

REVISITING THE SUPREME COURT'S  
PERSONAL JURISDICTION CASES: 1977 - 1990

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**Introduction**

The standard account of the Supreme Court's history of constitutional adjudication in personal jurisdiction cases takes as its starting point Justice Field's opinion in *Pennoyer v. Neff*.<sup>1</sup> Writing for the Court, Field embraced a strict territorial power theory as the basis on which a state court could hale a defendant before it, the theory being justified on the ground that a state's power over its territory necessarily included the power of its courts to issue binding judgments against persons or property present in the territory. The territorial principle granted maximum power to a state seeking to adjudicate a dispute involving a defendant served with process within the state's boundaries but no power in disputes involving defendants served while out of state.<sup>2</sup>

In dicta, Field's *Pennoyer* opinion also constitutionalized the law of personal jurisdiction by tying it to the Due Process Clause of the Fourteenth Amendment. Thus, as the Court's approach to due process analysis changed, *Pennoyer*'s rigid territorial power rule began to collapse. The exceptions to the limitations on state power to adjudicate — presence and consent — became increasingly fictionalized. By the early

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<sup>1</sup> 95 U.S. (5 Otto) 714 (1877).

<sup>2</sup> [exceptions for in rem cases, civil status, etc.]

part of the twentieth century, the Court, under the pressure of changing transportation and economic realities, had rejected challenges to state statutes permitting service of process on out-of-state drivers “deemed” to have consented to service of process to establish personal jurisdiction in automobile accident suits.<sup>3</sup> In cases involving foreign corporations, courts similarly resorted to highly fictionalized accounts of the corporation’s presence in the state or consent to service of process to permit the exercise of personal jurisdiction.<sup>4</sup>

Finally, the standard account goes, the Court abandoned the fiction-filled regime of *Pennoyer* in *International Shoe Corp. v. Washington*.<sup>5</sup> In its place, the Court adopted a flexible standard permitting jurisdiction so long as the defendant had “minimum contacts” with the forum state such that the exercise of jurisdiction did not offend traditional notions of fair play and substantial justice. The rule-of-reason style minimum contacts test thereby replaced an incoherent and pro-defendant regime with a more rational and balanced acceptance of the exercise of state power.

That explanation of the change from *Pennoyer* to *International Shoe* — the Court’s response to changing social and economic forces and greater solicitude for state regulation of out-of-state businesses — provides a satisfactory account of the doctrinal development up through the middle part of the twentieth century. But the century saw a second great wave of personal jurisdiction cases from 1977 to 1990. Those cases are

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<sup>3</sup> *Hess v. Pawloski*, 274 U.S. 352 (1927); *Kane v. New Jersey*, 242 U.S. 160 (1916).

<sup>4</sup> *E.g.*, *Bank of America v. Whitney Central Nat’l Bank*, 261 U.S. 171, 173 (1923).

<sup>5</sup> 326 U.S. 310 (1945).

widely taught — and criticized for their incompleteness — in first-year civil procedure classes. But the standard account does not seemingly explain *why* the Court embarked on its later exploration of the due process limits of state court jurisdiction. Were there changes in economic or social conditions that sparked the Court's interest? If so, why did the Court abruptly lose interest in further doctrinal development in the area — a change in mood that makes little sense in light of the speed of technological change after 1990? While civil proceduralists and the courts debate the proper application of personal jurisdiction doctrine in the age of the Internet, the Supreme Court has remained silent on the topic. If social and economic change has driven the Court's personal jurisdiction cases, why would such changes not have landed the doctrine back on the Court's docket in recent years?

This paper seeks to gain insights on those questions by viewing the second wave of personal jurisdiction cases from inside the Court. The papers of Justices Blackmun and Marshall give a fairly detailed account of the Court's decision to hear the series of personal jurisdiction cases in the 1970s and 1980s and the Court's deliberations on how to resolve those cases. They reveal a Court less concerned with grand theories of state power or with careful tailoring a flexible doctrine to changes in economic and social conditions. Instead, a confluence of factors appears to have gotten the Court into and then out of the business of personal jurisdiction during that period.

First, the personal jurisdiction cases were marginal cases that appeared on the Court's radar more by happenstance than design. They were weighted heavily towards the Court's appellate jurisdiction docket rather than its certiorari docket, and the Court

accordingly gave the cases greater attention than it might otherwise have done. In other words, the cases were not particularly compelling on their own merit, but they tended to come to the Court through a route favorable to less compelling cases.

Second, there was no stable coalition among the justices for a single view as to whether and how to decide personal jurisdiction issues. Different justices cared about different aspects of the cases in deciding to hear them, with Justice White caring principally about the Court's role in clearing up confusion in the lower courts and Justice Powell expressing the most interest in reining in out-of-control litigation in the lower courts. Both justices routinely rescued personal jurisdiction cases from oblivion by lobbying their colleagues to grant plenary review.

Third, personal jurisdiction issues fell off the Court's radar largely through the abolition of most of the Court's mandatory jurisdiction docket in the mid-1980s and changes of personnel at the Court. When Congress gave the Court greater discretionary over its docket, it stopped hearing marginal cases, which included personal jurisdiction cases. Similarly, when Justice Powell retired, the pace of the Court's attention to personal jurisdiction slowed, and it completely ended once Justice White left the Court.

This paper proceeds roughly chronologically. It begins with an extended review of *Shaffer v. Heitner*, the case that sparked the second wave of personal jurisdiction doctrinal development at the Court. It then turns to the Court's decision in *Kulko v. Superior Court*, which tested the application of personal jurisdiction doctrine in the domestic relations context. The paper next views the Court's deliberations in pro-defendant decisions in *Rush v. Savchuk* and *World-Wide Volkswagen v. Woodson*, two

personal injury cases, and the Court's brief interlude of pro-plaintiff decisions in *Calder v. Jones* and *Keeton v. Hustler*, two defamation cases. A discussion of the application of personal jurisdiction doctrine to contractual disputes in *Burger King v. Rudzewicz*, followed by the collapse of any majority for a coherent theory of due process analysis in personal jurisdiction cases in *Asahi Metal Industry Co. v. Superior Court* and *Burnham v. Superior Court* concludes the paper.

### ***Shaffer v. Heitner*: A Case of the Accidental Adjudication**

*Shaffer v. Heitner* presented the first opportunity for the Court to make a serious change in the law of personal jurisdiction. *Shaffer*, now familiar to a generation of civil procedure students, was perhaps an odd case to inaugurate a decade of sustained attention by the Court to the development of personal jurisdiction doctrine. The case did not involve some new-fangled statutory innovation testing the outer limits of the reach of a state court's jurisdiction. Rather, the case involved a fairly straightforward application of the power theory of jurisdiction laid down in *Pennoyer v. Neff* and nowhere questioned — at least, not explicitly — in *International Shoe v. Washington*.

*Shaffer* presented a constitutional challenge to Delaware's method of asserting jurisdiction over defendants who could not be served with process within the state. Under Delaware's sequestration statute,<sup>6</sup> a plaintiff could seek an order of attachment from the Court of Chancery against a non-resident defendant's shares in a Delaware

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<sup>6</sup> 10 Del. C. § 366.

corporation in order to establish quasi-in-rem jurisdiction over that defendant. Because the owner of such shares had property located within Delaware, an order of attachment would authorize a Delaware court to proceed to judgment, at least to the extent of the value of the property attached. Instead of testing the boundaries of procedural innovation, the underlying law in *Shaffer* relied on a manner of asserting personal jurisdiction over a defendant that appeared to rest safely on “*traditional* notions of fair play and substantial justice.”<sup>7</sup> Indeed, the Delaware sequestration law or a predecessor had been on the Delaware statute books since at least 1852.<sup>8</sup>

At the same time, the case bore hallmarks of more adventurous reaches of litigation. The case was a shareholder derivative suit in which Heitner, the shareholder, owned a single share of stock in the corporation. Heitner alleged that the defendants — twenty-eight then- and former directors of the Greyhound corporation — had breached their fiduciary duties by allowing the corporation to engage in a course of conduct leading to a finding that the corporation had violated the antitrust laws.<sup>9</sup> As a result of that conduct, federal courts in separate actions had imposed a large criminal contempt fine and awarded substantial damages in a private antitrust suit.<sup>10</sup> Heitner sought to recover from the defendants the company’s damages from the antitrust case, together

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<sup>7</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, [pin] (1945) (emphasis added).

<sup>8</sup> Rev. Code Del. 1852, § 1938. The Court had rejected a constitutional challenge to the statute in 1921 in a case in which future Chief Justice Harlan Stone represented the winning party. *Ownby v. Morgan*, 256 U.S. 94 (1921).

<sup>9</sup> 433 U.S. 186, at 189-90.

<sup>10</sup> Brief of Appellee, *Shaffer*, at 11.

with benefits and deferred compensation paid to the defendants over the years.<sup>11</sup> Despite his small stake in the corporation, he (or, at least, his lawyer) stood to recover a substantial amount in attorney's fees for his efforts.

In addition to the plaintiff-lawyer nature of the case, the suit fit the basic fact-pattern giving rise to due process scrutiny. None of the defendants was a resident of Delaware. The underlying conduct giving rise to the antitrust violations had not occurred in Delaware. Indeed, the attachment statute satisfied the requirements for due process under *Pennoyer's* territorial power theory solely because of a legal fiction: Delaware, alone among the states, deemed the situs of a share of stock in a Delaware corporation to be in Delaware and not the place where the physical share certificate was kept.<sup>12</sup> The situs statute meant, in other words, that that the owners of shares in most Fortune 500 companies could be haled into Delaware court on quasi-in-rem grounds, regardless of the lack of connection between Delaware, the defendant, and the underlying litigation.

The case arrived from the Delaware courts in the summer of 1976 when the defendants invoked the Supreme Court's mandatory appellate jurisdiction.<sup>13</sup> The defendants' jurisdictional statement principally attacked the Delaware sequestration statute not on jurisdictional grounds but on the ground that it deprived them of property

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<sup>11</sup> *Greyhound Corp. v. Heitner*, 361 A.2d 225, at 228-29 (Del. 1977).

<sup>12</sup> [cite]

<sup>13</sup> [cites]

without prior notice and a sufficient opportunity to be heard.<sup>14</sup> The defendants also attacked the state's power to deem the situs of shares in a Delaware corporation to be Delaware.<sup>15</sup>

The clerk<sup>16</sup> responsible for writing the memorandum on the case for the cert pool, however, devoted attention to a third argument presented in the jurisdictional statement. The defendants had also attacked the constitutionality of the use of sequestration to acquire personal jurisdiction over them. That attack was really a hybrid challenge to distinct aspects of the Delaware sequestration statute.

The first troubling aspect of Delaware's procedure was its coercive nature. Delaware permitted a defendant to enter an appearance to challenge the sequestration without thereby conceding the court's jurisdiction, but that appearance was not a limited one. In other words, a defendant who made an appearance in an unsuccessful attempt to overturn the sequestration of her shares would be liable for the *full* amount of the underlying claim if she lost the case on the merits. The pool memo writer described this aspect of the case as the one that appeared to "pose a substantial constitutional question, on which I am unable to find any clearly dispositive decisions of this Court."<sup>17</sup> The pool

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<sup>14</sup> The appellants relied on the line of cases beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), in which the Court had invalidated pre-judgment attachment of property without notice and a hearing.

<sup>15</sup> Jurisdictional Statement, *Shaffer v. Heitner*, at [pin].

<sup>16</sup> Donald B. Ayer, law clerk to Justice Rehnquist.

<sup>17</sup> Preliminary Memo, *Shaffer v. Heitner*, No. 75-1812, at 6 (July 22, 1976).

memo also noted a clear division among the lower courts on the propriety of denying a limited appearance to defend in a quasi-in-rem action.

The pool clerk pointed to the second aspect of the defendant's attack on the statute — and the one that eventually formed the basis of the Court's decision in *Shaffer*. "I am unclear what to make of the fact that Delaware could have gotten personal jurisdiction over these derivative suit defendants through their association with a Delaware corporation, but sought to do so by the coercive method of a property sequestration statute which, in many contexts, might be used to compel a general appearance by defendants with insufficient minimum contacts constitutional to support direct personal jurisdiction."<sup>18</sup>

Although the plaintiff had moved to summarily affirm or dismiss the appeal, the law clerk<sup>19</sup> in Justice Blackmun's chambers recommended plenary review. The Blackmun clerk annotated the pool memo, "I strongly suspect that the Court will affirm, but I am inclined to think there is enough here for plenary review."<sup>20</sup>

Blackmun evidently saw the case as one warranting further review, but he was not inclined to believe his law clerk's prediction about the eventual outcome in the case. He scribbled a question mark (his usual shorthand for puzzlement or outright disagreement) next to the clerk's suggestion that the Court would eventually affirm the judgment of the

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<sup>18</sup> *Id.* at 7.

