in one state by levying against property located in another state. An action to enforce a judgment is a classic *quasi in rem* situation; the judgment creditor is seeking to seize property in order to vindicate a claim based on the defendant's breach of a duty which may be completely unrelated to the property. The body of the *Shaffer* opinion suggests that in such a case the judgment could be enforced only if the judgment debtor has minimum contacts with the state where the property is located. Such a rule would represent a radical change from current practice.

Marshall brushed off this problem rather cavalierly in a footnote:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[14]

This analysis overlooks the distinction between the action on the

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12. *Id.* at 209 (footnote omitted).

13. In *Shaffer*, Marshall identified three distinct categories of property-based actions: pure *in rem*, type I *quasi in rem*, and type II *quasi in rem*. A pure *in rem* action purports to settle all potential claims to a particular piece of property. In a type I *quasi in rem* action, a plaintiff seeks to establish the priority of his claim to the property over that of particular persons. In a type II *quasi in rem* action, the plaintiff seeks to establish his claim to the property based on an unrelated cause of action. *Id.* at 199 n.17 (quoting Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958)). Except for problems of notice, for purposes of analyzing personal jurisdiction issues, a pure *in rem* case is virtually indistinguishable from a type I *quasi in rem* action. Thus, for the sake of simplicity, in the remainder of this article both of those categories will be subsumed under the label pure *in rem*, while the label *quasi in rem* will refer to type II situations.

14. *Id.* at 210-11 n.36 (citation omitted).

putative judgment debt and the action establishing the existence of the debt. Whatever the character of the plaintiff's original claim, that claim merges into the judgment, which can typically be enforced only as an action for debt. The defenses which the defendant can interpose may also be entirely different. Of course, typically those defenses will be less numerous than those which could be asserted in the original action. But in some cases—for example, some statute of limitations situations—the defendant might actually be in a better position to oppose the judgment than the original claim.[15] In any event, as in other lawsuits, the defendant clearly has potential defenses to an action based on a judgment; if he could not be forced to come into court and assert those defenses in actions for debt generally, it is difficult to see why the situation should change simply because the source of the debt is a judgment.

The point emerges most dramatically when one considers objections to the jurisdiction of the court rendering the original judgment. Suppose the defendant [*D*] owns two identical pieces of land—Whiteacre in state *A* and Blackacre in state *B*. Assume further that *D* has no other contacts with either *A* or *B*. In case 1, Plaintiff [*P*] sues *D* in state *A*, claiming that *D* committed a battery on him in state *C*. Jurisdictionally, the claim rests on a *quasi in rem* theory based upon *D*'s ownership of Whiteacre. Under *Shaffer*, *D* has three options. First, he can choose to defend in *A*. Second, he can appear specially in *A* and have *P*'s claim dismissed for lack of personal jurisdiction. Finally, *D* can default and have the default judgment for *P* vacated later (at *D*'s leisure) for want of personal jurisdiction.

In case 2, *P* chooses to proceed in *A* on a pure *in personam* theory. *D* defaults and *P* then obtains a judgment from the state *A* courts. *P* then seeks to enforce the judgment in state *B* by levying on Blackacre. Under the *Shaffer* footnote, *D* cannot raise a direct jurisdictional objection to *P*'s judgment action. He could defend *on the merits* by appearing and challenging the jurisdiction of the *A* court over the battery. But *D* cannot default and later challenge a *B* court's decision to respect the original *A* court judgment and award Blackacre to *P*. The flaw in the *B* court's judgment would relate to the merits rather than jurisdic-

15. *See, e.g.*, Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965); RESTATEMENT (SECOND) OF JUDGMENTS § 16 & comment b (1982).

tion; thus the judgment would not be subject to collateral attack.

Comparing case 1 to case 2, one finds the following inconsistency. From *D*'s perspective both cases involve unrelated claims to identical pieces of property in states with which he has no other contacts. Yet under the majority's analysis in *Shaffer*, in case 1 he can default and launch a collateral attack at his leisure, while in case 2 he must appear and defend the critical jurisdictional issue at the time and place chosen by the plaintiff.

One can resolve the anomaly either by subjecting actions to enforce judgments to the *International Shoe* standards or by abandoning Marshall's contention that *quasi in rem* actions should be treated the same as *in personam* actions for jurisdictional purposes. Which path one chooses depends on one's view of the majority's general approach in *Shaffer*. The crucial step in the analysis is the differentiation between pure *in rem* and *quasi in rem* actions for jurisdictional purposes. The description of both actions as involving the rights of persons is not only sound but entirely uncontroversial. Further, the application of the *International Shoe* standards would be of little practical importance if the presence of the property automatically generated minimum contacts. Finally, one could not challenge state court jurisdiction over pure *in rem* actions without challenging very basic premises of American federalism. Thus the key question is whether for jurisdictional purposes plausible distinctions can be drawn among the various types of property-related actions.

Marshall's answer is that pure *in rem* actions are in some sense "about" the property while *Shaffer*-type actions are "about" something else. Despite its facial plausibility, this contention does not withstand careful analysis. First, the stakes in the two types of action are precisely the same: ownership of the property which constitutes the *res*. Second, neither type of action is *res judicata* of related *in personam* claims; while each might settle some issues through operation of collateral estoppel, there is no difference between *in rem* and *quasi in rem* actions in this respect.

The major difference between the two types of action lies in the source of law which will determine the ownership of the relevant property. In the pure *in rem* case, the answer to the ownership question will often (but not invariably) be derived from sources which are directed either specifically to the property at issue or generally to the class of property to which the subject of

the litigation belongs. In the *quasi in rem* case, by contrast, the case will typically turn on more general sources of law.

Such a distinction hardly seems relevant for jurisdictional purposes. Assume, for example, that a borrower/debtor (*D*) is attempting to obtain a loan to expand his widget manufacturing business in state *A*. Unable to obtain the full amount of needed capital from any single bank in *A*, *D* borrows half of the money from each of two banks, bank 1 and bank 2. The loan from bank 1 is unsecured; the loan from bank 2, is secured by a mortgage on Blackacre. *D* acquired Blackacre by inheritance; the property is located in state *B*, a state which *D* has visited only once, and which (aside from the mortgage) is totally unrelated to the widget manufacturing enterprise.

