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## The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of Justice John Paul Stevens

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# ARTICLES

## The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of Justice John Paul Stevens

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## INTRODUCTION

When Justice John Paul Stevens announced his retirement from the Supreme Court in April 2010, the news was accompanied by the inevitable counting of votes on the Supreme Court. The conventional wisdom was that Stevens's retirement meant the departure of the most senior liberal Justice from the Court and that his successor would not substantially change the political orientation of the conservative Court led by Chief Justice John Roberts. The focus on the political implications of Stevens's retirement obscured a significant aspect of his retirement: the loss of the Supreme Court's preeminent common law lawyer.

From his appointment to the Supreme Court in 1975 through his last term that ended in 2010, Justice Stevens generally decided cases in the manner of the quintessential common law judge. This common law approach was defined by three related qualities. First, Stevens decided cases narrowly, with careful attention to the facts of the particular case and primary attention paid to the contentions of the litigants. This approach was consistent with the common law notion that the law develops on a case-by-case basis over time. Second, although Stevens did not shy away from exercising judicial power, he nevertheless employed it in moderation, often deferring to other legal decision-makers. Third, he generally eschewed the political debates that often are attendant to the Supreme Court's decisions involving issues of constitutional interpretation.<sup>1</sup> Stevens's common law approach to deciding cases certainly characterized his personal jurisdiction jurisprudence.

In recent years, as the prospect of Justice Stevens's retirement loomed, his decisions became the subject of substantial academic inquiry.<sup>2</sup>

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1. No other current Justice on the Supreme Court follows Justice Stevens's common law approach to deciding cases. On the right, Justices Antonin Scalia and Clarence Thomas are devout Originalists, committed to deciding cases in accordance with their views of what the framers of the Constitution intended. Chief Justice Roberts—usually joined by Justice Samuel Alito—tends to be an ideological conservative. Justice Anthony Kennedy often decides cases in sweeping terms, even when the result is liberal. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating criminal laws outlawing homosexuality). On the left, the distinctions are not as clear but are nevertheless evident. Justice Stephen Breyer often shares Stevens's views but is willing to go one step further and decide the case in accordance with his views of the appropriate policy. Justice Ruth Bader Ginsburg shares Stevens's attention to detail and nuance but tends to be more constrained about the exercise of judicial power. As for Justices Sonia Sotomayor and Elena Kagan, it is too early to tell.

2. The most prominent example is the Fordham Law Review symposium on Justice Stevens. *See* Symposium, *The Jurisprudence of Justice Stevens*, 74 *FORDHAM L. REV.* 1557 (2006); *see also* Jeff Bleich et al., *Justice John Paul Stevens: A Maverick, Liberal, Libertarian, Conservative Statesman on the Court*, 67 *OR. ST. B. BULL.* 26, 27 (Oct. 2007) (noting that "Justice Stevens'[s] approach to decision-making . . . is not 'liberal' so much as it is merely less conservative than that of President Bush's recent appointments" and that "[w]hatever the label, his brand of analysis is independent"); Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 *TEMP. POL. & CIV. RTS. L. REV.* 83, 106 (2007) (arguing that Justice Stevens was "the contemporary Supreme Court's foremost advocate of

Nevertheless, apparently no one has specifically examined the jurisprudence of Stevens's personal jurisdiction decisions.<sup>3</sup> This oversight may be due to the fact that the Supreme Court failed more than it succeeded in its effort to develop a coherent body of law with respect to personal jurisdiction in the series of cases that began with *Shaffer v. Heitner* in 1977 and concluded with *Carnival Cruise Lines, Inc. v. Shute* in 1991.<sup>4</sup> After *Carnival Cruise*, the Supreme Court abandoned its efforts to provide a general set of personal jurisdiction rules and did not squarely address the rules governing personal jurisdiction for two decades.<sup>5</sup> Furthermore, the role of Justice Stevens in this set of cases was not that of leader or decision-maker but rather that of critic, in both dissents and concurring opinions.

From the perspective of a legal scholar, the decisions of a single Justice criticizing a now-settled, albeit less-than-coherent, body of law may not have seemed worth exploring. In fact, Justice Stevens's personal jurisdiction jurisprudence warrants examination for a number of reasons. As a doctrinal and pedagogical matter, personal jurisdiction is one of the most challenging legal issues first-year law students confront; this challenge results not only from the different parts of the analysis and the various categories of personal jurisdiction, but also from the failure of the Supreme Court to reach consensus on an analytical framework for

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constitutional rights protections for incarcerated, convicted offenders"); Douglas M. Branson, *Prairie Populist? The Business and Securities Law Opinions of Justice John Paul Stevens*, 27 RUTGERS L.J. 605, 607 (1996) (Justice Stevens's judicial decisions are characterized by "pragmatism, adherence to the principle of judicial restraint, an absence of litigation phobia, willingness to look beyond the plain meaning of a statute, and superb common law skills"); Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 ANN. SURV. AM. L., xxix, xxxii ("Justice Stevens respects the formal restrictions that flow from the judiciary's institutional role."); William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087.

3. *But see* Stanley E. Cox, *Would That Burnham Had Not Come to be Done Insane!*, 58 TENN. L. REV. 497, 531–37 (1991) (discussing "Stevens' [r]efusal to [a]dopt any [j]urisdictional [t]heory"); *id.* at 532 ("Essentially, Justice Stevens' jurisdictional 'theory' consists of crafting fact-specific precedents based on consistency with earlier fact-specific precedents tempered by Justice Stevens' subjective sense of fairness.").

4. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

5. In 2011, after Justice Stevens retired, the Court revisited the issue of personal jurisdiction in a pair of decisions. *See Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011) (North Carolina court could not exercise general jurisdiction over foreign subsidiaries of Ohio corporation); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (New Jersey court could not exercise specific jurisdiction over English company that manufactured—but did not distribute on its own—machine that injured plaintiff in New Jersey). This Article is not about *Goodyear* or *J. McIntyre* but nevertheless will discuss both decisions to the extent they are relevant to understanding Justice Stevens's approach to personal jurisdiction. As detailed *infra*, the decisions—especially the fractured decision in *J. McIntyre*—confirm a number of points established through an analysis of Justice Stevens's decisions.

evaluating personal jurisdiction. Stevens's decisions highlight the limits of the Supreme Court's efforts and provide insight into the various rules articulated in the Court's decisions. As a jurisprudential matter, Stevens's common law approach contrasts with that of other Justices, illuminating the consequences of different judicial philosophies in a particular area of law. Finally, as an institutional matter, Stevens's personal jurisdiction decisions, in particular his concurrences in *Asahi* and *Burnham*, demonstrate the way in which the Court's institutional practices enabled him to limit the holdings in those cases—results entirely consistent with his common law approach.