<sup>19</sup> Diane Wood (?) [initialed "DP"].

<sup>20</sup> Preliminary Memo, *Shaffer v. Heitner*, No. 75-1812, at 8 (notation dated July 26, 1976).

Delaware Supreme Court. He also added his thoughts on the appeal to the first page of the pool memo. “C[hec]k *limited* grant possibility. Hard t[o] say no S[ubstantial] F[ederal] Q[uestion]. The prin[ciple] needs t[o] b[e] est[ablish]ed but t[he] case is n[ot] t[he] best.” He also scribbled, “J[oin] 3 on pers[onal] J[uris]D[iction] p[oin]t.”<sup>21</sup>

Bolstering the argument for further review, a clear and direct split of authority had developed while the appeal was pending at the Supreme Court. The Third Circuit, in an opinion by Judge Aldisert, had held the Delaware sequestration statute unconstitutional on the ground that it compelled defendants to submit to personal jurisdiction before the state’s courts without the requisite contacts.<sup>22</sup> In light of that development, another Blackmun clerk<sup>23</sup> added a comment that probable jurisdiction should be noted. The Court considered the case at the end-of-summer “long conference” on October 1 and noted probable jurisdiction on October 4, 1976.

At the merits stage, the parties boiled the case down to two issues. The appellants evidently placed far more hope in the success of the first issue — the question whether the Delaware sequestration procedures provided sufficient notice and opportunity for a hearing before a deprivation of property. The second issue — whether Delaware had the

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<sup>21</sup> A justice’s vote to “join three” indicates a willingness to grant further review if three other justices wish to hear a case. The maneuver effectively lowers the barrier to further review imposed by the “Rule of Four”—that is, the requirement of four votes to grant certiorari or note probable jurisdiction, as the case may be. See David M. O’Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 16 J.L. & Pol. 779 (1997).

<sup>22</sup> *U.S. Industries, Inc. v. Gregg*, 540 F.2d 142 (1976).

<sup>23</sup> Richard K. Willard.

power to hale the defendants into its courts when the defendants did not have contacts with the state that would satisfy *International Shoe* — took a backseat in the briefs to the first.<sup>24</sup>

The appellants' choice of emphasis made perfect sense. The Court had not entertained a personal jurisdiction case since the 1950s.<sup>25</sup> It must have appeared to knowledgeable counsel that, although challenges to the assertion of personal jurisdiction were bubbling up through the lower courts, the Court's attention was likely devoted to other aspects of the case. No obvious intervening event indicated that the Court had any interest in revisiting and re-elaborating personal jurisdiction doctrine evidently settled more than twenty years before.

But the other aspect of the case — the challenge to the propriety of the prejudgment seizure procedures — would have appeared more promising as the likely focus of the justices' attention. In the eight years before *Shaffer*, the Court had decided a series of cases, starting at the tail end of the Warren Court era, in which the propriety of prejudgment attachments of property had been contested.<sup>26</sup> Those decisions had not

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<sup>24</sup> The appellants' brief in *Shaffer* devoted the first 13 pages of argument to the first question and only eight pages to the second. The appellants addressed the personal jurisdiction argument to the Court as an alternative ground if the Court found the prejudgment deprivation argument unpersuasive. *Shaffer*, Brief for Appellants, at 20. Appellee devoted five pages of his brief to the personal jurisdiction question. *Shaffer*, Brief for Appellee, at 11-16.

<sup>25</sup> *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).

<sup>26</sup> *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

summed up to an easily applied doctrine. Indeed, the Court had begun to retreat from initially imposing a high barrier to prejudgment seizures<sup>27</sup> before once again abruptly changing course to train renewed skepticism on such procedures.<sup>28</sup>

Commentators had noted the difficulty of making those cases cohere. To be blunt, the prejudgment seizure cases were widely viewed as a mess — “an arch-example of inconsistency, even irrationality, in constitutional doctrine.”<sup>29</sup> Justice Blackmun, dissenting in one of the prejudgment seizure cases, lamented that the Court had become “immersed in confusion, with . . . [the prejudgment seizure cases] decided in a manner that leaves counsel and the commercial communities in other States uncertain as to whether their own established and long-accepted statutes pass constitutional muster with a wavering tribunal off in Washington, D.C.”<sup>30</sup>

More than being incoherent, the prejudgment seizure cases were politically charged. The Court had embarked on the project when a solid cast of liberal justices held sway. Justice Douglas’s opinion for the Court in the initial case, *Sniadach*, openly emphasized the hardship visited upon poor persons whose wages were garnished. That sympathetic ear to the plight of consumer debtors had been turned away as the Court’s membership changed and the more conservative Burger Court took shape. The Court’s

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<sup>27</sup> Compare Mitchell with Fuentes and Sniadach.

<sup>28</sup> North Georgia Finishing.

<sup>29</sup> Richard S. Kay & Harold M. Lubin, Making Sense of the Prejudgment Seizure Cases, 64 Ky. L.J. 705 (1976).

<sup>30</sup> North Georgia Finishing, 419 U.S. at 619 (Blackmun, J., dissenting).

treatment of the cases took heavy criticism from all sides, with some commentators lamenting the Court's decision to question long-established creditors remedies,<sup>31</sup> others deriding the Court for engaging in free-wheeling social policymaking,<sup>32</sup> and others lambasting the retreat from the logic of the early prejudgment seizure cases.<sup>33</sup> Some observers even noted that the apparent change in approach had "partially fulfilled th[e] prophecy" that the addition of more conservative Nixon's appointees to the Court would make short work of the continued development of limitations on prejudgment remedies.<sup>34</sup> Against the backdrop of the doctrinally messy and politically charged question of prejudgment seizure presented by the case, the more placid personal jurisdiction question offered a cleaner path to decision.

When the Court met after oral argument at conference on February 25, 1977, the justices' deliberation focused on the personal jurisdiction question. Only Justice White, who authored two of the key prejudgment seizure cases, expressed interest in the prejudgment seizure question.<sup>35</sup> Six justices voted to reverse the judgment of the

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<sup>31</sup> See Robert Scott, *Constitutional Regulation of Provisional Creditors' Remedies: The Cost of Procedural Due Process*, 61 Va. L. Rev. 807 (1975).

<sup>32</sup> Philips, *Revolution and Counterrevolution: The Supreme Court on Creditors' Remedies*, 3 Fordham Urban L.J. 1 (1974).

<sup>33</sup> [cites]

<sup>34</sup> *The Supreme Court, 1973 Term: Judicially Supervised Prejudgment Sequestration of Debtor's Assets*, 88 Harv. L. Rev. 71, 72 (1974). It is interesting to note that Donald Ayer, the law clerk to Justice William Rehnquist who wrote the pool memo in Shaffer, and Richard Willard, a law clerk to Justice Blackmun, were members of the Harvard Law Review at the time the comment was published.

<sup>35</sup> Blackmun papers, conference notes.

Delaware Supreme Court; only Justice Brennan voted to affirm.<sup>36</sup> Justice Powell invoked Judge Aldisert's opinion finding Delaware's sequestration statute unconstitutional. Justice Stevens's reaction was more visceral. He called Delaware's procedures "outrageous" and "just wrong" — a "hostage stat[ute]" that unfairly coerced the defendants' presence in the forum.<sup>37</sup> Justice Marshall was assigned the opinion.

The first draft of Justice Marshall's opinion circulated on May 16, 1977. The draft opinion made only a passing mention of the prejudgment attachment question and focused exclusively on whether Delaware could exercise personal jurisdiction over the defendants.<sup>38</sup> At almost thirty pages, Marshall's opinion contained a scholarly account of the Court's personal jurisdiction jurisprudence since the late Nineteenth Century.<sup>39</sup> The

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<sup>36</sup> Justice Stewart, who had raised questions about the Court's appellate jurisdiction at oral argument, passed at conference. Justice Rehnquist did not participate, possibly because he had some prior connection to Greyhound, which was headquartered in his home state of Arizona, or to one of the defendants.

<sup>37</sup> Blackmun papers, conference notes. Justice Blackmun's notes of the conference discussion also indicate that Justice Stevens said he had defended in a Delaware action brought under the sequestration statute.

<sup>38</sup> *Shaffer*, 1st draft, at 22 n.34.

<sup>39</sup> Marshall's opinion also contained a footnote addressing the Court's appellate jurisdiction, an issue neither party had addressed. Because the Delaware courts had merely rejected a challenge to the sequestration order before the case had proceeded to adjudication on the merits, the appeal came to the Supreme Court in an interlocutory posture. Relying on the then-recent decision of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, Marshall deemed the decision below a final judgment for purposes of Supreme Court review "consistent with the pragmatic approach that we have followed in the past in determining finality." *Shaffer*, 1st draft at 8 n.12 (quoting *Cox Broadcasting*, 420 U.S. at 485).. At least one commentator has called this aspect of *Shaffer* the "most influential in shaping the future of jurisdiction law" because many of the subsequent personal jurisdiction cases came to the Court in the same posture — from state courts that had upheld personal jurisdiction before a final judgment of the merits of the litigation had been reached. Wendy Collins Perdue, *The Story of Shaffer: Allocating*

opinion traced the origins of quasi-in-rem jurisdiction to Justice Field's opinion in *Pennoyer v. Neff*, acknowledging that the principles established in that opinion became "basic elements of the constitutional doctrine governing state court jurisdiction."<sup>40</sup> Marshall's opinion dissected later quasi-in-rem cases, such as *Harris v. Balk*, and the attachment of intangible property.

Marshall's opinion also contained a straightforward recounting of the conventional explanation for the Court's gradual abandonment of the rigid territorial power theory of *Pennoyer*. The draft touched on the rise of the automobile, the increase in interstate transportation, the general demand for greater regulation of corporate activities, and the effect on those changes on the law of in personam jurisdiction culminating in the Court's opinion in *International Shoe*. Although acknowledging that no similar change in the doctrine governing in rem jurisdiction had occurred, the draft marshaled scholarly and judicial criticisms of the proposition that the minimum contacts test of *International Shoe* need not apply to in rem cases. Weighing those criticisms against history, the draft opinion concluded that the standard set out in *International Shoe* should govern all assertions of personal jurisdiction.

Marshall's first draft concluded by applying the *International Shoe* standard and finding insufficient contacts among the defendants, the forum, and the litigation to sustain Delaware's assertion of jurisdiction. In Part IV of the draft, Marshall assessed various

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*Jurisdictional Authority Among the States*, in *Civil Procedure Stories* 129, 151 (Kevin M. Clermont ed. 2004).

<sup>40</sup> Shaffer, 1st draft, at 11.

arguments in favor of jurisdiction even under *International Shoe*, including the fact that the defendants were directors of a Delaware corporation and Delaware's interest in regulating a corporation that was a creature of state law. None of those factors could save the assertion of jurisdiction, the draft concluded, in large part because Delaware had given no legislative authorization for the assertion of personal jurisdiction over directors and officers of Delaware corporations.

Two days later, Justice Brennan, the only Justice inclined to affirm the Delaware courts at conference, wrote to suggest that he might be able to join Marshall's opinion but for Part IV. Brennan noted that the Delaware courts had not had the opportunity to apply *International Shoe* to determine whether minimum contacts existed. "Thus I think we ought not decide an important constitutional issue like this in a manner that effectively forecloses the assertion of state court jurisdiction in Delaware — or, for that matter, in other states that may expressly seek to make their corporate directors amenable to suit in the local forum."<sup>41</sup> Brennan suggested instead a remand to the state courts with a two pronged directive: first, stating that minimum contacts would be established when a defendant serves as a director or officer in a state chartered corporation, and second, remanding for an interpretation whether Delaware law would authorize jurisdiction on that basis and an application of *International Shoe*.