D defaults on both loans. Bank 1 brings a *quasi in rem* action in the courts of state *B* seeking to seize Blackacre in order to satisfy *D*'s debt. Bank 2 starts foreclosure proceedings on its mortgage. From *D*'s perspective, both lawsuits have essentially the same consequences; in each case one of his creditors is attempting to deprive *D* of his ownership interest in Blackacre and to have the value of that interest applied against one of his outstanding debts. Moreover, in both cases the plaintiff must satisfy the same basic prerequisites in order to prevail; he must show that *D* owes him a debt which is unpaid. Yet under the majority's analysis in *Shaffer*, *D* can have the suit of bank 1 dismissed for want of personal jurisdiction but cannot successfully assert a similar objection to the action of bank 2.

This analysis suggests that one cannot persuasively distinguish pure *in rem* and *quasi in rem* cases for jurisdictional purposes. The primary thrust of Marshall's analysis could still survive, however, if the assumption of personal jurisdiction in *in rem* cases were subject to substantial constitutional limitations. In order to evaluate the viability of such a system, one must first examine the basic nature of *in rem* actions.

The key to understanding the central role of the situs in *in rem* cases is the fundamental nature of the concept of a property right. Such a right entails nothing more or less than the privilege of calling upon the local governmental authorities to enforce one's wishes regarding the use and disposition of a particular piece of property. Suppose the police of state *A* are called to investigate a disturbance at Greenacre, real property located in *A*. Upon arriving they find two persons, *X* and *Y*, struggling.

Investigation reveals that both *X* and *Y* are residents of state *B* and each claims to own Greenacre.

Normally the final decision in such situations is not left to the police on the scene. Instead, society directs the courts to determine which person's claim has more merit and is therefore entitled to be supported both by the police and by the other coercive forces in the hands of the government. The resolution of such disputes is the essence of the function of the courts in *in rem* actions.

Of course, in the *in rem* actions that normally present personal jurisdiction problems, both parties will not be voluntarily within state *A*—the state where the land is located. In such cases it might be argued that it is unfair to force a defendant located in another state to come to defend his claim to the property at issue. However, two factors make the state *A* courts an appropriate forum. First, all actions that an owner might take to use the property must by their nature take place in state *A*. Second, it is state *A* police—the agents of the local government—who must deal with any prospective disputes over the use of the property. Thus, it is entirely reasonable that another branch of that state's government—its judiciary—be the agency which provides instructions to the police on the appropriate resolution of such disputes.

In short, jurisdictional issues in *in rem* and *quasi in rem* actions should generally not be subjected to the type of minimum contacts analysis which characterizes the Court's approach to *in personam* cases. *Shaffer* itself, however, posed special problems in this regard. First, the statute upon which the Delaware courts premised jurisdiction did not provide for a limited appearance. The defendants could only defend their rights in the seized property by making a general appearance, thereby submitting themselves to the *in personam* jurisdiction of the Delaware courts for all purposes. The sequestration statute could therefore be appropriately characterized as a device "to compel the defendant to enter a personal appearance,"[16] rather than a mechanism to provide a means of adjudicating interests in property located within the state. Even more significant is the peculiar nature of the property "seized" in *Shaffer*. The ownership interest in a corporation represented by stock cannot really be said to be located anywhere. There is no particular reason

16. 433 U.S. at 209.

why the Delaware police are likely to be called upon to decide disputes over the use and control of that interest. Given this fact, Delaware courts are no better placed than courts of any other state to prescribe the resolution of such disputes. Of course, for domestic purposes the state courts can define the situs of stock in any way they please; but for the purpose of applying federal jurisdictional standards, jurisdiction based on the presence of an intangible appears more like a pure *in personam* case than a classical *in rem* situation.[17]

In short, while the Court's general analysis of *in rem* jurisdiction in *Shaffer* can be effectively criticized, its conclusion that the *International Shoe* standards should be applied to the specific facts of that case seems perfectly sound. The next section will deal with the Court's application of that standard and will evaluate that analysis in the context of subsequent developments in the law of personal jurisdiction.

III. The Methodology of Assessing Minimum Contacts

Analyzing *Shaffer* under the minimum contacts test of *International Shoe,* the majority opinion relied heavily on what Marshall perceived to be Delaware's failure to assert a legitimate state interest in the controversy. Plaintiffs argued that the state had a strong interest in supervising the management of a corporation created under its auspices. The Court, however, found this interest insufficient to support personal jurisdiction. Marshall reasoned that if the supervision of the activities of the corporation had been the interest which the legislature had been attempting to protect, the statute would have granted the state courts jurisdiction over all corporate fiduciaries. Since the statute by its terms focused instead on the ownership of stock, the majority concluded that the statute must have been intended to serve another interest. Moreover, the opinion determined that whatever the interest, it was insufficient to support jurisdiction.[18] Finding in addition that the directors had not " 'purposefully avail[ed themselves] of the privilege of conducting activi-

17. *See generally id.* at 217-19 (Stevens, J., concurring in the judgment) (arguing that states should have jurisdiction to determine disposition of most types of property located within their boundaries). For a perceptive analysis of the problems posed by intangibles generally, see Lowenfeld, *In Search of the Intangible: A Comment on* Shaffer v. Heitner, 53 N.Y.U. L. Rev. 102 (1978).

18. 433 U.S. at 213-15.

ties within the forum State,' "[19] the Court found constitutional prerequisites for jurisdiction lacking.