Part I of this Article provides a more detailed definition of the common law approach to judging and provides the doctrinal background necessary to understand that approach in the context of personal jurisdiction. Part II examines the Supreme Court cases on personal jurisdiction, describing the Court's decision and then Justice Stevens's separate decision in the case. The analysis starts with *Shaffer* and ends with *Carnival Cruise*. Along the way, it notes the Supreme Court's limited success in developing a general framework for evaluating the exercise of personal jurisdiction in a civil case. Finally, this Article concludes with thoughts on Stevens's personal jurisdiction jurisprudence and what it may teach us, not only about civil procedure but also, more generally, about judicial decision-making.

#### I. DEFINITIONS AND DOCTRINE: THE COMMON LAW APPROACH TO JUDGING AND BASIC PERSONAL JURISDICTION DOCTRINE

Personal jurisdiction, generally taught in the first-year Civil Procedure course, is a doctrine governed by the Due Process Clause of the Fourteenth Amendment. Fundamentally, the question before the court in a challenge to the forum state's exercise of personal jurisdiction is whether the assertion of jurisdiction would be fair to the defendant.<sup>6</sup> Personal jurisdiction, therefore, is a constitutional law doctrine that implicates more general questions of constitutional interpretation.

In cases involving constitutional interpretation, the description of Justice Stevens as a common law judge readily applies. The common law

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6. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of suit does not offend ‘traditional notions of fair play and substantial justice.’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). See also *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting) (“The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness.”). But see *id.* at 2787 (plurality opinion) (stating that “[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law” and holding that purposeful availment is the determining factor with respect to personal jurisdiction in products liability cases).

judge tends to decide cases narrowly, with an emphasis on the particular facts of the case. Professor William Popkin noted this aspect of Stevens's approach to deciding cases in his observation that Stevens deliberated "about the facts of a particular case" and avoided "overly broad generalizations and summary dispositions."<sup>7</sup> Furthermore, Stevens's commitment to "deliberation focused on the facts of a particular case," and "narrowed the breadth of a judicial decision," generally producing a decision that "pa[id] genuine heed to the litigants' claims."<sup>8</sup>

Perhaps the most important characteristic of the common law approach is its reliance upon a process of case-by-case deliberation, in which the law develops through courts continuously deciding cases that present new facts and circumstances requiring the application of familiar legal principles and occasionally the development of new legal principles.<sup>9</sup> The common law process for the development of constitutional doctrine not only counsels against overbroad holdings in favor of more gradual development of the law, it also informed Justice Stevens's reluctance to adjudicate constitutional issues when the case could have been decided on other grounds.<sup>10</sup> Finally, as a common law judge, Stevens was particularly aware of the importance of the case to the individual litigants and believed that the judge's primary obligation was to carefully consider the particular case before the court.<sup>11</sup> This is most evident in his attention to the facts of the case, generally set out in detail and with care in his written decisions.<sup>12</sup>

7. Popkin, *supra* note 2, at 1090.

8. *Id.* at 1091.

9. *Id.* at 1094; *see also* John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 180 (1982) ("[O]ur common law heritage and the repeated need to add new stitches in the open fabric of our statutory and constitutional law foreclose the suggestion that judges never make law."); *see generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–8 (1949).

10. *See* Popkin, *supra* note 2, at 1096; Stevens, *supra* note 9 (citing Justice Brandeis's concurrence in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–56 (1936), to support his view that the doctrine of judicial restraint "teaches judges to avoid unnecessary lawmaking").

11. Stevens, *supra* note 9, at 183. At the close of his article, Justice Stevens quotes Justice Potter Stewart with approval:

I think it's very important for a judge—any judge, anywhere—to remember that every case is the most important case in the world for the people involved in that case, and not to think of a case as a second-class case or a third-class case or an unimportant case.

*Id.* As discussed in the Conclusion of this Article, not every justice shares this view of the Supreme Court's priorities and institutional role. *See, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

12. Popkin, *supra* note 2, at 1091. In deciding cases narrowly, paying close attention to the facts, and emphasizing the importance of the case to the litigants, Justice Stevens also may be described as a minimalist judge. The academic focus on minimalism grew out of continuing concerns with judicial activism and the political controversy—including specifically concerns about democratic self-government—attendant to broad or intrusive decisions by the Supreme Court. *See, e.g.,* Jonathan T. Molot, *Ambivalence About*

Justice Stevens's common law approach also was consistent with and reinforced his belief in judicial restraint, which he has defined as "a doctrine that relates to the merits of judicial decisions" and "that focuses on the process of making judicial decisions. It is a doctrine that teaches judges to ask themselves whether, and if so when, they should decide the merits of questions that litigants press upon them."<sup>13</sup> Critically, Stevens's understanding of judicial restraint focused on the institutional (rather than constitutional) limitations of courts; the issue was not whether the court has the power to decide the pending controversy but whether the court or another branch of government should do so—and if the court did decide the case, how broadly its decision should apply.<sup>14</sup>

Finally, it is important to note that all of these different qualities—Justice Stevens's belief in judicial restraint, commitment to deciding cases narrowly with an emphasis on the facts of the case, primary concern for the litigants, and faith in the development of the law through the common law approach to deciding cases—were related to, and in fact reinforced by, each other. A Supreme Court decision that is narrowly limited to its facts results in the articulation of a more specific rule. Such a decision also allows for lawmakers, including courts, to modify or develop the rule depending on the facts and circumstances of the next case. It also necessarily makes the litigants' concerns and contentions—as opposed to the more general political or philosophical implications of the Court's decision—the central focus of the case.<sup>15</sup>

The next section of this Article, Part II, describes and discusses five personal jurisdiction cases in order to illustrate Justice Stevens's common law approach to judging. Before discussing the cases, it is necessary to provide a brief overview of personal jurisdiction doctrine. Although, as

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*Formalism*, 93 VA. L. REV. 1, 43 (2007); Cass Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1914–15 (2006); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1454 (2000). The literature on judicial minimalism is less relevant here than in other contexts, such as litigation over abortion rights and affirmative action, because personal jurisdiction is not a politically-controversial area of the law. Nevertheless, Justice Stevens's common law approach was consistent with that of a judicial minimalist who, among other things, "favors rulings that are narrow rather than wide" and "seeks rulings that are shallow rather than deep." Sunstein, *supra*, at 1908. It also was in accord with his belief in judicial restraint. *See infra* text accompanying notes 13–15.

13. Stevens, *supra* note 9; *see also* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 37 (1992) ("The doctrine of judicial restraint . . . imposes on federal judges the obligation to avoid unnecessary or unduly expansive constitutional adjudication."); Popkin, *supra* note 2, at 1090 (describing Stevens's philosophy of judicial restraint, which holds that the Supreme Court "should not decide cases that other institutions can decide at least as well or better").