As Brennan's proposal made the rounds, it garnered a prompt reaction. Marshall, apparently believing that a majority of the Court would not accept Brennan's first option,

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<sup>41</sup> Letter from William J. Brennan to Thurgood Marshall, May 18, 1977, at 1-2.

was nevertheless open to his second option.<sup>42</sup> Justice Stewart chimed in the same day, describing *Shaffer* as “one of the most interesting cases we have had here in a long time.” He commended Marshall for writing “an excellent opinion” that would “surely be immortalized as required reading for every first year law student in the country for years to come.” But Stewart also expressed reservations about Part IV of the opinion, preferring “the second alternative suggested in Bill Brennan’s letter to you of today, *i.e.*, remanding the *International Shoe* issue for decision in the Delaware Supreme Court rather than deciding it here.”<sup>43</sup> Justice White, on the other hand, expressed his preference for simply deciding the question outright rather than remanding to the Delaware courts. But he added that if Marshall were persuaded to remand instead, “I would not dissent.”<sup>44</sup>

Marshall’s second draft, circulated the next day, adopted Brennan’s suggestion of a remand to the Delaware courts. The new draft expressly left open to the Delaware courts consideration of the question whether minimum contacts had been satisfied. It also left open for them re-examination of the procedural due process attack on the prejudgment attachment of property without notice and a hearing. Justice Brennan quickly indicated his agreement with the second draft.<sup>45</sup>

Other members of the Court, however, expressed a strong preference for terminating the litigation rather than remanding. Justice Blackmun was unpersuaded by

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<sup>42</sup> Memo from Richard Meserve to Blackmun, May 18, 1977.

<sup>43</sup> Letter from Potter Stewart to Marshall, May 18, 1977.

<sup>44</sup> Letter from Byron White to Marshall, May 18, 1977.

<sup>45</sup> Letter from Brennan to Marshall, May 23, 1977.

Brennan's suggestion of a remand, apparently understanding that a remand would likely lead to the state courts' asserting jurisdiction over the defendants and continuing to entertain the suit. Blackmun scribbled in the margin of his copy of Brennan's letter proposing a remand, "This is *pure* WJB! Dela. ct. w[oul]d OK." Despite his clerk's suggestion that he approve of Marshall's second draft, Blackmun wrote a terse note to Marshall on May 31, 1977, to indicate a preference for deciding the minimum contacts issue instead of remanding.<sup>46</sup>

That day, Justice Powell circulated a longer letter along similar lines. While expressing admiration for an opinion that "will be a 'must' for the textbooks," Powell made plain his reservations about remanding rather than outright reversing the Delaware courts. "I cannot join Part IV as it is now written. I agree with Byron that the issue of minimum contacts was addressed by the parties and the entire thrust of your opinion — as I read it — supports the view that fairness requires more than the minimal contacts present in this case. In short, I would reverse."<sup>47</sup>

Justice Powell bluntly expanded on his reasons for favoring an outright reversal: the suspect nature of the litigation. He noted that it had "all the earmarks of a lawyer-

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<sup>46</sup> Letter from Blackmun to Marshall, May 31, 1977. Blackmun had other reservations about Marshall's second draft, including its length and, apparently, the possibility that the prejudgment attachment issue might be revisited on remand. Near the end of the draft, where Marshall finally concluded that the standard of *International Shoe* should govern all assertions of personal jurisdiction, Blackmun wryly commented, "24 pp. to this!" He also scribbled in the margin "I wonder" next to Marshall's suggestion that the Delaware courts reexamine the prejudgment attachment procedure question. Blackmun evidently blamed the opinion's length and change in course on Marshall's clerk, noting at the top of the draft, "This is law clerk = professor stuff, *not* TM."

<sup>47</sup> Letter from Lewis Powell to Marshall, May 31, 1977.

made case.” Although Heitner’s single share ownership in Greyhound gave him standing to sue, “there are lawyers who make a plush living using tame clients who acquire one share of stock in numerous corporations for the purpose of setting the stage of ‘strike suits.’” Even if the case were more worthy, Powell reiterated that “fairness to the defendants . . . suggests that we dispose of the case here on the basis of your opinion.”<sup>48</sup> Powell added a pointed postscript by noting that six justices voted to reverse at conference, with only one voting to affirm, so that Marshall’s first draft was in line with that vote. The Chief Justice chimed in to express a preference for outright reversal, and Justice Stewart indicated that he would be content with Marshall’s reversion to his first draft opinion.<sup>49</sup>

Powell’s forthright assessment of the case surely resonated with other members of the Court. Blackmun’s notes of the oral argument are particularly telling. Blackmun, who documented the age and appearance of the advocates appearing before the Court, did not have a favorable impression of either lawyer in the case. He described John R. Reese, a lawyer at the San Francisco corporate law firm McCutchen, Doyle, Brown & Enersen, arguing for the defendants, as “young 37 — *n[ot]* forceful — only fair.” But Michael F. Maschio, a lawyer at the New York firm Cowan, Liebowitz, & Latman, representing the plaintiff, struck Blackmun as a good deal more menacing. He described

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<sup>48</sup> Powell also indicated his view that there may be differences between intangible property and property with a fixed situs within a state and that he contemplated writing briefly on the point.

<sup>49</sup> Letter from the Chief Justice to Marshall, June 1, 1977; letter from Stewart to Marshall, June 2, 1977.

him as “swarthy, oily(?)” an impression that undoubtedly reinforced the worst stereotypes of the plaintiff-side lawyer.

Marshall capitulated shortly after Powell’s letter circulated. He wrote to inform his colleagues that he would revert to the Part IV originally contained in the first draft of the opinion “[i]n view of the strong preference for resolving the minimum contacts question in favor of appellants.”<sup>50</sup> The new draft garnered joins from Justices Blackmun and Chief Justice Burger. Justice Brennan indicated that he would circulate an opinion dissenting in part. Justices Powell, who joined Marshall’s opinion, and Stevens, who did not, circulated separate writings in support of the Court’s judgment.<sup>51</sup>

After the Court handed down *Shaffer*, it had to decide how to dispose of three cases that had been “held” pending the decision in *Shaffer*. Marshall, as the justice writing for the Court, had the responsibility to recommend whether to grant or deny further review in each case, or whether the judgment below should be vacated and remanded for further proceedings in light of *Shaffer*. He urged denial of further review in two of the cases but recommended that the Court vacate and remand the third, *Rush v. Savchuck*.<sup>52</sup> That case would return to the Court two years later.

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<sup>50</sup> Memorandum to the Conference from Marshall, June 2, 1977.

<sup>51</sup> [In Marshall papers, not Blackmun papers]. Stevens originally circulated an opinion concurring in the opinion for the Court. A subsequent draft changed his separate writing to an opinion concurring only in the judgment.

<sup>52</sup> Memorandum to the Conference from Marshall, June 21, 1977.

***Kulko v. Superior Court: The Family in the Court***

The Court's next Term offered another case presenting a challenge to a state court's assertion of personal jurisdiction. *Kulko v. Superior Court* came to the Court from the California Supreme Court, which had upheld the assertion of personal jurisdiction over a New York resident in a suit brought by a California resident. *Kulko* would seem an odd case for sustained litigation on personal jurisdiction questions, because it did not involve, as most of the Court's prior cases had involved, a corporate defendant. The defendant in *Kulko* was the plaintiff's ex-husband, and the case involved a marital dispute about the custody and support of the couple's children. The decision below effectively meant that the father would have to defend in a forum a continent away.

Nevertheless, the facts as described in the pool memo<sup>53</sup> did not arouse much sympathy for the defendant. The couple separated in 1972 after thirteen years of marriage, which had produced two children — Ilsa and Darwin. Shortly after their separation, Mrs. Kulko obtained a Haitian divorce, with the consent of Dr. Kulko. The separation agreement contemplated that the children would remain in New York with their father during the school months but spend summer, Christmas, and Easter with their mother, who had relocated to California. By December 1973, their daughter, then eleven years old, told her father she wanted to live with her mother. He bought Ilsa a one-way ticket to California and inverted the visitation arrangement so that she would live with her mother and he would see Ilsa during the summers and holidays. Three years later, their

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<sup>53</sup> The memo was prepared by Thomas J. Campbell, one of Justice White's law clerks.

son, then fourteen, told his mother that life with his father was “intolerable.” She bought Darwin a one-way ticket to live with her in California. Dr. Kulko sent his ex-wife a note, as the pool memo put it, “saying she could keep Darwin as far as he was concerned, but some new arrangement should be formally agreed to, preferably without the help of lawyers.”<sup>54</sup>

When Mrs. Kulko sued in California state court seeking relief in the form of transforming the Haitian divorce into a California judgment, awarding her custody of the children, and increasing the amount of child support owed by her ex-husband, he challenged the court’s personal jurisdiction over him. The pool clerk showed little sympathy for Dr. Kulko, calling the case one in which there was “a clear awareness” by the defendant of subjecting himself to the jurisdiction of California courts by sending his daughter to live with her mother there, and that it would be “absurd to insist that California acquired personal jurisdiction over husband regarding one child but not regarding the divorce and custody arrangement.” The pool clerk urged dismissal of Dr. Kulko’s appeal for want of a substantial federal question.

In the Blackmun chambers, his law clerk<sup>55</sup> evidently concurred in the pool memo’s unsympathetic treatment of the appeal. The clerk wrote his recommendation, “DWSFQ [dismiss for want of a substantial federal question]” above the following note: “When the father shipped part of his family to California the state justifiably became interested in the custody issue.” Justice Blackmun was not as unsympathetic. He noted

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<sup>54</sup> Pool memo, at 2-3.

<sup>55</sup> Michael S. Sundermeyer.

that there were two dissenters in the California Supreme Court. He also scribbled the comment, “pretty long arm” on the pool memo. The pool clerk’s description of Dr. Kulko’s argument as “absurd” drew an underlining and question mark from Blackmun.

When the Court met in conference on November 4, 1977, there was interest in the case but not enough for plenary review. Three justices — Justices Stewart, White, and Rehnquist — voted to grant further review, with the rest of the Court preferring to dismiss the appeal. The case was relisted for Justice White, who set to work on a dissent from dismissal of the appeal for want of a substantial federal question.

Justice White’s decision to publish a dissenting opinion from the denial of further review in a case was becoming a familiar feature of his tenure on the Court. Almost alone among the justices, White would frequently lobby his colleagues through written dissents from denial of certiorari or dismissal of appeal in cases that he believed warranted the Court’s review. Typically, his dissents pointed to a circuit split, no matter how shallow, or to general confusion among the lower courts on the question presented in the case.<sup>56</sup> Most such dissents never made it to publication because they achieved their purpose — persuading other members of the Court that the case warranted further attention.

Justice White’s draft dissent from dismissal in *Kulko* stressed what he considered the novelty of the case. It was, in his view, a case in which “the facts . . . present a serious question of whether petitioner has conducted any activities within California, let

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<sup>56</sup> Cite O’Brien on White’s dissents from denial.

alone sought the protection of her laws.”<sup>57</sup> White did not believe, however, that the case should be heard as an appeal, because the constitutionality of California’s long-arm statute could not be challenged (the statute allowed the exercise of personal jurisdiction only so far as permitted by the Due Process Clause). He therefore indicated that he would treat the papers as a petition for certiorari and vote to grant certiorari.<sup>58</sup>

White’s draft dissent quickly had the intended effect. Justices Rehnquist and Stewart expressed agreement.<sup>59</sup> More importantly, Justice Lewis Powell, who had voted to dismiss the appeal at conference, agreed to grant plenary review. “Your dissenting opinion has persuaded me,” he wrote.<sup>60</sup> The Court set the case down for oral argument, although the question of appellate jurisdiction was postponed.<sup>61</sup>

At the merits stage, the abstract issue of personal jurisdiction barely concealed a morality play reflecting American society in the 1970s. Interwoven throughout the parties’ arguments were competing characterizations of Dr. Kulko’s behavior. Dr. Kulko’s brief described a conscientious father who had merely acceded to events set in motion by his ex-wife, who had “left the family home and eventually moved to

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<sup>57</sup> Draft dissent from dismissal of appeal, at 2 (Nov. 23, 1977).

<sup>58</sup> This treatment had been given to the appeal in *Hanson v. Denckla*.

<sup>59</sup> Rehnquist indicated that he would join the dissent from dismissal of the appeal but would not join a dissenting opinion that treated the jurisdictional statement as a petition for certiorari.

<sup>60</sup> Letter from Powell to White, November 29, 1977.

<sup>61</sup> 434 U.S. 983 (1977).