Shaffer's result has been justly criticized.[20] It seems rather strange to characterize as fundamentally unfair the assertion of jurisdiction over the officers and directors of a domestic corporation in a lawsuit focusing on the effect of their activities on that corporation. But, while not embracing the *Shaffer* Court's focus on the substantiality of the *asserted* interest of the forum, some commentators have reacted favorably to the theory that analysis of the forum state's interest in the litigation should play a central role in minimum contacts analysis.[21] Moreover, the same concept has appeared often in subsequent opinions dealing with personal jurisdiction issues. In *World-Wide Volkswagen Corp. v. Woodson*, for example, the Court listed "the forum State's interest in adjudicating the dispute" and "the shared interest of the several States in furthering fundamental substantive social policies" as two critical factors in jurisdictional calculus.[22] In upholding the state's power to exercise personal jurisdiction, the majority opinion in *Burger King Corp. v. Rudzewicz* referred clearly to the forum state's "manifest interest" in adjudicating the dispute.[23] The only dissonant note came in *Keeton v. Hustler Magazine*, where the majority described references to the state's interest as a "surrogate" for the consideration of other factors.[24] Even in *Keeton*, however, the Court noted that "the 'fairness' of haling respondent into [the forum] depends to some extent on whether [defendant's] activities relating to [the forum state] are such as to give that State a legitimate interest in holding [defendant] answerable on a claim related to those activities."[25]

One could easily construct a model of due process constraints on jurisdiction in which state interest plays a central role. However, the case law generated by such a model would

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19. *Id.* at 216 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

20. *See, e.g.*, Leathers, *Substantive Due Process Controls of* Quasi in Rem *Jurisdiction*, 66 KY. L.J. 1, 27-28 (1977); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 493 (1984).

21. *E.g.*, McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 12-15 (1982); Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 926 (1985).

22. 444 U.S. 286, 292 (1980).

23. 471 U.S. 462, 473, 483 (1985).

24. 465 U.S. 770, 776 (1984).

25. *Id.* at 775-76 (citations omitted).

bear little resemblance to that which has emerged from the Court. For clearly a state *always* has an interest in ensuring that its own citizens obtain recompense for wrongs done to them by others;[26] indeed, the basic reason for establishing a court system is to provide forums in which such recompense can be obtained. Thus an emphasis on governmental interest would lead to a system in which the Constitution imposes few significant restraints on state court jurisdiction; any time the plaintiff is a resident of the forum state, jurisdiction would be constitutionally appropriate.

Obviously, this principle has not guided the Court in the development of its approach to personal jurisdiction problems. Not only has the Court found the assertion of jurisdiction unconstitutional in a number of cases in which the plaintiff was proceeding in her home forum, but in *Keeton* the Court noted that the residence of the plaintiff was relevant only because "defendant's relationship with the [resident] plaintiff [may] enhance defendant's contacts with the forum."[27] Thus, if one is to look behind the Court's rhetoric to determine what values are actually reflected in its due process jurisprudence, some other model must be developed.

A. Federalism

Unfortunately, the other approaches most frequently advocated in the literature—those based on considerations of federalism, convenience and foreseeability—are also of little use in describing the Court's decision-making process. The prospect of a jurisdictional model based on federalism began to receive a great deal of attention after *World-Wide Volkswagen.* The majority in that case argued:

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution . . . . [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation

26. *See* Silberman, *supra* note 3, at 84-87.
27. 465 U.S. at 780.

> express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.
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> . . . .
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> . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[28]

This language generated a flurry of scholarly criticism.[29] Much of the criticism pointed out that a conceptualization of the personal jurisdiction problem based on federalism was inconsistent with the notion that defendants could waive their objections to personal jurisdiction. For while private defendants should be in a position to waive their own rights, they should hardly be given the power to forfeit the sovereign prerogative of state governments. Thus, if considerations of federalism were in fact at the core of fourteenth amendment limitations on jurisdiction, all such limitations should be treated as nonwaivable constraints on subject matter jurisdiction. A majority of the justices soon recognized this problem; in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* the Court abandoned the notion that federalism was central to personal jurisdiction analysis.[30]

The same difficulty undermines any attempt to treat *International Shoe* and its progeny as being fundamentally concerned with allocations of sovereign authority among the various states. One can reasonably treat subject matter jurisdiction issues in this fashion; in theory at least, the parties cannot confer subject matter jurisdiction by consent.[31] Personal jurisdiction

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28. 444 U.S. 286, 293-94 (1980) (citation omitted).

29. *See, e.g.,* Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation,* 75 Nw. U.L. Rev. 1112 (1981); Weinberg, *supra* note 21, at 923-24.

30. 456 U.S. 694, 702 n.10 (1982). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.13 (1985).

31. Some might argue that the distinction between subject matter and personal jurisdiction is largely illusory. This argument would be based on two observations. First, an otherwise final judgment in which the rendering court has personal jurisdiction over the parties cannot be attacked collaterally, absent special circumstances, on the ground that the court lacked subject matter jurisdiction. *See, e.g.,* Durfee v. Duke, 375 U.S. 106, 111 (1963); Johnson v. Muelberger, 340 U.S. 581, 583 (1951). Second, in the absence of a jurisdictional complaint by the defendant, courts are unlikely to notice a lack of subject matter jurisdiction. Thus, a defendant can effectively confer subject matter jurisdiction

questions raise different issues, however. Once subject matter jurisdiction objections are surmounted, the parties can generally by agreement allocate sovereign authority to the courts of any state which both parties find congenial. Problems arise only when the parties disagree on the question of which forum is the most desirable. The legal system must provide principles by which such disputes can be resolved.

In general, the answer of the American system on this point is clear: the plaintiff has primary authority to choose the forum. In certain circumstances, however, the system also grants some power to the defendant. Even under these circumstances, typically the defendant does not have power to select a specific forum; he can only veto the plaintiff's choice. The law of personal jurisdiction describes one circumstance in which the defendant may exercise this veto power.[32] Thus, it makes sense to focus on the parties rather than on the state in evaluating personal jurisdiction doctrine.

B. A Laundry List Approach

The most popular approach of those who focus on the parties might be termed the laundry list approach. Commentators who take this approach typically list many factors which should be considered in personal jurisdiction cases and exhort judges to analyze all of those factors in coming to their decisions.[33] This

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on a court simply by failing to object.