14. Popkin, *supra* note 2, at 1090.

15. *See also id.* at 1091 (noting that "[j]udicial deference to other institutions preserves the Court's time and political capital to implement" the objective of "deliberation about the facts of a particular case").

noted earlier, the resolution of a personal jurisdiction dispute involves the basic question of whether the forum state's exercise of personal jurisdiction is fair to the defendant, the doctrine that developed through the case law requires the consideration of a number of factors. The first consideration is whether the dispute involves a question of specific jurisdiction or general jurisdiction. Specific jurisdiction is based on limited activities or "minimum contacts" by a non-resident defendant in the forum state and limits the court's jurisdiction to claims arising out of those contacts.<sup>16</sup> Where the non-resident defendant's contacts in the forum state are more extensive, they may be so "continuous and systematic" as to subject the defendant to general jurisdiction, which means the defendant may be sued on any claim—including claims unrelated to the contacts.<sup>17</sup>

In a case involving specific jurisdiction, the first question is whether the exercise of personal jurisdiction is authorized by the forum state's long-arm statute.<sup>18</sup> If so, the second question is whether the exercise of personal jurisdiction is consistent with the Due Process Clause. That question, in turn, depends on whether the defendant has sufficient minimum contacts with the forum state and also whether the exercise of personal jurisdiction is consistent with notions of "fair play and substantial justice." In a case involving the exercise of specific jurisdiction, the minimum contacts analysis requires consideration of three factors: the relationship between the defendant's contacts and the claim, purposeful availment, and foreseeability.<sup>19</sup> The fair play and substantial justice determination requires consideration of five factors: burden on the defendant, convenience of the plaintiff, the forum state's interest in the case, the judicial system's interest in efficient resolution of controversies, and social policy.<sup>20</sup>

Well before the Supreme Court decided the series of cases examined in this Article, Professor Geoffrey Hazard wrote a superb article arguing that under the prevailing case law, the determination of whether the exercise of personal jurisdiction in a particular case was constitutional amounted to an exercise in "arbitrary particularization."<sup>21</sup> Perhaps because of the uncertainty attendant to this state of the law, the Supreme Court attempted to develop a more uniform—and more specific—set of rules for personal jurisdiction doctrine.<sup>22</sup> As detailed below, the Court's efforts met

16. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) ("Adjudicatory authority is 'specific' when the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'") (internal citation omitted).

17. *Int'l Shoe Co.*, 326 U.S. at 317; *see also* *Goodyear*, 131 S. Ct. at 2854 (general jurisdiction requires foreign corporation to have "'continuous and systematic' affiliation with the forum state"); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–16 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

18. *See, e.g.*, STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 154 (7th ed. 2008).

19. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

20. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775–80 (1984).

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21. Geoffrey Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 283.

22. In *Shaffer*, the Court restricted the availability of quasi in rem jurisdiction in a decision that was not unanimous; the concurring decisions sought to narrow the reach of the Court's decision. *Shaffer v. Heitner*, 433 U.S. 186, 217 (1976) (Powell, J., concurring) (reserving judgment "on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property"); *id.* at 217–19 (Stevens, J., concurring in the judgment). In *Asahi*, with no decision commanding more than four votes, the Court failed to agree on a standard for minimum contacts in stream of commerce cases. *Asahi Metal Indus. Co., v. Superior Court*, 480 U.S. 102 (1987). Similarly, in *Burnham*, the Court failed to agree on the reasons why in-state service of process on an individual confers jurisdiction over the individual in the forum state. *Burnham v. Superior Court*, 495 U.S. 604 (1990). Finally, in *Burger King* and *Carnival Cruise*, the majority decisions drew sharp dissents questioning the fairness of the outcome in the case before the Court. *Burger King*, 471 U.S. at 487 (Stevens, J., dissenting); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 597 (Stevens, J., dissenting). See Part II *infra*.

In order to provide a comprehensive account, it is important to note that the Supreme Court decided a number of other personal jurisdiction cases between *Shaffer* in 1977 and *Carnival Cruise* in 1991, including *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), which is discussed *infra* Part II in connection with *Asahi*. See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984) (foreign corporation's contacts with Texas, including more than \$4 million in purchases from a Texas company over a seven-year period, were not "continuous and systematic" and therefore did not establish general jurisdiction); *Calder v. Jones*, 465 U.S. 783 (1984) (reporter and editor in Florida could be haled into California forum where plaintiffs resided and article was circulated); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (New Hampshire could exercise personal jurisdiction over magazine sued for libel where circulation of magazines was defendant's only contact with forum state); *Ins. Corp of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (affirming district court's imposition of a discovery sanction to support finding of personal jurisdiction and holding that the "Due Process Clause . . . is the only source of the personal jurisdiction requirement"); *Rush v. Savchuk*, 444 U.S. 320 (1980) (Minnesota could not exercise quasi in rem jurisdiction over a defendant with no contacts in the forum state by attaching the contractual obligation of an insurer that was licensed to do business in the state and required to defend and indemnify the defendant in connection with the lawsuit); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (California could not exercise personal jurisdiction over a parent sued for child support where the parent was not a resident or a domiciliary of the state, even though the children were domiciled in California). In all of the decisions except *Rush*, Stevens voted with the majority and did not write a decision. In *Rush*, Stevens dissented on the question of whether the Minnesota statute authorizing personal jurisdiction over the dispute was the "functionally equivalent" of constitutionally permissible direct action statute. 444 U.S. at 333 (Stevens, J., dissenting). The fact that Stevens dissented in *Rush* on a narrow doctrinal issue is consistent with his common law approach to judging. Because the issue providing the basis for his dissent does not implicate any of the broader jurisprudential points discussed in this Article, the discussion of Stevens's dissent in *Rush* is limited to this footnote. This Article does not discuss *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which addressed, among other things, personal jurisdiction in the context of class actions. Justice Stevens wrote separately in that case because of his disagreement with the Court's "'conflict' of laws" analysis, but he did not discuss personal jurisdiction in his decision. *Id.* at 823–25.

with limited success. This was true even though the doctrine of personal jurisdiction generally does not involve controversial legal or political issues.