California.”<sup>62</sup> On his account, his ex-wife had “induced” the children to return to her in December 1973 over his protests. When their daughter eventually demanded that she return to her mother in California, he initially opposed her leaving, “but believing opposition would be detrimental to the family relationship, he acquiesced and purchased her a one-way airline ticket to California.”<sup>63</sup> The brief highlighted the fact that his ex-wife had surreptitiously sent their son a plane ticket to return to California without Dr. Kulko’s knowledge. (Dr. Kulko asserted that he believed Darwin had gone off to school the day he flew to California using the ticket his mother sent him.) In sum, according to Dr. Kulko, he had vainly attempted to hold together a family being pulled apart by the destructive centrifugal forces attacking American society: woman’s liberation, rebellious youth, and California. He was a bit player in a drama in which he had little control.

His ex-wife described Dr. Kulko’s behavior as far more volitional and unsavory. Her brief was replete with references to her ex-husband’s apparent desire to rid himself of the burden of caring for their children, including the fact that had not contested personal jurisdiction on her custody claim but had contested jurisdiction solely on her child support claim. Her brief also alleged that Dr. Kulko was in arrears on his child support obligations under their separation agreement. It quoted at length cold-blooded statements by Dr. Kulko about the children.<sup>64</sup> On her telling of events, her ex-husband had

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<sup>62</sup> Brief of Appellant, Kulko, at 7.

<sup>63</sup> *Id.* at [pin].

<sup>64</sup> The brief for his ex-wife contained excerpts from a letter in which Dr. Kulko said of their son, “I don’t want a human being around me with this type of behavior pattern. You are welcome to it. I would have hoped that our relationship was going to improve. I feel at this point it is unfeasable [sic].” That letter also suggested that the parties rearrange

heartlessly sent away his children and saddled her with the added expense of raising them. As her brief summarized the case, “If Dr. Kulko prevails, he will have sent his children to California and, by the same move, sidestepped his responsibilities, an unconscionable result.”<sup>65</sup>

The competing narratives had more technical significance, of course. If, as Dr. Kulko contended, he had merely acquiesced in events directed by others, he had not reached out to “purposefully avail” himself of the privilege of conducting activities in California.<sup>66</sup> But if, on the other hand, his ex-wife’s narrative were to be believed, he had exploited California for his own gain and now would be essentially immune from further enforcement of child support obligations if his wife could not sue him in a convenient forum.<sup>67</sup>

The non-business nature of the case evidently made it a difficult one for the Court. In a detailed bench memorandum before argument, Justice Blackmun’s clerk<sup>68</sup> considered the arguments of the parties to be closely balanced. But he recommended affirming the state courts in part because of the “odd (and procedurally cumbersome)” circumstance that the California courts would have jurisdiction to decide the question of

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their agreement regarding custody and child support without resorting to lawyers. “I would like to do it without lawyers as you know how I feel about them.” Brief of Appellee, Kulko, at 18-19.

<sup>65</sup> Brief for Appellee, Kulko, at 39.

<sup>66</sup> *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).

<sup>67</sup> *McGee*.

<sup>68</sup> Keith P. Ellison.

custody (which Dr. Kulko did not contest) but lack jurisdiction to decide the question of child support. Even though litigation in California would impose a burden on Dr. Kulko, there were practical reasons for allowing the California courts to assume jurisdiction, including the fact that three of the four members of his family lived there, the bench memo concluded.

Similar concerns apparently bothered Justice Blackmun. In his notes prepared before oral argument, he wrote, “I am loath to aban[don] tradi[tional] notions o[f] J[uris]D[iction]. But I am bothered by *bifurcation* o[f] custody + child support — d[oe]s he do it by *default* bec[ause] t[he] chil[dren] [a]r[e] in Calif?” Nevertheless, Blackmun indicated that he was inclined to reverse for a number of reasons. Dr. Kulko had not been present in California and had merely permitted his children to choose to live there. In addition, Blackmun took note that long arm statutes were not intended for these situations. He also mused that perhaps a new standard for personal jurisdiction was needed in domestic relations cases.

Justice Blackmun’s notes of oral argument indicate how strongly the domestic relations nature of the case played on the Court’s mind. The lawyer for Dr. Kulko emphasized that he was “a fam[ily] man” and a “fa[ther] who cooperated.” The larger societal backdrop was also apparent in the courtroom, as Blackmun took note that Suzie S. Thorn, arguing the case on behalf of Sharon Kulko Horn, wore “slax” — an apparently disapproving reference to the lawyer’s choice of a pantsuit.

At conference on March 31, 1978, the Court was closely divided. Chief Justice Burger initially voted to affirm, likening what Dr. Kulko had done to entering into a

contract having an impact in California. Justice Brennan also voted to affirm or dismiss the case, with a preference for affirming. Justice Powell voted to affirm, explicitly invoking the domestic relations nature of the case by emphasizing the importance of California's having jurisdiction to determine matters concerning the welfare of the children. Justice Stewart voted to reverse, noting that the California courts had not relied on the contract theory put forward by the Chief Justice. Justice White — who had pressed to hear the case in the first place — indicated that he was having trouble with the case and first voted to pass, then to affirm. Justices Marshall, Rehnquist, and Stevens, on the other hand, voted to reverse, although Justice Marshall's vote was perhaps in question. That would have made five votes to reverse and four to affirm, with Justice Stewart being the senior justice in the majority. But the Chief Justice then apparently changed his vote to favor reversal. Accordingly, Burger assigned the opinion to Justice Marshall, who had authored *Shaffer* the previous Term.

Justice Marshall's draft opinion for the Court largely eschewed any innovation in the law in order to recognize explicitly the domestic relations nature of the case. The draft recited the basic teaching of the foundational personal jurisdiction cases from *International Shoe* onward: first, that a state lacked personal jurisdiction over a defendant who did not establish a connection with the forum through some affiliating circumstances; and second, that the unilateral activity of a third party that might tie the defendant to the forum did not satisfy that requirement of contact with the forum. The opinion treated the case as one in which the flexible, if occasionally opaque, *International Shoe* standard had been impermissibly stretched too far by the California courts. The domestic relations nature of the case barely surfaced. One exception was a

footnote that left open the question whether different considerations might affect a case in which a state had an explicit jurisdictional statute for domestic relations cases.<sup>69</sup> A second was a sentence suggesting that making the case turn on whether Dr. Kulko had sought to prevent his daughter's departure to California would "impose an unreasonable burden on family relations." The opinion also took the view that causing an "effect" in another state could only subject a defendant to jurisdiction there if his action was wrongful and not the result of ordinary family decisionmaking. Otherwise, the opinion largely viewed the circumstances as directly analogous to any other personal jurisdiction dispute.

In doing so, Marshall's opinion plainly embraced the version of the parties' interactions proffered by Dr. Kulko. Throughout the opinion, the ex-wife was portrayed as the one who had abandoned the family home and whose initiatives drove events, with Dr. Kulko merely acquiescing. The opinion discounted Dr. Kulko's buying his daughter a ticket to return to California, viewing it as a single event that he had not initiated and one from which he could not reasonably have anticipated being haled before a California court. Moreover, the parties' separation agreement had made no mention of the children's residence in California, although in a footnote the opinion suggested a different case might be presented if the separation agreement had contemplated a custody arrangement with the children there.<sup>70</sup> The alignment of circumstances had come about because of the ex-wife's designs. "It is appellant who has remained in the State of the

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<sup>69</sup> 1st Draft at 13, n.13. At Justice Stevens's request, Marshall omitted this footnote in subsequent drafts.

<sup>70</sup> 1st Draft at 8 n.6. Justice Blackmun asked Marshall to omit a portion of the footnote.

marital domicile, whereas it is appellee who has moved across the continent.”<sup>71</sup> In any event, any inconvenience visited on the ex-wife could be limited by her seeking to modify the support arrangements in other ways.

Marshall’s opinion quickly garnered approval from Blackmun, Stewart, Rehnquist, and the Chief Justice, who all joined before a dissenting opinion was circulated. Justice Stevens later joined, conditioned on removing language from the opinion that suggested the case might have been decided differently if California had enacted a special jurisdictional statute in domestic relations cases. Perhaps given the close balance of factors (and competing narratives) in the case, two justices — Powell and White — awaited further writing. Powell wrote Marshall to say that he found his “excellent opinion quite persuasive” but would await a dissent to be authored by either Justice Brennan or Justice White. Brennan’s dissent circulated the next day, and White and Powell joined it in short order.

***Rush v. Savchuk and World-Wide Volkswagen v. Woodson:*  
Personal Jurisdiction and the Peripatetic Tort**

The Court’s next Term brought two more personal jurisdiction cases, each landing on the Court’s docket at the same time, each involving automobiles, and each presenting questions touched on in passing in *Shaffer* and *Kulko*. *Rush v. Savchuk*, an appeal from the Minnesota courts, involved an attempt to assert quasi-in-rem jurisdiction over an automobile insurance policy after a car accident in Indiana. *World-Wide Volkswagen v.*

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<sup>71</sup> Id. at 12.

*Woodson*, a cert petition out of the Oklahoma state courts, was a products liability suit arising out of a car accident that injured several members of a family. Both tort suits raised questions about the expanding reach of modern tort law and the mobility of people and products in a national market.

*Rush* appeared to be the more straightforward case. Like *Shaffer*, it called into question an attachment procedure permitted by only a small minority of states. The plaintiff, a Minnesota resident, brought a negligence action against the defendant, an Indiana resident, in Minnesota state court. Savchuk, the plaintiff, sought \$125,000 in damages. At the outset of the suit, the plaintiff attached the defendant's auto insurance policy with State Farm. Although the policy was written in Indiana, State Farm did business in Minnesota. Accordingly, Savchuk took advantage of a Minnesota law, patterned on a practice approved by the New York courts, that permitted a plaintiff to attach a defendant's liability policy and thereby establish quasi-in-rem jurisdiction to pursue litigation in the forum. The Court had previously vacated and remanded *Rush* for further proceedings in light of the decision in *Shaffer*. But the Minnesota Supreme Court, with three dissenting votes on a seven member court, reaffirmed its original disposition by distinguishing *Shaffer*. In the Minnesota court's view, unlike the corporate shares in *Shaffer*, the res attached in *Rush* — the defendant's auto insurance policy — had no significance apart from the litigation. Moreover, the Minnesota court took comfort in the fact that the Court's opinion in *Shaffer* had left open the possibility that a quasi-in-rem proceeding might be permissible to establish personal jurisdiction when the plaintiff

could bring suit no other forum.<sup>72</sup> That was the case in *Rush*, because the Indiana courts would have barred recovery on the plaintiff's claim.<sup>73</sup> Of course, allowing suit in one forum when it would be barred in another invited forum shopping by plaintiffs.

The New York Court of Appeals decision that gave birth to this attachment procedure, *Seider v. Roth*, had been in Justice Powell's cross-hairs. Earlier in the Term, he authored a lengthy dissent from denial of certiorari in a case challenging the *Seider* doctrine. In that case, *Lee-Hy Paving Corp. v. O'Connor*, the Second Circuit had declined to invalidate a *Seider* attachment of a New York-based insurance carrier's liability policy in a tort action brought in New York, even though the insured defendant and the accident had no ties to New York. The Second Circuit's decision relied on an earlier opinion by Judge Friendly that approved the *Seider* doctrine on the theory that the attachment procedure was conceptually indistinguishable from a so-called "direct action" by a plaintiff against a liability policy, with the defendant in the tort suit being a nominal party.<sup>74</sup> Because the "real" defendant in the litigation was the insurance company, which concededly was subject to personal jurisdiction in New York, no due process concerns were presented by the *Seider* attachment procedure, Friendly had reasoned.

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<sup>72</sup> Shaffer, 433 U.S. 186, 211 n.37 (1977)

<sup>73</sup> Because Savchuk was a passenger in a car driven by Rush at the time of the accident, Indiana's automobile guest statute would have prohibited the suit. And, although the suit was timely when filed in Minnesota, the Indiana statute of limitations had already run in any event.