This argument suffers from both practical and theoretical flaws. First, courts have held on their own motion that they lack subject matter jurisdiction notwithstanding the failure of the parties to raise the issue. *See* Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). Even more important, where the aggrieved party has made a general appearance in the original action, the reasons for refusing to allow collateral attack on issues of personal jurisdiction are quite different from those which protect judgments on subject matter jurisdiction. In the personal jurisdiction situation, the refusal to allow collateral attack is premised on the proposition that where the defendant has appeared the decision to take jurisdiction is perforce correct; by appearing he has waived any objection. By contrast, the judge may have made a mistake on the issue of subject matter jurisdiction; the system is willing to tolerate such mistakes, however, in order to serve other values such as the desirability of repose. *See Durfee*, 375 U.S. at 111. Thus the two different types of jurisdiction remain analytically quite separable. *Compare* Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 787-92 (1985) (suggesting that differences between subject matter and personal jurisdiction are typically overstated).

32. In addition to personal jurisdiction challenges, defendants may exercise this power through the doctrines of *forum non conveniens* and change of venue.

33. *See, e.g.*, Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 451-55 (1981); Woods, Pennoyer*'s Demise: Per-*

approach has the advantage of tracking closely the language used in the various opinions. Moreover, any given decision can be justified by emphasizing the appropriate factors on the list.

The laundry list approach is inherently limited both as a descriptive and as an analytic tool. For just as one can demonstrate that a decision is consistent with emphasis on a particular list, one can generally argue equally well that the same decision is "wrong" simply by focusing on different factors. Of course, this problem does not prove that the Court in fact adopts some other approach to personal jurisdiction cases; indeed, in many areas of the law the laundry list approach is preeminent.[34] The difficulties with laundry list analysis do suggest, however, that it would be useful if one could locate a more specific theme in the Court's decisions.

Commentators who seek to avoid the laundry list approach often focus on either foreseeability[35] or convenience.[36] Just as with state interest analysis, one could conceivably construct a system of constraints based on either theory. Moreover, both foreseeability and convenience have figured prominently in the rhetoric of judicial opinions.[37] Nonetheless, neither concept has generated a framework which provides a useful tool for understanding the factors that have influenced the Court in personal jurisdiction cases.

C. *Foreseeability*

In considering the role of foreseeability, one must distinguish between two quite different concepts. "Actual" foreseeability focuses on whether a reasonable defendant would believe his actions might generate an action in the relevant forum. "Legal" foreseeability, by contrast, would charge the defendant only with the knowledge that existing legal rules exposed him to a

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sonal Jurisdiction After Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen v. Woodson, 20 ARIZ. L. REV. 861, 890-98 (1978).

34. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (procedural due process); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) (commerce clause).

35. *See* Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 13-15 (1984).

36. *See* Fullerton, *Constitutional Limits on Nationwide Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1, 41-43 (1984); Redish, *supra* note 29, at 1137-39.

37. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (convenience and foreseeability); Keeton v. Hustler Magazine, 465 U.S. 770, 780-81 (1984) (foreseeability); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980) (convenience).

possible lawsuit in the forum. The Court was faced with a choice between these two concepts in *World-Wide Volkswagen.*

In *World-Wide Volkswagen,* the plaintiffs (then New York residents) purchased an automobile from the defendants in Massena, New York. The following year the plaintiffs decided to move to Arizona. En route to their new home, they had an accident in Oklahoma and one of the plaintiffs suffered severe injuries. Plaintiffs brought a products liability suit in federal district court in Oklahoma.

Plaintiffs based their jurisdictional argument on the concept of actual foreseeability. They reasoned that because of the nature of the product, the defendants should have foreseen the possibility that it would be used in another state and cause injury there. Notwithstanding the fact that the relevant defendants had no other contacts with the forum state, plaintiffs contended that the assumption of jurisdiction in *World-Wide Volkswagen* was consistent with constitutional norms.

Speaking for the majority, Justice White disagreed. He conceded that "foreseeability is [not] wholly irrelevant."[38] White, however, was speaking of *legal* rather than actual foreseeability. "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[39] In turn, this type of foreseeability was to be determined by reference to the judicial interpretations of the *International Shoe* standards.

By adopting this approach, *World-Wide Volkswagen* destroyed the independent analytic significance of foreseeability. The concept remains formally significant, but the reasoning process by which it is applied is circular. An assumption of personal jurisdiction is not inconsistent with "traditional notions of fair play and substantial justice" if foreseeable to the defendant. Conversely, the exercise of such jurisdiction is foreseeable if and only if it is not inconsistent with traditional notions of fair play and substantial justice. This analysis is hardly an adequate explanation for the Court's pattern of decisions.

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38. 444 U.S. at 297.
39. *Id.*

D. Convenience

Convenience-based theories fare no better as descriptive devices. Such theories are inconsistent with two related concepts which have been central to the structure of the Court's analysis. The first is the difference between the constraints placed on the respective reaches of state and federal jurisdiction. Under current case law, it appears that Congress may, if it chooses, establish nationwide personal jurisdiction for the federal courts.[40] If this is true, then in a diversity case a state court may be constitutionally prohibited from forcing a defendant to appear and defend the merits while the federal court across the street would be under no such restriction. This is inconsistent with a system of jurisdictional analysis based on convenience.[41]

Moreover, even if convenience theorists were able to ignore the apparent dissonance between the respective jurisdictional reaches of state and federal courts, they would still be faced with the fact that the distance which a defendant must travel seems not to have been relevant to any of the Court's personal jurisdiction decisions dealing with *state* courts. Instead, the key issue

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40. *See* Mississippi Publishing v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925). Some commentators have challenged the proposition that there are no constitutional limitations on the ability of the federal courts to assert nationwide personal jurisdiction. *See, e.g.*, Clermont, *supra* note 33, at 435-37; Fullerton, *supra* note 33, note 36. While lower court opinions occasionally support this skepticism, *see* Clermont, *supra* note 33 at 435 n.116, the Supreme Court seems to entertain no such doubts. Not only was *Murphee* decided contemporaneously with *International Shoe*, but the doctrine reaffirmed in that case has been explicitly approved by four of the Justices who participated in *Shaffer*. *See* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., joined by Brennan, J., dissenting) ("The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists."); Leroy v. Great W. United Corp., 443 U.S. 173, 191-92 (1979) (White, J., joined by Brennan and Marshall, JJ., dissenting) ("[N]o restrictions [are] imposed by the Constitution on the exercise of jurisdiction by the United States over its citizens."). By contrast, only one sitting Justice has even implicitly cast doubt on its continued validity. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 714-16 (1982) (Powell, J., concurring in the judgment). Thus in the absence of some clear signal to the contrary from the Court, one is entitled to assume that the due process clause of the fifth amendment would not prevent Congress from establishing nationwide federal jurisdiction in all cases cognizable under article III.