## II. THE PERSONAL JURISDICTION CASES: THE COURT'S DECISIONS AND JUSTICE STEVENS'S DIFFERENT APPROACH

### A. *Resistance to General Rules: Asahi and Shaffer*

#### 1. *Shaffer: A General Rule for In Personam and In Rem Jurisdiction*

With *Shaffer v. Heitner*, the Supreme Court embarked upon an ambitious—and arguably overdue—effort to provide a comprehensive legal framework for evaluating assertions of personal jurisdiction that implicate the Due Process clause. As detailed below, the Court in *Shaffer* restricted the availability of quasi in rem jurisdiction and held that assertions of personal jurisdiction based upon property should be analyzed according to the fairness approach set out in *International Shoe* for evaluating assertions of personal jurisdiction over persons.<sup>23</sup> Justice Thurgood Marshall's decision for the Court in *Shaffer* is long and scholarly, providing a history of the doctrine of personal jurisdiction, starting with *Pennoyer v. Neff*<sup>24</sup> and

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23. The Court expressly abolished the “category” of quasi in rem jurisdiction in which “the only role played by the property is to provide the basis for bringing the defendant into court.” 433 U.S. at 209; *see also id.* at 196, 199–201, 205–06, 208–09 (discussing in personam and in rem categories of jurisdiction). There are “two types of [quasi in rem] jurisdiction,” according to Professor Richard Freer. RICHARD D. FREER, CIVIL PROCEDURE 44 (2d ed. 2009). The first, which was not at issue in *Shaffer*, refers to “cases [that] adjudicate the *ownership* of the property that is used as the jurisdictional predicate, and purport to determine the ownership as between and among the parties to the case.” *Id.* The second type of quasi in rem jurisdiction refers to cases in which “[t]he property is relevant as a jurisdictional predicate only because the plaintiff cannot obtain *in personam* jurisdiction over the defendant . . . [and] the dispute is . . . unrelated to the ownership of the property.” *Id.* at 45–46. In *Shaffer*, the Supreme Court “rejected” (and abolished) the second type of quasi in rem jurisdiction. *Id.* at 90; *see also id.* at 89–93 (discussing *Shaffer*).

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24. 95 U.S. 714 (1877).

discussing a number of cases and secondary authorities to support this new framework.<sup>25</sup> This Section will summarize the Supreme Court's decision in *Shaffer* and then describe and discuss Justice Stevens's brief opinion concurring in the judgment. Stevens was aware of the significance of the Court's opinion and sought to minimize its scope.

*Shaffer v. Heitner* involved a shareholder's derivative suit filed against Greyhound Corp. ("Greyhound"), its wholly-owned subsidiary Greyhound Lines, Inc., and twenty-eight present or former officers or directors of one or both corporations in Delaware Chancery Court.<sup>26</sup> Greyhound was incorporated in the State of Delaware, and its principal place of business was in Phoenix, Arizona.<sup>27</sup> The suit alleged that the defendants had "violated their duties" to Greyhound and Greyhound Lines by causing them to engage in actions that resulted in more than \$13 million in civil damages and \$600,000 in criminal contempt fines.<sup>28</sup> Because Greyhound's actions establishing its liability occurred in the State of Oregon, the exercise of specific jurisdiction over Greyhound based upon its illegal activities would have been proper in Oregon but not in Delaware.<sup>29</sup>

Heitner, the plaintiff, brought suit in state court in Delaware on the basis of a Delaware statute<sup>30</sup> that authorized the assertion of jurisdiction over non-resident defendants solely by virtue of their ownership of stock in a Delaware corporation.<sup>31</sup> Although none of the stock certificates were physically located in Delaware, Delaware nevertheless was considered the "situs of ownership" pursuant to another state statute; therefore, the stock certificates were considered property in Delaware.<sup>32</sup> Heitner proceeded on the basis of the rule in *Pennoyer v. Neff* that the "presence" of the individual defendants' property in-state was sufficient to establish personal jurisdiction in the Delaware forum.

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25. For a detailed discussion of the Court's decision, see Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

26. *Shaffer*, 433 U.S. at 189–90. Heitner, the plaintiff in the Delaware Chancery Court lawsuit, was a nonresident of Delaware who owned one share of stock in Greyhound Corporation. *Id.* at 189.

27. *Id.* at 189. Greyhound Lines, the wholly-owned subsidiary, was incorporated in California with its principal place of business in Phoenix, Arizona. *Id.* at 189 n.1.

28. *Id.* at 190 & nn.2, 3.

29. *Id.* at 190; *see also id.* at 190 n.2; *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977) (affirming treble damage award of more than \$13 million against Greyhound for predatory conduct in violation of antitrust laws), *vacated*, 437 U.S. 322 (1978).

30. *See* DEL. CODE ANN. tit. 10, § 366 (2010).

31. *Shaffer*, 433 U.S. at 189. Heitner filed for an order of sequestration of the Greyhound common stock and stock options of the individual defendants pursuant to the Delaware statute that allowed the court to compel an appearance of the nonresident by seizing their property. *Id.* at 190–91. Pursuant to the signed sequestration order, 82,000 shares of stock and stock options valued at approximately \$1.2 million were seized. *Id.* at 191–92 & n.7.

32. *Id.* at 192 & n.9 (citing tit. 8, § 169).

The defendants sought to dismiss the complaint, challenging the attachment procedure.<sup>33</sup> The defendants also contended that they did not have sufficient contacts with the State of Delaware to sustain jurisdiction under the standard set out in *International Shoe*.<sup>34</sup> Their arguments were rejected by the Delaware Court of Chancery.<sup>35</sup> The defendants appealed to the Delaware Supreme Court, which affirmed the Court of Chancery.<sup>36</sup>

In the decisions of the Delaware courts, much of the discussion concerned whether the individual defendants' due process rights were violated because they did not have sufficient notice of the sequestration procedure.<sup>37</sup> With respect to the defendants' arguments based on *International Shoe*, the Delaware Supreme Court held that the principles set out in that case did not apply because, pursuant to the state statutes, a Delaware court could assert quasi in rem jurisdiction based on the (statutory) presence of the defendants' stock in state.<sup>38</sup>

The United States Supreme Court reversed.<sup>39</sup> In an opinion delivered by Justice Marshall, the Court held that the Delaware courts' exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment because it based jurisdiction solely on the statutory presence of the defendants' property in Delaware.<sup>40</sup> The Court explained that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*."<sup>41</sup> As such, this form of quasi in rem jurisdiction, or "jurisdiction over the interests of persons in a thing," essentially was abolished because such jurisdiction was permissible only when the non-resident defendant has "minimum contacts" with the forum state.<sup>42</sup> Although the Court substantially limited quasi in rem jurisdiction, it nevertheless emphasized that the non-resident defendant's property may be considered as evidence of minimum contacts in the forum state.<sup>43</sup>

The Court traced the history of personal jurisdiction doctrine from *Pennoyer*'s emphasis on a state's absolute jurisdictional power over

33. *Id.* at 192–93.

34. *Id.* at 193 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

35. *Id.* at 193–94. The chancery court explained that the purpose of § 366 was to compel a nonresident defendant to appear and defend the suit brought against him and that, because the sequestration was for a limited purpose and length of time, it did not violate due process. *Id.* at 193. Furthermore, the court stated "that the statutory Delaware situs of the stock provided a sufficient basis" for the court's assertion of quasi in rem jurisdiction. *Id.*

36. *Id.* at 194.

37. *Id.*

38. *Id.* at 194–95 (citing *Greyhound Corp. v. Heitner*, 361 A.2d 225, 229 (1976), *rev'd*, *Shaffer*, 433 U.S. at 186) ("We hold that seizure of the Greyhound shares is not invalid [even though] plaintiff has failed to meet the prior contacts tests of *Int'l Shoe*.").