<sup>74</sup> *Minichiello v. Rosenberg*, 410 F.2d 106 (1968). The Court had rejected a due process challenge to a Louisiana direct action insurance law in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

Powell's dissent from denial in *Lee-Hy Paving* attacked that reasoning as insufficiently attuned to the new realities of litigation and at odds with *Shaffer*. Tort suits were now serious business, with damages that could be ruinously higher than an insured's policy limits. The attachment of the policy therefore put defendant's interests at stake. He explained:

. . . . The opinion of the Court of Appeals seems to assume, by its reference to petitioners as nominal defendants, that the only real parties in interest are the insurance companies. To be sure, a judgment against the petitioners in the New York courts cannot exceed the amount of indemnification provided under the insurance policies. *But judgments for civil damages, especially in recent years, often have exceeded insured limits.* In this case, for example, if respondent wins a judgment that exhausts the obligation of the insurers, the respondent will be free to sue petitioners in Virginia where they would be forced to go through a second trial . . . . To say that the legal rights of insured defendants are not being adjudicated, despite their substantial role in the defense of the suit and despite the potential loss of their right to the insurance company's legal representation, begs the question: To what extent must an individual be involved in the litigation before the fundamental-fairness requirements of *International Shoe Co. v. Washington* . . . are applicable?<sup>75</sup>

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<sup>75</sup> *Lee-Hy Paving Corp. v. O'Connor*, 439 U.S. 1034, 1038 (1978) (Powell, J., dissenting from denial of certiorari) (emphasis added).

Powell also criticized the *Seider* doctrine on the ground that it would make the defense of the case much harder by moving the litigation to New York and far away from the forum where the accident occurred and witnesses could be found.

The law clerk<sup>76</sup> responsible for the pool memo in *Rush* took note of Powell's dissent from denial of certiorari in *Lee-Hy Paving*. After reciting the parties' contentions, the clerk concluded that the defendant below had properly invoked the Court's mandatory appellate jurisdiction. The clerk then added, "I think the arguments advanced by Mr. Justice Powell militate against a dismissal herein." Justice Blackmun, who had joined Powell's dissent from denial of cert in *Lee-Hy Paving*, agreed. He wrote in the margin of the pool memo, "*Seider* is most ?able," and he underlined "mandatory jurisdiction" in the pool memo's discussion of appellate jurisdiction. He marked the front of the memo to show his inclination to note probable jurisdiction.

*World-Wide Volkswagen*, on the other hand, presented a fact pattern that was not obviously in tension with the Court's prior decisions. But, like *Rush*, it did raise the specter of high-ticket tort litigation and forum shopping. The case involved a horrific car accident in which the vehicle's occupants (a family moving cross country from New York) were seriously injured when a fire caused by a ruptured gas tank broke out after the car crashed. Members of the family brought a products liability suit in Oklahoma state court, alleging manufacturing and design defects and naming their car's manufacturer, importer, regional distributor, and dealer as defendants. Only the distributor and dealer, the petitioners before the Court, contested personal jurisdiction. They pressed for

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<sup>76</sup> Gary Sasso, law clerk to Justice White.

certiorari on the ground that the decision below was in conflict with other state court decisions on the question of personal jurisdiction in products liability cases.

The law clerk<sup>77</sup> preparing the pool memorandum suggested granting certiorari. “I tend to agree with petrs that the issue is an important one, given the extent of interstate automobile travel, the frequency of accidents, and the significance of products liability suits.” He confirmed that the petition implicated a square split of authority. He also indicated that the case for granting certiorari was also bolstered by the Court’s consideration of the appeal in *Rush v. Savchuk* at the same conference. *Rush*, the pool memo noted, presented “the minimum contacts problem in a somewhat different aspect.” Justice Blackmun’s clerk<sup>78</sup> also endorsed granting certiorari. “There is a conflict, and the issue is interesting. . . . I think it important, given the role of the auto today. I’m not convinced the court below was correct — so I recommend a grant.” The Court considered and granted further review in both *Rush* and *World-Wide* at the February 16, 1979, conference. The Court set down both cases for argument the following Term.

At the merits stage, *Rush* appeared to be the more straightforward case. The parties grasped that the principal question would be whether the Minnesota court’s decision — and the *Seider* procedure generally — survived *Shaffer*. They devoted much of their briefs to that question. In order to tie himself as close to *Shaffer* as possible, the appellant devoted much of his brief to demonstrating that *Seider* attachments were incompatible with *Shaffer*. The appellee devoted much of his brief to distinguishing

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<sup>77</sup> Eric G. Andersen, law clerk to Justice Powell.

<sup>78</sup> William A. McDaniel.

*Shaffer*, relying on Minnesota's interest in providing a forum for its injured resident and the state's contacts with the insurer whose policy had been attached.

Although *Seider* attachments were permitted in a small minority of jurisdictions, the appellant suggested that the effects of the doctrine could be pernicious. In New York, *Seider* attachments had been effected in negligence suits, malpractice cases, and products liability actions. The brief took pains to emphasize that more than money was at stake in these cases by stressing the reputations interests of defendants. "In professional malpractice and products liability cases, for example, the integrity of the insured person or product is deeply involved. The insured has a substantial personal interest in seeing that he or his product is vindicated. The defendant is much more than a mere witness . . . ."<sup>79</sup> The broad range of matters potentially affected by a *Seider* attachment was linked with the openness of the state courts to forum shopping. The appellants criticized the Minnesota Supreme Court for its emphasis on the importance of providing a forum for a resident, "however transitory or temporary that resident may be"<sup>80</sup> The appellant's attack on the forum was also an attack on Minnesota's choice of law, because the state courts had decided to apply Minnesota's substantive law in a case that clearly would have been barred if it had been brought in the state where the accident occurred and the defendant resided.

The concerns raised by the appellant found a receptive audience at the Court. Before argument, Justice Blackmun noted to himself that "*Seider* is incompatible wi[th]

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<sup>79</sup> Brief for Appellant, *Rush v. Savchuk*, at 15-16.

<sup>80</sup> *Id.* at 12.

*Shaffer v. Heitner.*” He also listed as a reason for reversing the Minnesota courts, “Too much forum shopping.” The concern about forum shopping was highlighted by an aspect of the case not mentioned in the briefs but disclosed by Blackmun’s clerk in a pre-argument bench memorandum — the appellee was no longer a Minnesota resident. “This change in facts . . . exacerbates [*sic*] concerns about forum shopping, for if a person can move into Minnesota, sue, and then move out without giving up his lawsuit, there is little to prevent him from merely exploiting the Minnesota courts for personal gain.”<sup>81</sup> At conference after oral argument, the Chief Justice, Justice Stewart, Justice Marshall, Justice Powell, and Justice Rehnquist voted to reverse. Stewart, Powell, and Rehnquist made clear their view that *Seider* had been overruled by *Shaffer*. But Justice Powell went further, raising concerns about forum shopping. As Blackmun’s notes of the conference indicate, Powell took the view that Minnesota was simply being used as a favorable forum because of its lengthier statute of limitations, its negligence regime, and the absence of a guest statute. Justice Brennan voted to affirm — an expected outcome in light of his dissent in *Shaffer*. But Justices White and Stevens also indicated their preference for affirming the Minnesota decision. For Justice White, the case was “harder,” but he was persuaded by the analogy to direct action lawsuits, which the Court had blessed two decades before. Similarly, Stevens focused on whether the insurance company was the real party in interest, and concluded that the insurer, and not the individual defendant, was truly the party before the court.

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<sup>81</sup> Memorandum from Dan T. Coenen to Blackmun, September 1979 [unsigned but so labeled in Blackmun’s handwriting], at 18.

That alignment shifted significantly in *World-Wide Volkswagen*, perhaps because the case did not involve a direct collision with *Shaffer* and no forum shopping was evident on the facts. *World-Wide Volkswagen* proved to be a more vexing case. The petitioners — the defendants below — pointed to the same line of cases the Court had found persuasive in *Kulko*. Despite the gray areas of personal jurisdiction doctrine, it had been settled under those cases that the unilateral activity of a third party could not serve as an affiliating circumstance subjecting a defendant to personal jurisdiction in a forum. That, the petitioners argued, is exactly what had occurred in the case. The plaintiffs' choice had brought the car to Oklahoma, and it was only "the fortuitous transient presence in that state of the retailer's New York customer and the product he purchased in New York" that led to the defendants' contact with Oklahoma. The respondents emphasized the state's interest in adjudicating a suit arising out of an accident on its roadways. That argument had an odd resonance with the indicia of forum legitimacy suggested by Justice Powell when dissenting from denial of certiorari in *Lee-Hy Paving*. He had expressed concern that the *Seider* doctrine pulled litigation away from the place of injury in the tort suit. The plaintiffs invoked an older personal jurisdiction case, *McGee v. International Life Ins. Co.*, which had stressed the state's regulatory interest in providing a convenient forum for suit. Otherwise, the *McGee* Court had reasoned, defendants located in far off places would be rendered judgment proof when they caused harm in the forum. But the plaintiffs also marshaled more recent innovations in the law in support of affirming the decision below. They noted that the American Law Institute's then-recent second Restatement of Conflicts of Laws had taken the position that a person

who caused effects within a state could be subject to personal jurisdiction there.<sup>82</sup> They also cited lower court opinions and scholarly commentary criticizing the apparent restrictiveness of the “purposeful availment” test of *Hanson v. Denckla* in product liability cases. Products entered states by a variety of channels, some fortuitous, and the automobile, by its nature, would tend to enter fortuitously. The nature of the product, therefore, was sufficient to put a seller of an automobile on notice that the product might cause harm in a far off place.

The Court’s discussion of the case at conference was closely divided.<sup>83</sup> Chief Justice Burger noted that Oklahoma seemed to be the most convenient forum for the litigation, but passed on voting one way or the other. Justice Brennan and Justice Marshall voted to affirm, with Brennan stressing the state’s interest in light of the situs of the accident (Marshall indicated that he thought the result was “silly” but comported with the law). Brennan also added that a seller must be aware of the possibility of possible use of the car in Oklahoma. Justice Stewart disagreed with Brennan, noting the complete lack of any other contacts between the petitioners and Oklahoma and pointing out that the situs of the accident was not integral to the theory of the plaintiff’s suit — negligent design — which had nothing to do with Oklahoma. Justice White agreed with Stewart,

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<sup>82</sup> Brief for Respondents, *World-Wide Volkswagen*, at 5-6 (citing Restatement (Second) of Conflicts of Laws § 37). The Restatement provided:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to causes of action arising from these effects unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable.

<sup>83</sup> Blackmun’s notes indicate that oral argument had not been a particularly fruitful exercise. His notes say little about the defendants’ lawyer, Herbert Rubin, beyond noting “soft words.” Blackmun’s impression of Rubin’s adversary, Jefferson G. Greer, was a good deal worse: “This guy is pretty obtuse.”

making the case that prior cases had looked to the degree of fairness to the defendant and not the plaintiff with respect to personal jurisdiction. He even suggested, given the nature of the suit, that jurisdiction should not be available anywhere in the United States (presumably because the car was designed and manufactured overseas).

Justice Blackmun, who had voted to find no jurisdiction in *Shaffer*, *Kulko*, and *Rush*, voted to affirm. He invoked the expected mobility of the automobile and suggested that auto dealers must anticipate such movement. The fact that suit was being brought in the place of the accident also bore on his thinking.

Justice Powell voted to reverse, but he, alone among the Justices, raised the nature of the litigation itself as a reason to terminate the suit. He asserted that the “lawyers [a]r[e] at it” and that plaintiffs’ arguments in support of the court below had no logical stopping point. The end result, he asserted, would be nationwide jurisdiction. To reach that result, the Court would necessarily have to cast aside cases from *International Shoe* to *Shaffer*. Powell also seemed suspicious of the reasoning of the Oklahoma court. He accused the court of finding facts that were not in the record (presumably a reference to certain advertising allegedly attributable to the defendants, which the Oklahoma Supreme Court had invoked to bolster the case for personal jurisdiction). The Chief Justice then voted to reverse, suggesting that to do otherwise would mean leaving behind the standard of contacts and moving to a more far-reaching “foreseeability test.” Justices Rehnquist and Stevens chimed in to reverse.

The draft opinions that circulated in *Rush* and *World-Wide Volkswagen* further diverged. Justice Marshall’s opinion for the Court in *Rush* treated the case as squarely

decided by *Shaffer*. After acknowledging that the *Seider* doctrine embraced by the Minnesota courts was “an ingenious jurisdictional theory,” Marshall quickly dispatched it in light of *Shaffer*. The teaching of *Shaffer* was that the mere presence of property within the forum could not support jurisdiction absent sufficient contacts among the defendant, the forum, and the litigation. And the lack of contacts between this defendant and the forum were fatal to personal jurisdiction over him in Minnesota. Marshall also disposed of the argument adopted by the Second Circuit to the effect that the defendant was a nominal defendant, with the insurance company being the real part in interest, such that a *Seider* action was really a direct action against an insurer. Marshall’s opinion reasoned that the chain of operations mattered: unlike a direct action, a *Seider* attachment required pursuing the insured in order to get to the insurer. Thus, the question of jurisdiction over the insured could not be circumvented. The tendency of the *Seider* doctrine was impermissibly to make the plaintiff’s contacts with the forum decisive in determining whether the defendant’s due process rights had been violated.