41. It should be noted, however, that every circuit has held that under the current *Federal Rules of Civil Procedure* the personal jurisdiction of a federal district court in typical diversity cases reaches no further than that of the courts of the state in which it sits. *See, e.g.*, Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 710-11 (4th Cir. 1966); Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1962); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 116 n.15 (2d ed. 1980). Thus, the minimum contacts test continues to have a strong impact on litigation in the federal courts.

has been whether the defendant was forced to cross a state line to defend.[42] The same contacts which subject a New Jersey defendant to the jurisdiction of a Pennsylvania court will also justify a California court in asserting jurisdiction over the same defendant. Analogously, the fourteenth amendment would be irrelevant to an Alaska court's decision to force a resident of Juneau to defend a lawsuit in Nome in the dead of winter. This pattern is totally inconsistent with a convenience-based theory of constraints on personal jurisdiction.

E. Purposeful Availment

At this stage one might well conclude that the Court's decisions are simply a product of the laundry list approach or do not reflect *any* coherent, understandable pattern. Indeed, on a multimember Court it is probably unrealistic to expect that an entire series of cases can be perfectly explained by one simple principle. Justice Powell, for example, continues to cling to the notion that federalism is an important component of the due process calculus,[43] while Justice Brennan seems to pursue a line of analysis substantially different from that of any of his colleagues.[44] Given the vagaries of the shifting coalitions which generate majorities in personal jurisdiction cases, such differences will necessarily generate some divergence in both the result and rhetoric of majority opinions. Despite these factors, one clear theme from *Shaffer* seems to run through virtually all of the later cases—a theme which is often either ignored or denigrated

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42. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting) ("[I]t would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom." (footnote omitted)). *But cf.* Kulko v. Superior Court, 436 U.S. 84, 97 (1978) (noting that actions of defendant were not such that "a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away").

43. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709-16 (1982) (Powell, J., concurring in the judgment).

44. In five of the ten personal jurisdiction cases decided by the Burger Court, Brennan has filed separate opinions which were not joined by any other justice. Brennan's perspective is that a defendant who enters the "stream of commerce" should be subject to the jurisdiction of any state which his goods or services might affect. This would greatly expand the scope of personal jurisdiction. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 419 (1984) (Brennan, J., dissenting); Keeton v. Hustler Magazine, 465 U.S. 770, 782 (1984) (Brennan, J., concurring); Rush v. Savchuk, 444 U.S. 320, 333 (1980) (Brennan, J., dissenting); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting); Shaffer v. Heitner, 433 U.S. 186, 219 (1977) (Brennan, J., concurring in part and dissenting in part).

by the commentators: whether the defendant purposefully availed himself of the privilege of conducting activities within the forum, thus invoking the benefits and protections of its laws.[45]

Of course, the concept of purposeful availment did not originate in *Shaffer*; the majority opinion in *Hanson v. Denckla*[46] applied the same analysis and found its antecedents in *International Shoe* itself. *Hanson v. Denckla* was a complex dispute over the right to certain assets of a decedent who had established a trust during her lifetime. The trust had been established while she was a domiciliary of Pennsylvania; the trustee was a Delaware trust company. Prior to her death, the decedent moved to Florida and, exercising a power reserved in the original trust agreement, "appointed" trust assets to be administered by a third party. The substantive question in the case was whether the appointment was valid; the jurisdictional question was whether the Delaware trustee could constitutionally be required to appear in a Florida action which sought to adjudicate the rights to the assets in question.

The Court held the trust company was constitutionally entitled to refuse to appear in the Florida proceeding. Relying heavily on the fact that "[t]he cause of action . . . is not one that arises out of an act done or transaction consummated in the forum State," the majority asserted that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State," and that "it is essential in each case 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."[47]

Obviously, purposeful availment reflects values which are also incorporated in the social contract theory which permeates Anglo-American jurisprudential and political theory. However, neither the Warren nor the Burger Court has made a serious ef-

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45. *E.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-76 (1985). For examples of the generally unfavorable commentary on purposeful availment analysis, see Clermont, *supra* note 33, at 419-21; Woods, *supra* note 33, at 885-87. The concept is treated with more respect in Hazard, *Revisiting the Second* RESTATEMENT OF JUDGMENTS: *Issue Preclusion and Related Problems,* 66 CORNELL L. REV. 564 (1981), and Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds its Reach: A Comment on* World-Wide Volkswagen v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407 (1980).

46. 357 U.S. 235, 253 (1958).

47. *Id.* (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

fort to characterize jurisdictional theory as a simple reflection of a broader coherent philosophical theory. Instead, the purposeful availment concept has been viewed as an independent premise of fairness, resting on the observation that the assertion of jurisdiction over a person's affairs subjects that person to the sovereign authority of the state of which the court is a representative. In essence, the focus on purposeful availment reflects a belief that it is fundamentally unfair to force a person to submit to the authority of a sovereign with which that person has no voluntary association.[48] By contrast, where a person deliberately affiliates with a particular state it seems only fair for courts of that state to adjudicate his disputes—at least with respect to those matters related to the affiliation.

The centrality of this concept of fairness to the Court's approach appears clearly when one compares the results in *Burger King* and *Keeton* with that in *World-Wide Volkswagen*. In *Burger King*, the defendant had never been physically present in Florida; he had, however, entered into a franchise agreement with a Florida corporation which contemplated a continuing relationship with the defendant and required payments to be made to Miami, Florida. Under these circumstances the Court held that in a lawsuit over the alleged breach of the franchise agreement, the Florida courts could constitutionally exercise personal jurisdiction over the defendant. The majority opinion asserted:

> [W]here the contacts [with the forum] proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State . . . [h]e manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.[49]

In some respects *Keeton* was even more dramatic. *Keeton* was a libel action in the federal district court for New Hampshire. Defendant was an Ohio corporation whose principal place of business was in California; its only connection with New Hampshire

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48. *See* Redish, *supra* note 29, at 1125. *Cf.* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring) ("The requirement of [the due process clause] includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign.").