39. *Id.* at 195.

40. *Id.* at 213, 216–17.

41. *Id.* at 212.

42. *Id.* at 207.

43. *Id.*

persons and property within its boundaries to *International Shoe*'s focus on fairness based on the defendant's activities in the forum state.<sup>44</sup> *International Shoe*'s analysis was limited to personal jurisdiction over persons. Until *Shaffer*, as the Delaware statutes and state court decisions showed, a state had jurisdiction over property within its boundaries regardless of whether that exercise of jurisdiction was reasonable or fair. In *Shaffer*, the Court questioned the separate rules for evaluating the assertion of personal jurisdiction based on property.<sup>45</sup> It noted the weakening of the *Pennoyer* framework regarding in rem jurisdiction, citing lower courts that questioned that ownership of property alone, unrelated to the underlying dispute, gave a state jurisdiction to adjudicate.<sup>46</sup>

The Court reasoned that in rem jurisdiction is the assertion of jurisdiction over a person's interests in a thing and therefore must satisfy the minimum contacts standard for due process under *International Shoe*.<sup>47</sup> The Court explained that this holding would not affect those in rem proceedings where the property relates to the claim itself or where the ownership of the property serves as evidence of contacts with the forum state.<sup>48</sup> However, going forward, the presence of a defendant's property in the state would not by itself support jurisdiction, although it might provide evidence of ties with the state.<sup>49</sup>

The Court rejected the various arguments that supported maintaining different approaches depending upon whether the personal jurisdiction was based on person or property.<sup>50</sup> It dismissed the notion that quasi in rem jurisdiction was necessary to maintain in order to prevent a defendant from avoiding payment of obligations by "removing his assets to a place where he is not subject to an in personam suit."<sup>51</sup> That concern could be addressed upon a showing that the defendant was engaged in such activity and did not justify an entire jurisdictional category.<sup>52</sup>

The Court acknowledged that the *Pennoyer* regime promoted certainty by establishing clear rules based upon a simple concept (if the defendant's property is in the forum state, the assertion of personal jurisdiction is

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44. *See id.* at 199–204.

45. *Id.* at 205.

46. *Id.*

47. *Id.* at 207.

48. *Id.* at 207–08. Examples of this type of proceeding include title disputes and injuries suffered on a defendant's land. *Id.*

49. *Id.* at 209 ("[A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction.").

50. *See id.* at 210.

51. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (1971)).

52. *Id.* Furthermore, the Court noted, once personal jurisdiction is secured, the full faith and credit clause renders one state's judgment enforceable in all others. *Id.*

permissible).<sup>53</sup> Nevertheless, the Court stated that in most cases it would not be difficult to apply the fairness approach set out in *International Shoe*, and in any event, sacrificing “fair play and substantial justice” was unacceptable.<sup>54</sup> Similarly, merely invoking the history of the *Pennoyer* rules did not justify them. The Court stated that “traditional notions of fair play and substantial justice” may be just as easily offended by “the perpetuation of ancient forms that are no longer justified.”<sup>55</sup>

Applying this standard to the facts of *Shaffer*, the Court concluded that the defendants’ voluntary purchase of stock did not provide sufficient contacts to support Delaware’s assertion of jurisdiction.<sup>56</sup> Although the statute was defended as intending to promote supervision over the management of its corporations, the Court found no relationship between holding a fiduciary position in a corporation and owning stock in that corporation.<sup>57</sup> The Court stated that if the responsibilities and obligations of corporate officers were the primary interest of the state, then Delaware should have based jurisdiction on that corporate-fiduciary role rather than the presence of property.<sup>58</sup> Heitner also argued that appellants, by assuming positions as corporate officers in a Delaware corporation, were provided substantial benefits by the state;<sup>59</sup> therefore, it was reasonable for them to answer in the state in return for these benefits.<sup>60</sup> The Court found this argument unpersuasive as it did not demonstrate that appellants “purposefully avail[ed]” themselves of the benefits so that they would have reasonably expected to defend themselves in the State.<sup>61</sup> Delaware did not treat acceptance of a directorship as consent to jurisdiction, and it was not reasonable for anyone buying securities in a Delaware corporation to “impliedly consent” to jurisdiction.<sup>62</sup> Thus, Delaware’s assertion of jurisdiction over appellants was inconsistent with the Due Process Clause.<sup>63</sup>

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53. *See id.* at 211.

54. *Id.*

55. *Id.* at 212.

56. *Id.* at 213.

57. *Id.* at 214.

58. *Id.* at 214–15. In fact, after the Supreme Court’s decision in *Shaffer*, “the Delaware legislature enacted a statute purporting to give its courts jurisdiction over officers and directors of Delaware corporations in cases related to their activities,” and the “Delaware Supreme Court upheld the statute against constitutional attack in *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980).” YEAZELL, *supra* note 18, at 93–94; *see* DEL. CODE ANN. tit. 10, § 3114 (2010).

59. *Shaffer*, 433 U.S. at 215–16.

60. *Id.*

61. *Id.* at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (noting that Heitner’s line of reasoning suggests that although Delaware law may appropriately govern, Delaware does not have jurisdiction).

62. *Id.* at 216.

63. *Id.* at 216–17. Justice Marshall’s decision for the Court was joined in full by five other justices and in part by Justice William Brennan, who agreed with parts I through III articulating the new rule. *Id.* at 220. However, Justice Brennan disagreed with Part IV

Justice Stevens did not join any part of the Court's decision and instead wrote a short opinion concurring in the judgment.<sup>64</sup> Stevens agreed with the concurring opinion of Justice Lewis Powell that the majority's opinion "should not be read to invalidate quasi in rem jurisdiction where real estate is involved."<sup>65</sup>

Justice Stevens reasoned that the Due Process Clause protects against "judgments without notice."<sup>66</sup> He explained that notice comes in two forms for nonresident defendants: actual notice in the historical form of publication, registered mail, or personal service outside the state, and "fair notice," which is fair warning that the defendant's activity may subject him to the jurisdiction of the state.<sup>67</sup> Activities such as purchasing real estate, visiting, or opening a bank account in the state serve as fair notice because the defendant should expect that the state may "exercise its power over [his] property or . . . person while there."<sup>68</sup>

With respect to the defendants in *Shaffer*, Justice Stevens asserted that purchasing securities on the open market did not provide fair notice of Delaware's power to exercise jurisdiction.<sup>69</sup> He explained that "[o]ne who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction."<sup>70</sup> He added that although it was reasonable to expect a purchaser of stock from a corporation in a foreign country to research international law, it was not reasonable to expect the purchaser of stock in a domestic corporation to research the law of the state of incorporation to determine whether any applicable laws related to the situs of the stock would raise jurisdictional issues at some future date.<sup>71</sup> In fact, he stated, the Delaware statute created "an unacceptable risk of judgment without notice" because Delaware was the only state that considered stock to be located in the corporation's state of incorporation, even where the actual certificates and owner were not within the State.<sup>72</sup>

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because he believed that properly applied, the new rule established that Delaware had personal jurisdiction over the defendants in this case. *Id.*

64. *Id.* at 217 (Stevens, J., concurring in judgment).