Marshall’s opinion, which circulated on October 28, 1979, quickly drew joins from Justices Stewart, Rehnquist, Blackmun, and Powell (who indicated that he might also write a short concurring opinion along the lines of his dissent from denial of certiorari in *Lee-Hy Paving*),<sup>84</sup> and the Chief Justice. Although he had voted tentatively

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<sup>84</sup> Justice Blackmun, who had joined Powell’s *Lee-Hy Paving* dissent, urged him to write a short concurring opinion along the lines of *Lee-Hy Paving* with an “emphasis on the practicalities” involved in squelching *Seider* attachments. Letter from Blackmun to Powell, October 31, 1979. Later in the year, however, Powell wrote to Marshall to indicate that he would not write a concurring opinion. Letter from Powell to Marshall, December 20, 1979. On that letter, which was copied to all other justices, Powell added a note, solely for Justice Blackmun, explaining his decision not to write separately.

to affirm at conference, Justice White was persuaded by Marshall's opinion and joined it two weeks later. White explained his shift by indicating that he did not think the Court's "judgment puts direct action statutes in jeopardy."<sup>85</sup> Justices Brennan and Stevens adhered to their dissenting votes, but they wrote separately in light of their very different concerns. Stevens's dissent maintained that the *Seider* procedure was conceptually the same as direct action insurance statutes previously approved by the Court. Brennan, on the other hand, wrote a single dissent in *Rush* and *World-Wide Volkswagen*.

Justice White's opinion in *World-Wide Volkswagen* attempted to shoehorn the case into the framework of prior personal jurisdiction cases. White's opinion contained a recitation of the minimum contacts standard of *International Shoe* and injected a strong federalism rationale for the contacts requirement. The opinion also marshaled the prior cases to show the additional factors in the calculus of the reasonableness of the assertion of jurisdiction. These included an assessment of the forum state's interest in adjudicating the dispute, the plaintiff's interest in a convenient forum, and the interest of the interstate judicial system and the states in efficient resolution of controversies so as to further substantive social policies.

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Harry: I have been a little hesitant to 'bootstrap' on the basis of my own dissent in *Lee-Hy Paving*. In addition to the practical considerations that I mentioned there, I also was concerned about the possibilities of a second suit and other factors. If I undertook a concurrence, I would have to get into these, which seems unnecessary.

Blackmun marked (and underlined) a large question mark next to Powell's note.

<sup>85</sup> Letter from White to Marshall, November 16, 1979.

The applicability to the instant case of the framework described was not explained, however. The draft shifted to describe the case as one in which there was a “total absence of affiliating circumstances” between the defendants and the forum. Notably, the defendants had not solicited business or advertised there. The opinion rejected mere foreseeability as a sufficient predicate for jurisdiction. Although the dealer and distributor could have foreseen that the vehicle might one day have been driven by its owner into Oklahoma, that alone “has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” White asserted that it was foreseeable in *Kulko* that “a divorced wife would move to California from New York . . . and that a minor daughter would live with the mother,” but that did not authorize California to exercise personal jurisdiction in that case. The consequences of a foreseeability test would be the horrible that Justice Powell had suggested at conference: nationwide jurisdiction. “Every seller of chattels would in effect appoint the chattel his agent for service of process.” That eventuality would have revived the treatment of transitory intangible property that the Court had ended with *Shaffer*. Curiously, however, although White’s opinion did not totally discard foreseeability as part of the personal jurisdiction calculus, the focus had to be on whether the defendant’s conduct and connections with the forum were such that “he should reasonably anticipate being haled into court there.” At the same time, White cited with approval *Gray v. American Radiator & Standard Sanitary Corp.*, a case in which the Illinois Supreme Court had permitted personal jurisdiction over the nonresident manufacturer of an allegedly defective intermediate part incorporated into an end product that eventually made its way to Illinois. White’s

opinion was quickly joined by Justices Powell, Stewart, and Rehnquist, with the Chief Justice and Justice Stevens joining after Brennan circulated his dissent.

White's attempt to draw a dividing line between mere foreseeability and "reasonable anticipation" of litigation was unsatisfying. Justice Blackmun's clerk<sup>86</sup> wrote a long memorandum to the Justice encouraging him to adhere to his dissenting vote. The law clerk noted the apparent inconsistency between White's reasonable anticipation test and the outcome in *Gray*. The clerk also feared White's test would "have untoward consequences in cases similar" to *World-Wide Volkswagen*. He posed the following hypothetical, variants of which are now a staple of law school civil procedure courses:

Assume, for example, that a giant California company manufactures commercial airplanes. It sells these planes only to 6 airlines headquartered in California, who do not resell them but locate them in other states and fly them around the country. The company advertises only in California. It executes all sales contracts there. It makes all deliveries there. If a sold plane carrying passengers from all over the country crashes in South Carolina, must all the passengers come to California to sue? Must the small South Carolina farmer whose farm is wiped out in the crash?"<sup>87</sup>

Brennan's dissent echoed these concerns. Rather than suggesting that the case required a loosening of personal jurisdiction analysis in order to affirm the Oklahoma

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<sup>86</sup> Dan Coenen.

<sup>87</sup> Memo from Coenen to Blackmun, Nov. 15, 1979, at 3.

courts, he invoked *Ohio v. Wyandotte Chemicals Corp.*, in which the state of Ohio sued, in its own courts, a nonresident polluter that had no contacts with Ohio other than the fact that chemicals the defendant had dumped into streams reached Lake Erie and eventually affected Ohio. Although the question in that case was whether the Court's original jurisdiction had been properly invoked by the defendant, Brennan understandably drew support from the Court's treatment of the matter. "The stream of commerce is just as natural as a stream of water, and it was equally predictable that the cars petitioners' released would reach distant States." What Brennan's dissent did not say, of course, was that there was no specter of plaintiffs lawyers and forum shopping in the *Wyandotte Chemicals* case. A state acting in *parens patriae* stoked few of the fears that the tort litigation in *Rush* and *World-Wide Volkswagen* seemed to set ablaze.

Justice Blackmun and Justice Marshall dissented separately, because Brennan had authored a single dissent in *Rush*, in which Blackmun and Marshall were in the majority. But both Blackmun and Marshall echoed the same themes in opinions that focused on the peripatetic nature of the automobile. Each recounted that the very value of an automobile derived from its ability to move about on the roads, encouraged by a nationwide service network from which the defendants benefited, even though their businesses were localized. Blackmun did express puzzlement, however, about why the parties contested personal jurisdiction over the dealer and distributor when the "deep pocket" entities —

Volkswagen and its American importer — were present in the case.<sup>88</sup> Blackmun joined Marshall's dissent.

**Keeton v. Hustler Magazine and Calder v. Jones:  
Sympathy for the Defamation Plaintiff**

Three Terms later, the Court confronted another pair of cases that seemed to upend the pro-defendant slant of the cases since *Shaffer*. *Keeton v. Hustler Magazine* and *Calder v. Jones* presented similar fact patterns. The plaintiff in each case alleged that she had been defamed by a publication and brought suit in a favorable forum distant from the defendant's home forum. In *Calder*, the plaintiff, a California resident, brought suit in her home jurisdiction. In *Keeton*, the plaintiff, a New York resident, brought suit in New Hampshire federal court after admittedly shopping for a forum in which her claim was not time barred. In both cases, the courts below had given weight to the plaintiff's

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<sup>88</sup> Shortly after the Court handed down the decision in *World-Wide Volkswagen*, Blackmun received a letter from a law student at the University of Missouri-Kansas City that enclosed correspondence from Jefferson G. Greer, the lawyer for the plaintiffs. The law student, Sean D. O'Brien, had been similarly puzzled, and asked Greer if the disputed attempt to maintain personal jurisdiction over the two smaller defendants was really an attempt to destroy diversity jurisdiction and keep the case in the state courts (the plaintiffs were citizens of New York, as were the auto dealer and distributor). The correspondence confirmed that suspicion. Greer explained that he had brought suit in Creek County, Oklahoma, "one of the best jurisdictions in the United States for plaintiffs in personal injury lawsuits. On the otherhand [sic], Tulsa County [the location of the federal district court] is heavily Republican and very conservative and the lawsuit here would not be worth near the money that it would be in the adjoining Creek County. Since the injuries in this case are so horrendous, we felt that the effort was justified." Greer maintained that he had pursued the personal jurisdiction issue because he "felt that our position was correct and that that should be the law all over the United States." He also added, "Unfortunately, in making the law, I'll go down in history as a loser rather than the winner."

connection to the forum in assessing the propriety of personal jurisdiction over the defendant there. In *Keeton*, the court below had held the assertion of jurisdiction by New Hampshire unreasonable, while in *Calder*, the lower court upheld personal jurisdiction in the plaintiff's home forum on the ground, among others, that the reputational harm of the defamation was greatest there. Neither case appeared to present compelling reasons for the Court's further review.

*Keeton* was a particularly odd vehicle for continued elaboration of personal jurisdiction doctrine. Keeton was the common law husband of Penthouse Magazine publisher Bob Guccione, the archrival of Hustler Magazine publisher Larry Flynt. Keeton also worked for several of Guccione's publications. Flynt launched a smear campaign against Keeton, the nadir of the dispute being Flynt's publication of a highly unflattering cartoon of her in the May 1976 issue of Hustler.<sup>89</sup> Keeton responded by suing Flynt for defamation and invasion of privacy in Ohio, the home of several corporate entities controlled by Flynt. The Ohio courts, after a choice of law analysis, applied the statute of limitations of New York to the invasion of privacy claim and deemed it time barred, while applying the Ohio statute of limitations to the defamation claim, which was also deemed time barred. Keeton refiled the defamation action in federal court in New Hampshire, which had an unusually long limitations period for libel and was the only jurisdiction where the statute of limitations had not yet run. The district court dismissed on personal jurisdiction grounds, and the First Circuit affirmed. The court of appeals's decision, by then-circuit judge Stephen Breyer, was unremarkable. After reciting the teachings of recent Supreme Court cases, including *Shaffer*, *Rush*, and

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<sup>89</sup> The cartoon accused Guccione of giving Keeton a venereal disease.

*World-Wide Volkswagen*, the First Circuit determined that it was unreasonable to permit New Hampshire to exercise jurisdiction in light of the low level of defendant's contacts and the plaintiff's limited connection to the state. Even if wrong, the court of appeals's decision was highly factbound error.

*Calder* presented a more plausible case for further review. First, the California state courts had rejected the argument that First Amendment considerations should be given weight when analyzing personal jurisdiction in media libel cases. The lower courts were divided on that question, with venerable precedent suggesting that such considerations should be taken into account to prevent a chill on protected speech. Second, *Calder* came to the Court by way of appeal and not certiorari. It would be difficult to maintain that the case presented no substantial federal question.

*Keeton* arrived at the Court in the early part of October Term 1982. The pool clerk<sup>90</sup> wrote a relatively brief memorandum describing the background and the parties' contentions before recommending denial of certiorari. In a concluding paragraph, the pool memo found nothing objectionable in the court of appeals's treatment of the case. That court had recited and applied the teaching of past cases, including the list of factors recited by Justice White's opinion in *World-Wide Volkswagen* for assessing the reasonableness of a forum's assertion of jurisdiction. One of those factors was the interest of the forum state, and the First Circuit had reached the not implausible conclusion that the New Hampshire had little interest in maintaining suit given the limited contacts of the defendants and the plaintiff. Moreover, the First Circuit held that

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<sup>90</sup> Gary L. Francione, law clerk to Justice O'Connor.

New Hampshire had little interest in compensating plaintiff for harm that occurred predominantly outside the state. The pool memo noted, “Even if the court [of appeals] misjudged the intensity of N.H.’s interest, the issue does not require review by this Court.” Justice Blackmun’s clerk<sup>91</sup> endorsed the pool memo’s conclusion, “I see no conflict and a factbound decision.”