49. 471 U.S. at 475-76 (emphasis in original) (citations omitted).

was that a small proportion of the total number of magazines which it produced (some of which contained the allegedly libelous statements) were sold in that state. Plaintiff was a New York resident; her only connection with the forum was that her name appeared on the masthead of several magazines which were distributed in New Hampshire. Only a small portion of the damages which the plaintiff claimed were allegedly suffered in the forum state. Nonetheless the Court unanimously held that the fourteenth amendment did not prevent the New Hampshire courts from asserting jurisdiction over the defendant, arguing that "[w]here, as in this case, [the defendant] has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."[50]

Conversely, *World-Wide Volkswagen* demonstrates the significance of lack of purposeful availment. While the automobile dealer must have known that its product would be used throughout the nation, the dealer initiated contact with only the New York area. The choice to drive the car to Oklahoma was entirely the plaintiff's. Such "unilateral action" did not forge the type of connection between the defendant and the forum which would force the defendant to accept the Oklahoma court's authority to govern the defendant's affairs.

The focus on the defendant's voluntary association with the forum also fits comfortably with the sharp dichotomy which the Court has drawn between specific and general jurisdiction.[51] Certainly one would not wish to argue that it is fair to force a defendant to submit himself generally to the sovereign authority of a particular state simply because he has knowingly entered into a single transaction which affected that state. At the same time, however, it seems eminently reasonable to require the defendant to answer to the representatives of the state for the results of that specific action. In such a situation, the state courts can be said to have specific but not general jurisdiction over the defendant.

At some point, however, the defendant's activities will become so intertwined with a particular sovereign that it should be viewed as generally subject to the authority of that sovereign.

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50. 465 U.S. 770, 781 (1984) (citation omitted).

51. This terminology was first employed in Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136, 1144 (1966).

The most obvious case is where the defendant has voluntarily become a permanent resident of the relevant state. But even short of that situation, a person might have associated himself with the state in a fashion sufficiently "continuous and systematic" that he can be seen as willingly submitting his affairs generally to the authority of that state. In such a case the state courts could fairly assert jurisdiction over all of his affairs.[52] In other words, he would be subject to the "general jurisdiction" of those courts.

Helicopteros Nacionales de Colombia v. Hall[53] illustrates the operation of the distinction between general and specific jurisdiction. *Helicopteros* was a Texas action arising from a Peruvian helicopter accident. The defendant was a Colombian corporation which had contracted to provide helicopter transportation for a Peruvian consortium, which in turn was the alter ego of a joint venture headquartered in Houston. The defendant sent its chief executive officer to Houston to negotiate the transportation contract; accepted checks drawn on a Texas bank; purchased helicopters, equipment and training sessions from a Texas manufacturer; and sent personnel to that manufacturer's facilities for training. The defendant had no other contact with the forum state.

The plaintiffs' strongest claim would have been based on specific jurisdiction. The majority opinion argued, however, that plaintiffs had conceded that defendant's contacts with Texas were unrelated to the cause of action and thus a specific jurisdiction theory was not viable.[54] The opinion then concluded that under the rubric of general jurisdiction, Texas lacked constitutional authority to subject the defendants to the authority of its courts.[55]

The academic response to *Helicopteros* has been quite negative.[56] Indeed, the Court's decision to ignore specific jurisdiction is somewhat questionable.[57] Nonetheless, within the limited

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52. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

53. 466 U.S. 408 (1984).

54. *Id.* at 415 n.10.

55. *Id.* at 416.

56. *See* Knudsen, Keeton & Calder, Helicopteros *and* Burger King—International Shoe*'s Most Recent Progeny*, 39 U. MIAMI L. REV. 809, 824-35 (1985); Weinberg, *supra* note 21; Weintraub, *supra* note 20, at 527-32.

57. The brief for the plaintiffs on this point was somewhat cryptic, not making a clear distinction between the two jurisdictional theories. But in any event the issue in *Helicopteros* was not whether Texas had "general jurisdiction" or "specific jurisdiction"

framework of general jurisdiction analysis *Helicopteros* makes eminent sense. The theory of such jurisdiction is that the defendant is a kind of quasi-citizen, subject to the judicial authority of the sovereign for all purposes. Thus, if the Texas courts could assert jurisdiction in *Helicopteros*, the defendant could have been forced into Texas to litigate (for example) a totally unrelated Chilean automobile accident with a Texas resident. Surely the contacts initiated by the defendant in Texas were insufficient to support such a result.

In short, the bulk of the Court's post-*Shaffer* jurisprudence has been dominated by the concept of fairness embodied in the purposeful availment formulation. Two cases, however, might appear inconsistent with this approach—*Phillips Petroleum Co. v. Shutts*[58] and *Kulko v. Superior Court*.[59] *Phillips* involved the application of a Kansas class action statute to out-of-state members of a plaintiff class. Under the statute, once a class of plaintiffs had been certified, all members of that class were sent notice of the pendency of the action. Unless a class member affirmatively "opted out" of the lawsuit, his rights would be adjudicated. This provision was challenged as violating the due process rights of members of the plaintiff class who were otherwise unconnected with the state.

The Court found that the Kansas statute did not violate the due process clause. Clearly, this decision cannot be squared with the principle that a person should not be subjected to the sovereign authority of a state without first voluntarily associating with that state. As the *Phillips* Court conceded, a chose in action is a species of property right.[60] The disposition of the class action may permanently deprive class members of that right. Thus the adjudication of the class claims is an exercise of sovereign authority over those members. Yet under the Kansas system, that authority could be exercised over a person who had never affirmatively established any connection with the state.

Despite its apparent inconsistency with prior case law, *Phillips* does not presage a generalized retreat from purposeful

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over the defendants, but rather whether on the facts of the case the assumption of jurisdiction would violate the due process clause of the fourteenth amendment. The Court arguably should have addressed this point directly, notwithstanding the fact that counsel for the plaintiffs failed to conceptualize the issue in the manner most favorable to his client.