65. *Id.* at 219 (emphasis omitted).

66. *Id.* at 218 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324 (Black, J.) (1945)). Justice Stevens's citation to Justice Black's opinion rather than the opinion of the Court suggests that he may not have wholeheartedly endorsed the minimum contacts standard, especially when used to undermine traditionally accepted methods of obtaining jurisdiction. See Cox, *supra* note 3, at 533-34.

67. *Shaffer*, 433 U.S. at 218.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 218-19.

72. *Id.* at 218.

The statute therefore imposed an inherent, unknown risk for every purchaser of a domestic market security to have to litigate in Delaware.<sup>73</sup>

Justice Stevens concluded by articulating his concern with the breadth of the majority's opinion and how it would be applied in other contexts.<sup>74</sup> He would not have invalidated quasi in rem jurisdiction in cases of real property or in the other traditional methods of establishing jurisdiction where the defendant had received adequate notice of both the actual controversy and where his activity could subject him to that state's jurisdiction.<sup>75</sup>

Justice Stevens's decision to write separately, and his refusal to join the opinion of the Court because of its unnecessarily broad holding, was entirely consistent with his common law approach to judging. Moreover, his concurrence rested upon an analysis of the property that authorized the exercise of personal jurisdiction—shares of stock sold on the open market—rather than the more general categories of in personam and in rem jurisdiction.<sup>76</sup> Stevens thus decided the case narrowly and expressed his disagreement with the court's having decided “a great deal more than is necessary to dispose of this case.”<sup>77</sup>

## 2. Asahi: *The Stream of Commerce Tests*

Subsequent to *Shaffer* and the Court's applying the minimum contacts approach set out in *International Shoe* to assertions of personal jurisdiction over property as well as persons, the Court decided several cases involving the exercise of specific jurisdiction.<sup>78</sup> The most important was *World-Wide Volkswagen Corp. v. Woodson*,<sup>79</sup> in which the Court elaborated on the notion that “purposeful availment” is necessary to support the forum state's exercise of personal jurisdiction over a non-resident defendant.<sup>80</sup> In

73. *Id.* Justice Stevens also found the Delaware statute to be unconstitutional because it forced the defendant to choose between defending on the merits and subjecting himself to the unlimited jurisdiction of the court or the loss of his property. *Id.* at 218–19.

74. *Id.* at 219.

75. *Id.*

76. *See id.* at 218–19.

77. *Id.* at 219.

78. *See also* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011) (“Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving ‘single or occasional acts’ occurring or having their impact within the forum State.”).

79. 444 U.S. 286 (1980).

80. The Court held that the retail seller of an automobile, located in New York, and its wholesale distributor, which did business in the Northeast, could not be haled into an Oklahoma forum because neither defendant had contacts with the State of Oklahoma or attempted to do business in the state. *Id.* at 298. That is, neither defendant “purposefully avail[ed] itself of the privilege of conducting activities within the forum state.” *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The majority decision was written

addition, *World-Wide Volkswagen* is apparently the first case in which the Court articulated the five factors to be analyzed when determining whether “traditional notions of fair play and substantial justice” have been “offend[ed]” by the exercise of personal jurisdiction.<sup>81</sup> *World-Wide Volkswagen* involved an attempt to exercise specific jurisdiction over a retail seller and its wholesale distributor.<sup>82</sup> An open question remained as to what showing was necessary to exercise specific jurisdiction over the out-of-state manufacturer of a product (and the out-of-state manufacturers of component parts of a product) sold into the forum state. The Court addressed that question in *Asahi Metal Industry Co. v. Superior Court*,<sup>83</sup> decided seven years after *World-Wide Volkswagen*.

In *Asahi*, the Supreme Court addressed the standard for establishing minimum contacts in a case involving the sale or delivery of products in the stream of commerce.<sup>84</sup> Justice O’Connor wrote the opinion for the Court; however, she could gather only three other votes<sup>85</sup> to support her view that the mere placement of a product in the stream of commerce by a foreign company was not sufficient to establish purposeful availment by that company.<sup>86</sup> In a separate opinion, Justice Brennan championed a less demanding standard, one that only required the sale or delivery of a product in the stream of commerce.<sup>87</sup> Because Justice Stevens did not join either decision with respect to the standard for minimum contacts,<sup>88</sup> the Court could not and did not establish a general rule for establishing personal jurisdiction in a stream-of-commerce case. His refusal to join either opinion was entirely consistent with his reluctance to rely on a general rule to decide a case, especially where the case could be decided without the articulation of such a rule.<sup>89</sup>

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by Justice Byron White and received the vote of Justice Stevens. *Id.* at 286. Three justices dissented, including Justice Brennan. *Id.* at 286, 299.

81. *Id.* at 292 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). As the citations in the relevant paragraph of the Court’s decision demonstrate, the different factors had been set out in previous cases; however, *World-Wide Volkswagen* represents the first decision in which the different factors were collected and presented as part of “fair play and substantial justice” inquiry.

82. *Id.* at 288.

83. 480 U.S. 102 (1987).

84. *Id.* at 105.

85. *Id.*

86. *Id.* at 112.

87. *Id.* at 117.

88. *Id.* at 121.

89. The Supreme Court revisited the stream-of-commerce theory of personal jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), a products liability lawsuit in which the British manufacturer of a metal-shearing machine was sued in New Jersey by a man who injured himself using the machine in that state. As noted in the text preceding this footnote, the Court in *Asahi* did not agree on the standard for establishing personal jurisdiction in a stream-of-commerce case. In *McIntyre*, the Court again failed to agree on the standard in such a case. Justice Kennedy’s plurality opinion rejected the

*Asahi* arose out of a motorcycle accident that occurred on September 23, 1978, when Gary Zurcher was severely injured and his wife was killed after he lost control of his motorcycle and collided with a tractor on a highway in California.<sup>90</sup> About a year later, Zurcher filed a product-liability lawsuit in California Superior Court alleging that the accident was caused by the motorcycle's defective tire, tube, and sealant; specifically, Zurcher claimed that the defective products caused the tire to explode while he and his wife were riding the motorcycle and that malfunction of the tire caused the accident.<sup>91</sup>