But Justice Rehnquist took an interest in the case. When the case failed to garner sufficient votes for certiorari at conference, Rehnquist requested that it be relisted so that he could set to work on a dissent from denial of certiorari. He circulated a lengthy dissent from denial on January 18, 1983. Stretching to seven pages, the dissent’s main thrust was the incorrectness of the decision below on a crucial point: the importance of the plaintiff’s lack of substantial connection with the forum. He argued, “It is beyond dispute, and the court below recognized, that New Hampshire has an overwhelming interest in redressing injuries that actually occur within the State.”<sup>92</sup> Rehnquist questioned the apparent limitation on state power implicit in the First Circuit’s decision: “The Court of Appeals seemed to suggest that New Hampshire’s legitimate interests extended only to providing redress for in-state injuries to New Hampshire residents. . . . Plainly though, New Hampshire — which has provided petitioner with a cause of action and a forum for all her injuries — does not agree.” Rehnquist also reminded his colleagues, “There is, of course, ‘no constitutional value in false statements of fact.’”<sup>93</sup>

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<sup>91</sup> David Van Zandt.

<sup>92</sup> 1st Draft, dissent from denial of cert, Keeton, at 4.

<sup>93</sup> *Id.* at 5 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

For good measure, Rehnquist asserted that the case presented questions related to those raised in another case, *Gillette Co. v. Miner*,<sup>94</sup> which had been dismissed for want of jurisdiction after oral argument in December 1982.

Rehnquist's vehement dissent had its intended effect, and the draft never saw the light of day. Justice O'Connor quickly joined, followed by the Court's vote to grant certiorari at the next conference.

The Court first considered *Calder* at its April 15, 1983, conference. The pool memorandum<sup>95</sup> recounted the somewhat odd factual background in the case. Shirley Jones and her husband, Marty Ingels, had sued the National Enquirer, a writer, and an editor at the paper for libel in connection with a story alleging that Ingels had "one of the most notorious casting couches in all of Hollywood" and that Jones had been "driven to drink by his bizarre behavior." The newspaper did not contest personal jurisdiction but the individual defendants did. Neither had any relevant contacts with California, save telephone conversations by the writer with sources for the article who were located in California. The court below had rejected the defendants' contention that First Amendment considerations required a heavier showing of contacts before suit could be maintained in California. The court had also attributed to the individual defendants

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<sup>94</sup> *Gillette* presented the question whether the Due Process Clause prevented a state from asserting jurisdiction over absent class members who had no contacts with the forum and had not consented to jurisdiction.

<sup>95</sup> By Foote, law clerk to [ ].

contacts on behalf of their corporate employer. The pool memo spent considerable time discussing the question of appellate jurisdiction<sup>96</sup> before turning to the merits.

On the merits, the pool memo described a “substantial conflict” on the key questions presented in the case. On the First Amendment issue, the lower courts were closely divided.<sup>97</sup> Similarly, on the question whether a corporate employee could be subject to personal jurisdiction based on actions undertaken for the corporation, the memo identified considerable conflict among the lower courts. Accordingly, the pool memo recommended postponing jurisdiction and setting the case for plenary review, possibly in conjunction with *Keeton*. Justice Blackmun’s clerk, although skeptical that the Court had appellate jurisdiction, endorsed the pool memo’s recommendation. The Court postponed consideration of its jurisdiction and set the case for argument in conjunction with *Keeton*.

Although the litigation in *Keeton* carried the unsavory hints of forum shopping and excessive liability in a “hotspot” jurisdiction, events before oral argument perhaps served to distract the Court. Days before argument, Larry Flynt fired his lawyers, including Lea Brilmayer, who was counsel of record before the Court, and requested that he be permitted to argue the case pro se. *Keeton*’s lawyers objected that “the Court

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<sup>96</sup> As in *Kulko*, the nature of California’s jurisdictional statute, which permitted the exercise of personal jurisdiction to the full extent permitted by the Constitution, suggested that the constitutionality of the statute could not be called into question by the decision below.

<sup>97</sup> The clerk considered holding the case for *Keeton*, but suggested that any eventual decision in *Keeton* was unlikely to shed much light on the First Amendment question in *Calder*.

should not be permitted to be turned into a circus ground by Mr. Flynt.”<sup>98</sup> The Court evidently agreed and followed the suggestion of the Clerk of Court to request that Stephen Shapiro, counsel to an amicus in support of affirming the decision below, argue the case for the respondent.<sup>99</sup> The drama erupted in full at the end of oral argument, when Flynt “began a profane outburst” and was immediately removed from the courtroom and arrested.<sup>100</sup>

Oral argument in *Calder* immediately after *Keeton* that day was much more placid. The First Amendment issue was touched upon. But the advocates devoted much of their time to the question whether the so-called effects test — the position taken by the Restatement that jurisdiction would be appropriate where the effect of wrongful conduct was felt — should ever apply outside the context of products liability cases.

At conference, the Court had little trouble deciding either case. In *Keeton*, the vote was unanimous to reverse the First Circuit. The Chief Justice began the discussion by saying that, because publication had occurred in New Hampshire, “[J]urisdiction follows t[he] bullet or t[he] publication.” Surprisingly, no justice indicated concerns about forum shopping or the potential that *Keeton* could seek to recover all the damages she suffered anywhere from the allegedly defamatory publication in New Hampshire. The deep theoretical problem of goods in the stream of commerce presented in *World-Wide Volkswagen* did not appear to interest any member of the Court. In *Calder*, the

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<sup>98</sup> Letter from Grutman to Stevas, Nov. 3, 1983, at 2 [in TM papers].

<sup>99</sup> Memorandum from Stevas to the Chief Justice, Nov. 3, 1983. [in TM papers]

<sup>100</sup> Memorandum from Wong, November 8, 1983.

initial vote at conference was also unanimously in favor of the permissibility of personal jurisdiction. Justices Brennan and O'Connor endorsed application of the effects test. No one had difficulty with the First Amendment issue or the employee/corporation distinction. Remarkably, barely three years after *World-Wide Volkswagen*, none of the difficulties of personal jurisdiction in cases in which a good might be widely dispersed troubled the Court. As the justice who sparked the interest in *Keeton*, Rehnquist was assigned both opinions.

Rehnquist's draft opinion in *Keeton* circulated a month after argument. It incorporated much of the material from his unpublished dissent from denial of certiorari. It quickly dispatched the First Circuit's holding that New Hampshire's interests were limited. A tort had been committed within the state's territory, and the state had an interest in providing redress for that tort. As the draft asserted, "New Hampshire may rightly employ its libel laws to discourage the deception of its citizens." The fact that the defamation affected a nonresident did not matter, since the state had "clearly expressed its interest in protecting such persons from libel, as well as safeguarding its populace from falsehoods." To the extent that the court below had a concern about Keeton's seeking to recover multistate damages in New Hampshire, that concern was a matter of substantive law and not personal jurisdiction. Any "unfairness" that resulted from Keeton's forum shopping similarly could not be attributed to personal jurisdiction but to choice of law, a field the Court had long admonished should be kept distinct. The opinion was joined in quick succession by a majority of justices. Only Justice Brennan declined to join. He wrote separately to concur in the judgment.

Rehnquist's opinion in *Calder* was similarly straightforward, even tending toward the ipse dixit. The opinion emphasized that this was not a case of "mere untargeted negligence" but intentional tortious conduct "expressly aimed at California." Because the plaintiff was the focus of defendant's activities, her contacts with California justified jurisdiction that would not exist in their absence. The plaintiff's presence, and professional reputation, in California meant that the defendants knew that the brunt of the injury to her reputation would occur there. Rehnquist dispatched the defendant's corporate employee arguments with the statement that their status as employees should not insulate them from jurisdiction. Their First Amendment argument received little more analysis. At bottom, the opinion concluded, concerns about chilling speech were incorporated into the substantive law of defamation and should be saved for the merits. Otherwise, "reintroduce[ing] those concerns at the jurisdictional stage would be a form of double counting." Only Justice Blackmun raised a question about the opinion. He expressed some concern about the language in the *Calder* and *Keeton* opinions addressing the extent of the plaintiff's contacts with the forum. "I suspect these respective observations will breed further litigation. While I would prefer to have the plaintiff's aspect of the jurisdictional question deemphasized, I join the opinion."<sup>101</sup> Rehnquist did not remove the language.

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<sup>101</sup> Letter from Blackmun to Rehnquist, Dec. 14, 1983.

***Burger King Corp. v. Rudzewicz*: Personal Jurisdiction and Contractual Disputes**

On the heels of *Keeton* and *Calder*, the next Term brought another case in which the Court decisively ruled in favor of personal jurisdiction over the defendant. *Burger King Corp. v. Rudzewicz* presented the odd circumstance of a large corporate plaintiff pursuing a small-time defendant. In other respects, however, *Burger King* resembled the Court's recent personal jurisdiction cases. Like most of the previous personal jurisdiction cases from *Shaffer*, the case came up on the Court's mandatory appellate jurisdiction.<sup>102</sup> Much like *Rush v. Savchuk*, strong dissents from denial of certiorari in a previous case played a role in encouraging the Court to grant plenary review. Justice White, joined by Justice Powell, had dissented in 1980 from the Court's denial of certiorari in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*<sup>103</sup> White's dissent from denial highlighted an "arguabl[e] conflict" on the treatment of personal jurisdiction in cases involving contractual dealings. The general "disarray," White had urged, required clarification by the Court. White, again joined by Powell, dissented from denial of certiorari in two more cases raising the same question in the intervening years.<sup>104</sup>

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<sup>102</sup> Although the case arose from the federal courts, the Supreme Court's jurisdiction statute permitted appeals to the Court in cases in which a federal court declared a state statute unconstitutional.

<sup>103</sup> 445 U.S. 907 (1980).

<sup>104</sup> *Baxter v. Mouzavires*, 455 U.S. 1006 (1982); *Chelsea House Publishers v. Nicholstone Bookbindery, Inc.*, 455 U.S. 994 (1982). The Chief Justice also joined White's dissent from denial in *Chelsea House Publishers*.

The pool memorandum<sup>105</sup> essentially recapitulated the reasoning of these dissents from denial. The lower courts, the pool writer stated, were in disarray on the treatment of personal jurisdiction in cases involving contractual dealings. Although the pool memo acknowledged that it would be hard to formulate a rule of general applicability, the clerk believed that “the Court should probably try to bring some measure of uniformity to the area.” The pool memo accordingly ended with a recommendation to grant further review.<sup>106</sup> The Court postponed jurisdiction at its “long conference” before the start of the October Term 1984.

Perhaps the Court’s decision to delve into the area was attributable to Justice White’s repeated entreaties to clarify the area, or the presence of the case on the Court’s mandatory appellate docket, or the positive recommendation of the cert pool memo. Or, perhaps, some combination of all three was responsible. At the same time, the facts involved in *Burger King* seemed sympathetic to the defendant. Rudzewicz was a franchisee who operated a Burger King store in Michigan. When the parties’ relationship soured, Burger King sued Rudzewicz in federal court in Florida for breach of the franchise agreement. After losing in the district court on merits, the defendant renewed his attack on the court’s personal jurisdiction over him in the Eleventh Circuit, which held that personal jurisdiction in Florida exceeded the bounds of due process.

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<sup>105</sup> Written by A. Lee Bentley III, law clerk to Justice Powell.

<sup>106</sup> The clerk recommended, however, that an appeal was not the appropriate route for further review. Instead, the pool memo suggested dismissing the appeal and granting certiorari.

Rudzewicz found little sympathy at the Court, however. The unsympathetic hearing he received was probably attributable to the factual circumstances of the case. Although a small-time franchisee, Rudzewicz had entered into a long-term, multi-million dollar agreement with Burger King. The course of dealings among the parties also suggested multiple contacts with Florida by Rudzewicz and a business associate. It could not have helped matters that Rudzewicz's lawyer before the Court was not particularly strong. As Blackmun's clerk<sup>107</sup> noted in a bench memorandum for the justice, "Unfortunately, appellee's brief is by far the poorest of any I've seen in an argued case." At conference, only Justice Stevens voted to affirm the Eleventh Circuit. Although Justice Rehnquist viewed the case as "close to t[he] line," and Justice Blackmun found the case troubling,<sup>108</sup> no other justice indicated an interest in affirming.<sup>109</sup>

Justice Brennan's opinion was a lengthy recitation of the parties' course of dealings and the Court's prior personal jurisdiction cases. Despite its length, the opinion did little to reformulate the basic doctrinal understandings, with the exception of its reliance on a choice of law clause in the contract designating Florida law as the governing law in the case of any dispute between the parties arising out of their agreement. But the opinion decided little. It left open the possibility that a case involving more attenuated contacts might lead to a finding of no jurisdiction. Six justices joined the opinion, with Justice Stevens dissenting in an opinion joined by Justice White.