58. 472 U.S. 797 (1985).

59. 436 U.S. 84 (1978).

60. 472 U.S. at ___.

availment analysis. As the Court recognized, the case was unique because the rights of plaintiffs rather than defendants were under consideration. Although the respective choses in action of the absent plaintiffs constituted property interests which would be jeopardized by the class action, the plaintiffs themselves were nonetheless in a position quite different from absent defendants; while the latter seek to avoid a judicially-imposed *detriment*, the only interest of the plaintiffs was ensuring that the *benefit* granted them would be sufficiently large. This fact is significant because of a generally unarticulated premise which underlies much judicial doctrine: in the absence of some specific showing to the contrary, the expectation of the parties should be that the courts will leave the status quo intact.[61] While somewhat difficult to justify in purely analytic terms, this premise not only reflects deeply-held societal values, but also was clearly the ground on which the *Phillips* Court rested its judgment.[62]

Kulko presents a somewhat different problem for purposeful availment analysis. A New York couple with two children separated, with the father remaining in New York and the mother moving to California and obtaining a Haitian divorce. Under the initial separation agreement, the children were to live with the father during the school year and the mother during vacations. The agreement also provided that the father would pay the mother $3,000 per year as support for the children during the periods they were with their mother. One year later, when leaving for Christmas vacation, one of the children told the father she wished to live permanently with her mother. The father then bought the child a one-way ticket to California and sent her and her belongings to that state. Two years later the other child, without the knowledge of the father, obtained an airplane ticket and moved permanently to California to be with his mother.

The mother then brought an action in California state court to have the child support payments increased. The state courts rejected the father's contention that the California courts lacked jurisdiction to enter such a judgment against him.[63] The Su-

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61. The clearest example of the operation of this principle is in the requirement that the plaintiff bear the burden of proof in contract and tort actions.

62. *See* 472 U.S. at ___.

63. Kulko v. Superior Court, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 436 U.S. 84 (1978).

preme Court reversed, holding the exercise of jurisdiction inconsistent with the due process clause.

From the standpoint of purposeful availment theory, the *Kulko* decision is somewhat problematic. Certainly one could say that at least the father had voluntarily associated himself with the state of California by agreeing to send his children to that state—in one case, with knowledge that the child would take up permanent residence there. Further, he had taken these actions with full knowledge that California would become responsible for the protection of the children when they arrived. Viewed from this perspective, *Kulko* seems to reject the basic values underlying purposeful availment analysis.

The difficulty in *Kulko* derives from the unusual nature of the relationship between parent and child. The situation might be viewed as one in which the father chose to send the children to California; this position, taken by the state courts,[64] leads to the conclusion that *Kulko* is inconsistent with purposeful availment analysis. But one might also see the situation as one in which the relevant choices were made by the mother and children. In that case the position of the father appears quite different. Rather than being viewed as having voluntarily associated himself with the forum, he would be seen as simply financing the choice of others to make such an association.

Rather plainly, the latter view dominated the thinking of the majority in *Kulko*.[65] Of course, one might well conclude that this viewpoint is unrealistic. But the key point is that given the framework in which the majority was operating, the *Kulko* decision was entirely consistent with the basic principles underlying purposeful availment analysis.

In short, unlike *Shaffer* itself, the Supreme Court's analysis of post-*Shaffer* jurisdiction problems consistently reflects an overriding concern with the question of whether the defendant has voluntarily associated himself with the forum state. Of course, one cannot say with complete assurance that this will continue in the future; indeed, both *Keeton* and *Burger King* explicitly acknowledge the possibility that purposeful availment alone might be insufficient to support the assertion of jurisdiction in some circumstances.[66] Both cases, however, note that

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64. *See id.* at 524, 564 P.2d at 358, 138 Cal. Rptr. at 591.

65. *See* 436 U.S. at 92-98.

66. *See* Keeton v. Hustler Magazine, 465 U.S. 770, 774-75 (1985); Burger King v. Rudzewicz, 471 U.S. 462, 476-78 (1985).

such cases would be exceptions to the general rule. Thus it seems fair to state that purposeful availment analysis—not *Shaffer*-style interest analysis—is the dominant force in contemporary personal jurisdiction jurisprudence.

This analysis calls into question one of the conclusions commonly drawn from *Shaffer*—the theory that the case threatens "transient" jurisdiction.[67] Those who advocate this theory focus on the *Shaffer* Court's conclusion that all assertions of personal jurisdiction are to be analyzed using the minimum contacts test. They note that in some circumstances state courts have relied on a defendant's temporary physical presence to assert jurisdiction over a cause of action unrelated to the reason for that presence. This practice, they conclude, is fundamentally unfair and thus barred by the *Shaffer* gloss on *International Shoe*.

If the defendant's voluntary association with a state is in fact the touchstone for minimum contacts analysis, however, the problem of transient jurisdiction takes on a quite different aspect. For by physically coming into a state, a person deliberately places herself under the general control of that state's government. During her tenure there, the transient is not only subject to all of the state's laws, but also to the physical control of the coercive branches of the government. Indeed, with the exception of the federal government, no other sovereign may directly control her actions while she is in the state. Further, the transient is entitled to the protection of the state government for all purposes. Yet if the theory of transient jurisdiction is rejected, the courts—the agency charged with defining the scope of the responsibilities of other governmental actors in specific cases—would be unable to perform that obligation with respect to the transient. Creation of such an anomaly surely requires more justification than a simple assertion that transient jurisdiction is "fundamentally unfair."[68]

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67. *See, e.g.*, Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031, 1035 (1978); Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273, 303. *Cf.* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82.

68. For a contrary view, see Redish, *supra* note 29, at 1125. Some might argue that courts should be treated differently for due process purposes because, unlike the pronouncements of other branches of state governments, judicial decisions have a direct, extraterritorial effect, binding the courts of other states as well. This argument, however, would confuse the impact of the due process clause with that of the full faith and credit clause. The due process clause simply defines the conditions which must be satisfied

IV. CONCLUSION—*Shaffer* REVISITED

In light of recent developments, it seems fair to say that many scholars overestimated both the soundness of the reasoning in *Shaffer* and its importance in reshaping the law of personal jurisdiction. Admittedly, the most important portion of the holding—that which subjects all property-related issues of personal jurisdiction to the minimum contacts standard—has not been overruled or even questioned. Yet a reevaluation of that conclusion reveals that many of the premises underlying Marshall's analysis of this point are flawed. These flaws may well lead the Court to approve jurisdiction based on tangible property in most cases.