Zurcher sued a number of defendants, including Cheng Shin Rubber Industrial Co., Ltd. ("Cheng Shin"), the manufacturer of the tube used in the motorcycle tire.<sup>92</sup> Cheng Shin then filed a cross-complaint seeking indemnification from Asahi Metal Industry Co., Ltd. ("Asahi"), the manufacturer of the tube's valve assembly.<sup>93</sup> Eventually Zurcher settled with Cheng Shin and the other defendants so that the only remaining dispute in the lawsuit was Cheng Shin's indemnity action against Asahi.<sup>94</sup> Asahi moved to quash Cheng Shin's service of summons, arguing that California's exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment.<sup>95</sup>

The record established that Asahi was a Japanese corporation that manufactured tire valve assemblies in Japan and sold them to Cheng Shin in Taiwan for use in finished tire tubes.<sup>96</sup> Along with valve assemblies from other suppliers, Cheng Shin bought and installed

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standard set out by Justice Brennan, which he characterized as a "rule based on general notions of fairness and foreseeability" and found was "inconsistent with the premises of lawful judicial power." *Id.* at 2789. Justice Kennedy elaborated that "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Id.* Justice Kennedy held that the defendant, the British manufacturer, did not purposefully avail itself of the New Jersey market and therefore could not be sued in state court in New Jersey. *Id.* at 2790–91. However, his decision did not garner five votes and therefore only resolved the case but did not establish a rule. Justice Breyer, joined by Justice Alito, wrote a concurring opinion in which he stated that "[n]one of the Court's precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here [specifically the use of an independent distributor in the United States], is sufficient" for the New Jersey court to exercise jurisdiction over the British manufacturer. *Id.* at 2791. Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented. She argued that the British manufacturer, which "targeted a national market, including any and all states" through a distributor, should be "answerable in New Jersey for the harm [the plaintiff] suffered at his workplace in that State." *Id.* at 2804 (Ginsburg, J., dissenting).

90. *Asahi*, 480 U.S. at 105.

91. *Id.* at 106.

92. *Id.*

93. *Id.*

94. *Id.* at 106.

95. *Id.*; see also CAL. CIV. PROC. CODE § 410.10 (West 2004) (authorizing jurisdiction "on any basis not inconsistent with the state or federal Constitutions").

96. *Asahi*, 480 U.S. at 106.

150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States [were] in California.<sup>97</sup>

Although Cheng Shin claimed that Asahi was aware of the company's California sales, Asahi insisted that it had not contemplated that it would be subject to lawsuits in California given the small percentage of sales to Cheng Shin.<sup>98</sup>

The California Superior Court denied Asahi's motion to quash. This decision was reversed by the California Court of Appeals.<sup>99</sup> However, the Court of Appeals then was reversed by the California Supreme Court, which held that Asahi's knowledge that some of the tires would be sold in California, and the fact that Asahi indirectly benefitted from those sales, were sufficient to establish jurisdiction in California under the stream-of-commerce doctrine.<sup>100</sup> The United States Supreme Court granted certiorari and reversed.<sup>101</sup> As noted above, the Court divided on the appropriate standard for stream-of-commerce jurisdiction, but agreed—with the exception of Justice Scalia—that the exercise of personal jurisdiction over Asahi would offend “traditional notions of fair play and substantial justice.”<sup>102</sup>

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97. *Id.*

98. *Id.* at 107.

99. *Id.*

100. *Id.* at 108.

101. *Id.*

102. *Id.* at 113 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The Court considered the factors set out in *World-Wide Volkswagen* to determine the reasonableness of jurisdiction including the burden on Asahi, California's interests in maintaining jurisdiction, and Cheng Shin's interest in obtaining relief. *Id.* at 113. As Justice O'Connor wrote, the burden on Asahi would be severe because it would have to travel to another country and subject itself to a foreign judicial system. *Id.* at 114. California's interests were minimal because both parties were foreign and the transaction took place overseas. *Id.* California's interest in consumer-safety standards were minimal, at best, because the deterrent effect of imposing jurisdiction would still be served as long as parties that purchased (and then sold) Asahi's products, such as Cheng Shin, were subject to suit in California. *Id.* at 115. Additionally, Cheng Shin did not demonstrate that jurisdiction in California would be more convenient than in its own country or Japan. *Id.* Finally, the Court held that neither “the interstate judicial system's interest in obtaining the most efficient resolution of controversies” nor the “shared interest of the several States in furthering fundamental substantive social policies” weighed in favor of California retaining jurisdiction over the indemnification dispute that remained between two foreign corporations. *Id.* at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). The Court therefore held that California's exercise of personal jurisdiction was not “consistent with fair play and substantial justice.” *Id.* at 116.

In Part II-A of her opinion, Justice O'Connor—joined by Chief Justice Rehnquist and Justices Powell and Scalia—addressed whether placing a product into the stream of commerce constituted the “purposeful availment” necessary to establish minimum contacts.<sup>103</sup> The Court noted that since *World-Wide Volkswagen*, lower courts have been divided when confronted with stream-of-commerce cases.<sup>104</sup> While some courts had permitted jurisdiction when the defendant merely placed a product in the stream of commerce knowing that the product would be sold in that state, other courts had permitted jurisdiction only with an additional showing of purposeful availment.<sup>105</sup>

Justice O'Connor agreed with the latter position, which required more than mere placement of a product in the stream of commerce in order to satisfy due process.<sup>106</sup> Applying this standard, the Court reasoned that even if Asahi was aware that its product would end up in California, Cheng Shin had not demonstrated that Asahi purposefully availed itself of the California market.<sup>107</sup> O'Connor noted that “Asahi [did] not do business in California,” nor did it “advertise or otherwise solicit business in California”;<sup>108</sup> Asahi “did not create, control, or employ the distribution system that brought its valve [assemblies] to California”; and there was no evidence that Asahi specifically designed its product “in anticipation of sales in California.”<sup>109</sup> Justice O'Connor concluded that California's assertion of personal jurisdiction over Asahi violated due process.<sup>110</sup> This discussion drew explicitly on the discussion of purposeful availment and foreseeability in *World-Wide Volkswagen* but did not garner the vote of Justice White, who wrote the Court's decision in that case.<sup>111</sup>

In his concurring opinion, Justice Brennan argued that mere placement of a product in the stream of commerce was sufficient to establish purposeful availment and therefore concluded that Asahi had established minimum contacts.<sup>112</sup> Brennan stated that “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated

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103. *Id.* at 108–09.

104. *Id.* at 110.

105. *Id.* at 110–12.

106. *Id.* at 112.

107. *Id.*

108. *Id.*

109. *Id.* at 112–13.

110. *Id.* at 113.

111. *See id.* at 109–11 (discussing *World-Wide Volkswagen Corp.*), 105 (reporting that Justice White did not join Part II-A of the Court's opinion in *Asahi*).