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<sup>107</sup> Donald Donovan.

<sup>108</sup> Memo from Donovan to Blackmun, April 15, 1985.

<sup>109</sup> Powell did not participate in the case.

Even Stevens's dissent, however, was relatively mild. It quoted at length the majority opinion by Judge Vance for the Eleventh Circuit.

***Asahi Metal Industry Co. v. Superior Court: Doctrinal Division Part I***

The era of good feelings did not last. In October Term 1985, the Court confronted *Asahi Metal Industry Co. v. Superior Court*, a messy case that the Court did little to clarify. The change was perhaps attributable to a change in personnel at the Court. By the time *Asahi* was argued, Justice Antonin Scalia had joined the Court to fill the seat left by Justice Rehnquist's elevation to Chief Justice. The substitution of the decisive and methodologically driven Scalia for the indecisive and inconsistent former Chief Justice altered the dynamics of deliberation and consensus building on the Court.

*Asahi* began in the California state courts as a products liability suit against the manufacturers of motorcycle parts. One defendant, Cheng Shin, cross claimed against another, Asahi, for indemnity. The underlying tort suit was settled but the indemnity claim remained. Asahi, a Japanese manufacturer that had sold valves for a motorcycle tire tube to Cheng Shin, contested personal jurisdiction on the cross claim. Relying on the Court's seeming approval of a guarded "stream of commerce" theory in *World-Wide Volkswagen*, the California courts upheld personal jurisdiction.

As the pool memorandum<sup>110</sup> acknowledged, the decision below was not inconsistent with *World-Wide Volkswagen*. Justice White's opinion in the case had contemplated an assertion of personal jurisdiction when the presence of a product was not

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<sup>110</sup> Written by Andrew G. Schultz, law clerk to Justice White.

an isolated occurrence but the result of a manufacturer's delivery of the products "into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>111</sup> But the pool memo identified a "rather clear conflict" among the circuits as to the application of *World-Wide Volkswagen* to component part manufacturers. The pool clerk therefore recommended granting certiorari. Justice Blackmun's clerk,<sup>112</sup> however, annotated the petition to express doubts about the pool clerk's conclusions. Blackmun's clerk suggested that the split of authority was largely illusory, because several of the supposedly contrary decisions were factually distinguishable. Because the California court's opinion was in accord with the majority view and seemingly correct, and because of the factbound nature of the dispute, she recommended denial. At conference, the petition could not garner enough votes for a grant of further review. But the case was re-listed for Justice White.

Once again, a draft dissent from denial of certiorari saved the case from oblivion. Justice White circulated a dissent from denial detailing the conflict among the lower courts. The draft largely tracked the argument, and even the language, of the cert pool memorandum — an unsurprising occurrence given that the pool memo had been written by a clerk in White's chambers. And, once again, Justice Powell joined White's draft dissent. The Court granted certiorari on March 3, 1986.

The Court heard oral argument on November 5, 1986. The argument exposed a serious factual difficulty with the case. There was, it seemed, virtually no evidence in the

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<sup>111</sup> 444 U.S. 286, 297-98 (1980).

<sup>112</sup> Helane Morrison.

record about the number of Asahi's valves that were shipped to California by Cheng Shin. Assessing the defendant's understanding of the fate of its product without that record evidence would be a difficult task.

Chief Justice Rehnquist acknowledged the problem at conference after argument. But he voted to reverse the California Supreme Court on the ground that the burden was on the plaintiff to make the requisite showing. Absent such a showing, the contacts were too attenuated. Justice Brennan, however, invoked the problems with the record as a reason to dismiss the case as improvidently granted, as there was no concrete evidence on which to base a decision. White and Marshall voted to affirm. Blackmun suggested that, regardless of the level of contacts, the reasonableness prong of the *International Shoe* test militated against personal jurisdiction.<sup>113</sup> Justice Powell endorsed that disposition as a second-best option, although he preferred to rest on the lack of evidence regarding the presence of Asahi's products in California. Stevens expressed agreement with White for an affirmance. Justice O'Connor voted to reverse and hoped a good test would emerge from the case. She indicated a preference for relying on the factual inadequacies of the record, but expressed openness to Justice Blackmun's position. Justice Scalia, the junior member of the Court, however, made it clear that he would not vote to reverse on the second ground suggested by Justice Blackmun but only the lack of showing of contacts with California. The Chief Justice assigned the opinion to Justice O'Connor.

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<sup>113</sup> Blackmun's clerk, Ellen E. Deason, had recommend such a disposition in a pre-argument bench memorandum.

Justice O'Connor's draft opinion relied on both grounds for reversing. The draft rejected the California court's reliance on Asahi's awareness that its products would circulate in California. Just as the Court in *World-Wide Volkswagen* had required something more than foreseeability, she concluded, something more than mere awareness was needed for personal jurisdiction. Some action by the defendant was needed, such as designing a product for the forum market, or advertising there, servicing customers in the forum, or collaborating with a distributor serving the state. Because the record was bare of such evidence, on "the basis of these facts, the exertion of personal jurisdiction over Asahi . . . exceeds the limits of Due Process." The second part of the opinion, however, concluded that jurisdiction would be unreasonable because of the heavy burden on the defendant of defending far away from its home country, the limited interests of California in maintaining suit on the indemnity claim after the underlying tort suit had been settled, the fact that the transactions leading to the indemnity claim occurred far away from California, and the foreign context of those transactions.

The opinion garnered checkered support. Justice White, who had voted to affirm at conference, decided to vote to reverse but join only the Part II-B of O'Connor's opinion, which applied the reasonableness factors from *World-Wide Volkswagen* to find no jurisdiction. Justice Powell joined in toto, as did Chief Justice Rehnquist. Justice Stevens circulated a short opinion concurring in part and concurring in the judgment, which endorsed Part II-B but not Part II-A of the opinion (the discussion of minimum contacts). Stevens disagreed with the application of the minimum contacts test in that part of the opinion, and also admonished that it was not necessary to the Court's judgment. Justice White signed on to Stevens's separate writing. Justice Scalia, on the

other hand, while agreeing with Justice Stevens's point about not deciding unnecessary questions, believed that it was preferable to address the contacts issue and leave the reasonableness discussion aside. He therefore joined all but those parts of the opinion.

After Scalia's letter to O'Connor, her opinion had not yet become an opinion for the Court. Justice Brennan then circulated an opinion concurring in the judgment to attack O'Connor's minimum contacts analysis while agreeing with her application of the reasonableness factors. Brennan's opinion was joined by Marshall and, in part, by Justice White. In response, Justice O'Connor wrote to Brennan to offer a modification of her opinion in the hope of attracting his join on Part II-B of the opinion.<sup>114</sup> Brennan responded favorably to O'Connor's suggestion but indicated that a remaining difference between them was left — the significance of the settlement of the underlying tort suit. He discounted the importance of the settlement, because California had an interest in avoiding perverse interests created by consideration of settlement in personal jurisdiction analysis.<sup>115</sup> O'Connor's modifications led Brennan to join Part II-B of O'Connor's opinion. Justice Blackmun finally weighed in by joining O'Connor's modified opinion, as well as Brennan's and Stevens's separate writings.

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<sup>114</sup> Letter from O'Connor to Brennan, January 15, 1987.

<sup>115</sup> Letter from Brennan to O'Connor, January 15, 1987. Brennan took the position that consideration of settlement in personal jurisdiction analysis would create a disincentive for parties in Cheng Shin's position to settle.

***Burnham v. Superior Court: Doctrinal Division Part II***

Justice Scalia's influence also affected the Court's next personal jurisdiction case, *Burnham v. Superior Court*. The end result was a divided court with a plurality opinion, even though all members of the Court agreed with the judgment.

The facts of *Burnham* closely mirrored *Kulko* ten years before. A husband and wife had lived with their children in New Jersey for ten years until a separation agreement. The wife and the children then moved to California with the husband's consent. The husband filed for divorce in New Jersey based on the separation agreement, but failed to serve the wife with the divorce papers. While the husband was in California on unrelated business, however, the wife served him with papers in her own divorce action brought in court there. The California state courts rejected Mr. Burnham's challenge to "tag" jurisdiction, which he argued violated due process in light of the admonition in *Shaffer* that all assertions of personal jurisdiction must be judged by the standard of *International Shoe*.

The pool clerk<sup>116</sup> recommended granting certiorari. Although acknowledging the lack of a clear split among the lower courts, the pool memo argued that there was sufficient confusion on whether any remnant of jurisdiction based solely on presence within the forum survived *Shaffer*. The Court followed the recommendation at its end-of-summer conference and set the case down for argument in February 1990.

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<sup>116</sup> Bradford R. Clark, law clerk to Justice Scalia.

The conference vote after oral argument was to affirm, with only Justices Marshall and Blackmun voting to reverse. Justice Blackmun's notes of the argument do not indicate that the discussion was heated or divided. It seemed, from all appearances, to be a relatively straightforward case. Several justices noted the longstanding practice of "tag" jurisdiction, but little more reasoning was put forward. Chief Justice Rehnquist assigned Justice Scalia the opinion for the Court.

Justice Scalia's opinion could not attract a majority of Justices. Justice Kennedy and the Chief Justice promptly joined, but other justices recoiled at Scalia's apparent attempt to turn what had seemed to be a straightforward procedure case into a battle cry for originalism in constitutional interpretation. Justice Brennan indicated that he would write separately, with others indicating they would await further writing. Justice Marshall's clerk reported:

Boss:

AS's opinion in *Burnham* is out. It's much worse than I expected. It traces personal jurisdiction from the 1400's forward and emphasizes the notion of original intent — a concept one would have imagined irrelevant to this opinion.<sup>117</sup>

Blackmun's clerk wrote a similarly disapproving note describing Scalia's draft opinion:

J. Scalia has written an opinion, the gist of which is that transient jurisdiction has existed for so long that it must be fair, and that *International Shoe*, *Shaffer*, and more recent cases have not undermined the venerable tradition of

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<sup>117</sup> Memo from H. Elizabeth Garrett to Marshall, April 12, 1990.

jurisdiction based on presence. I think the opinion mischaracterizes the case law and sounds pompous and silly, and that its general approach to due process will be objectionable to some members of the majority (as indicated by J. Brennan's memo saying he will write separately). It would be fun to dissent from.<sup>118</sup>

Justice Stevens attempted to engage Scalia and modify his opinion. In a letter to Scalia, Stevens pointed to several points of disagreement, particularly Scalia's invocation of a hard and fast rule that tradition was the hallmark of fairness. "In short, if you can change your absolute rule to a strong presumption, I can join Parts I and II of your opinion, but I think it highly unlikely that you could make sufficient revisions in Part III to enable me to join."<sup>119</sup> Scalia returned with an acid dismissal of Stevens's concerns and a justification of the draft's absolutism.

Dear John:

I cannot accept the changes you propose. I think it important that we lay down a rule validating *all* personal-service jurisdiction, and not leave it to be litigated on the facts of each case. Such a rule cannot be announced if abstract "fairness" is the test, even if one loads the dice, as you propose, by giving two centuries of continuing tradition a "power presumption" of validity. . . . The only element of fairness suggested in Bill's opinion that applies to all personal-service jurisdiction rather than the particular facts of the present case is, as you correctly state, "constructive notice." But the *maxim sapienti non fit injuria* has never won

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<sup>118</sup> Memo from Martha Matthews to Blackmun, April 17, 1990.

<sup>119</sup> Letter from Stevens to Scalia, April 30, 1990, at 2.

much support, most people thinking that unfairness forewarned is not unfairness avoided. (Was it really fair that explorers, warned of the risks when they went to New Guinea, were eaten for dinner?)

Anyway, for the time being I will stay where I am.

After four drafts, Scalia's opinion had not attracted a majority. Brennan's separate writing, on the other hand, had been joined by Justice Marshall and Justice O'Connor. Justice White, who had stayed on the sidelines, also decided to write separately to concur in part and in the judgment. Justice Stevens wrote separately to concur in the judgment.

Conclusion