With respect to *in personam* cases generally, it is fair to say that the impact of *Shaffer* has been quite limited. The purposeful availment analysis used in the *Shaffer* opinion has indeed become the dominant theme of the Court's jurisprudence in this area. But to credit Marshall with an innovation in this respect would be wrong; the basic concept had emerged in *Hanson v. Denckla* almost twenty years earlier. By contrast, the focus on asserted state interest, while truly innovative, has had little impact on the subsequent development of the law; while often mentioned, the concept seems to have little or no impact on the disposition of cases. At best, one can expect asserted state interest analysis to have a subsidiary impact, coming into play only after it has been found that the defendant has satisfied the requirements of purposeful availment.

Of course, none of the foregoing should be taken to suggest that *Shaffer* is not a significant case. But to hale the decision as the critical step in rationalizing the law of personal jurisdiction is to overstate both its soundness and importance.

ADDENDUM

As this article went to press, the Supreme Court handed down its decision in *Asahi Metal Industry Co. v. Superior*

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before a state court can render a judgment which will be effective *within that state*. It is only the full faith and credit clause which requires other states to give effect to that judgment. While some scholars have suggested that all *in personam* judgments which satisfy the requirements of due process should be entitled to full faith and credit, *see, e.g.*, R. LEFLAR, AMERICAN CONFLICTS LAW 459 (3d ed. 1978), there seems to be no logical reason why the two clauses should be viewed as congruent. *See generally* Redish, *supra* note 29, at 1123-24.

Court.[69] *Asahi Metal Industry* began as a products liability action arising from a motorcycle accident which occurred in California. The cause of the accident was a rear tire blowout. The rider of the motorcycle sued, among others, Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese manufacturer which had produced the tube within the tire. As Cheng Shin made twenty percent of its total United States sales in California, this lawsuit in isolation presented no substantial jurisdictional problems.

Cheng Shin in turn filed a cross-complaint seeking indemnity from Asahi Metal Industry Co., the manufacturer of the tube's valve assembly. Asahi, a Japanese corporation, sold 1,350,000 valve assemblies to Cheng Shin in the period from 1978 to 1982; in addition, Asahi valve assemblies were incorporated into the tubes of numerous other manufacturers selling their product in California.[70] Asahi itself, however, had no offices, property or agents in California and neither solicited business nor made any direct sales in that state.

Reversing the California Supreme Court, the United States Supreme Court held unanimously that the due process clause prevented California from asserting jurisdiction over Asahi. The Court was deeply divided on the question of whether the Japanese manufacturer could be said to have purposely availed itself of the privilege of doing business in California. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia (the O'Connor group) argued that the position of Asahi was analogous to that of the defendant in *World-Wide Volkswagen.*[71] The O'Connor group contended that since Asahi itself had not made the choice to send its products to California, the assertion of jurisdiction was unconstitutional. By contrast, Justice Brennan, joined by Justices White, Marshall and Blackmun (the Brennan group) argued that once a manufacturer inserts its product into the stream of commerce with the knowledge that the product will eventually be used in the forum state, the requirement of purposeful availment is satisfied.[72] While Justice Stevens would have declined to reach the issue, he indicated that he would have adopted an intermediate approach, basing the constitutional analysis on the "volume, value and the hazardous nature of the components" at issue. Stevens suggested

69. 107 S. Ct. 1026 (1987).
70. *Id.* at 1030.
71. *Id.* at 1032-33 (opinion of O'Connor, J.).
72. *Id.* at 1035-36 (Brennan, J., concurring in the judgment).

"in most circumstances" he would have found jurisdiction over a manufacturer such as Asahi constitutionally permissible.[73] Thus five members of the Court appeared to believe that Asahi's activities constituted purposeful availment; the result turned on other factors.

These factors were articulated in a portion of Justice O'Connor's opinion which commanded support from all of the Justices.[74] In this portion of the opinion, O'Connor concluded that even assuming that the facts demonstrated that Asahi had purposefully availed itself of the privilege of doing business in California, the assertion of jurisdiction would offend traditional notions of fair play and substantial justice. The opinion recited the familiar litany of factors to be considered in personal jurisdiction analysis: "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 policies."[75] In finding the assertion of jurisdiction improper, Justice O'Connor relied heavily on two factors which derived from the international scope of the jurisdictional problem: "the unique burdens placed upon one who must defend oneself in a foreign legal system" and the potential implications for federal foreign policy.[76] The unanimous opinion also focused on the distance which the defendant would be forced to travel to defend himself and the fact that the rider's claim against Cheng Shin had been settled, leaving only the indemnity issue to be adjudicated. O'Connor argued that since no California resident was a party to the cross-claim and the contract provided only that the valve assemblies be shipped from Japan to Taiwan, the interest of the state in the resolution of the claim was "slight," and thus insufficient to justify the imposition of the "serious burdens" on Asahi.[77]

The failure of the majority opinion to address the purposeful availment issue is unprecedented in Burger Court due process jurisprudence. *Asahi,* however, does not seem to presage a general diminution of the importance of that concept to the

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73. *Id.* at 1038 (Stevens, J., concurring in the judgment).
74. *Id.* at 1033-35.
75. *Id.* at 1034.
76. *Id.*
77. *Id.* at 1035.

Court's jurisdictional analysis. For the O'Connor group, the lack of purposeful availment led to the same conclusion even if assertion of jurisdiction had been fair in all other respects; moreover, the Brennan group saw the case as a "rare" example of a case in which purposeful availment was insufficient to confer jurisdiction.[78] Thus for at least eight of the Justices on the Court, purposeful availment remains the most important in almost all jurisdiction cases; the key question dividing them is what constitutes purposeful availment.

78. *Id.* (opinion of Brennan, J.).