112. *See generally id.* at 116–21 (Brennan, J., concurring in part and concurring in the judgment). Brennan stated that “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale” and concluded that “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Id.* at 117.

flow of products from manufacture to distribution to retail sale” and concluded that “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”<sup>113</sup> Brennan’s concurrence was joined by Justices White, Blackmun, and Marshall, all of whom agreed with the holding that the exercise of personal jurisdiction would offend notions of fair play and substantial justice.<sup>114</sup>

Justice Stevens did not join the opinions of either Justice O’Connor or Justice Brennan with respect to minimum contacts.<sup>115</sup> Joining only in Parts I and II-B of O’Connor’s decision, but not Part II-A, Stevens stated that the case could be decided solely on the grounds that personal jurisdiction over Asahi was “unreasonable and unfair.”<sup>116</sup> In his view, because the Court did not have to develop a new rule, it should not have done so and instead should have decided the case based on already-established rules governing personal jurisdiction.<sup>117</sup>

In dicta, Justice Stevens nevertheless applied the facts of the case to the “stream of commerce plus” rule set out by Justice O’Connor and concluded that in fact Asahi satisfied her higher standard for purposeful availment. He observed that “Asahi ha[d] arguably engaged in a higher quantum of conduct than ‘[t]he placement of a product into the stream of commerce, without more’”<sup>118</sup> and noted that Asahi delivered over 100,000 valve assemblies annually over a period of several years.<sup>119</sup> Such activity, Stevens suggested, could constitute “purposeful availment” even though the valve assembly was a standard product marketed worldwide.<sup>120</sup> Stevens presented this analysis as dicta to avoid making a “constitutional determination” based upon the amount, value, and hazardous character of the particular product.<sup>121</sup>

Justice Stevens’s concurrence was a model of judicial restraint. His decision was narrow, resolving the case solely on the grounds of fair play and substantial justice and thereby avoiding unnecessary “constitutional

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113. *Id.* at 117.

114. *Id.* at 116.

115. *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment). Justices White and Blackmun joined his concurrence. *Id.*

116. *Id.* at 121–22; *see also* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (“Given the confines of the controversy, the dueling opinions of Justice Brennan and Justice O’Connor were hardly necessary.”).

117. *Id.* at 122 (“I see no reason for the plurality to articulate ‘purposeful direction’ or any other test as the nexus between the act of a defendant and the forum State that is necessary to establish minimum contacts.”).

118. *Id.* at 122 (quoting *Asahi*, 480 U.S. at 112 (majority opinion)) (alteration in original).

119. *Id.*

120. *Id.* (Stevens, J., concurring in part and concurring in the judgment).

121. *See id.*

adjudication.”<sup>122</sup> Furthermore, by not joining the decision of either O’Connor or Brennan with respect to minimum contacts, Stevens denied a fifth vote to each decision. Therefore neither decision had the five votes necessary to become the rule for future cases; instead, the Court only was able to decide the case before it. By deciding the case under established rules with respect to fair play and substantial justice, Stevens prevented the Court from articulating a new rule with respect to minimum contacts in stream-of-commerce cases—and thereby constrained the Court from acting in a manner that was not consistent with his general view of how cases should be decided.<sup>123</sup>

### B. *Focusing on Fairness: Burger King & Carnival Cruise*

*Shaffer* and *Asahi* illustrated Stevens’s resistance to articulating general rules and developing new rules when existing rules were sufficient to decide the case before the Court. *Shaffer* and *Asahi* also reflected Stevens’s concern for a fair result. In *Shaffer*, Stevens did not believe that the purchase or ownership of stock alone should subject a non-resident to personal jurisdiction,<sup>124</sup> while in *Asahi*, Stevens based his decision on principles of fair play and substantial justice,<sup>125</sup> the Court’s phrase for ensuring fairness in the exercise of personal jurisdiction. In the two cases discussed in this section, Stevens’s concern for fairness—in particular his concern for a fair result based on the facts of the particular case—led him to dissent in each case. It is worth noting that each case involves the intersection of principles of contract law with the rules of personal jurisdiction. As discussed below, contract law invites consideration of the balance of power between the parties as well as their sophistication and therefore permits the court to consider the fairness of the transaction between the parties.

#### 1. Burger King: *Haling the Local Franchisee Across State Lines*

The Supreme Court’s decision in *Burger King Corporation v. Rudzewicz*<sup>126</sup> illustrates a different aspect of the common law judicial approach taken by Justice Stevens. *Burger King* is perhaps most well-known as the Supreme Court’s principal personal jurisdiction decision involving claims for breach of contract.<sup>127</sup> The Court decided by a 7–2 vote—with Justice Brennan writing for the Court and Stevens (joined by

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122. See Stevens, *The Bill of Rights: A Century of Progress*, *supra* note 13, at 37.

123. The Supreme Court declined to consider stream-of-commerce jurisdiction until after Stevens resigned. See *J. McIntyre Mach. Ltd. v. Nicaastro*, 131 S. Ct. 2780 (2011), discussed *supra* note 89 and *infra* Conclusion.

124. See *supra* note 64–76 and accompanying text.

125. See *supra* notes 112–117 and accompanying text.

126. 471 U.S. 462 (1985).

127. *Id.* at 466.

Justice White) dissenting—that Florida could exercise personal jurisdiction over a franchisee who conducted business exclusively in Michigan because of the nature of the contractual dealings between the parties.<sup>128</sup> *Burger King* also is well-known because it sought to clarify the relationship between minimum contacts and fair play and substantial justice in a specific-jurisdiction case.<sup>129</sup> Stevens argued in his dissent that it would not be fair for Burger King, the franchisor, to be able to hale its franchisee into its home state and out of the franchisee’s state.<sup>130</sup> His decision emphasized the disparity in power between the parties, focused on the facts of the particular case, and relied on the more detailed discussion of the federal court of appeals decision that ultimately was reversed by the Supreme Court.<sup>131</sup>

The litigation grew out of a franchise agreement that was entered into in June 1979 between Burger King, a Florida corporation, and John Rudzewicz and Brian MacShara to operate a Burger King restaurant in Drayton Plains, Michigan.<sup>132</sup> The restaurant initially performed well; however, with the advent of a recession later that year, business declined and the franchisees fell behind in monthly payments required under the agreement.<sup>133</sup> Negotiations between the parties were unsuccessful, and Burger King terminated the franchise and demanded that Rudzewicz and MacShara vacate.<sup>134</sup> Rudzewicz and MacShara refused and ended up being sued by Burger King in the United States District Court for the Southern District of Florida in May 1981.<sup>135</sup>

Burger King asserted that there was personal jurisdiction over the defendants in Florida because they failed to make payments “at [its] place of business in Miami, Dade County, Florida.”<sup>136</sup> The District Court agreed with Burger King and ultimately entered a judgment in its favor.<sup>137</sup> On appeal, the Eleventh Circuit reversed on the grounds that Rudzewicz did not have reasonable notice of the possibility of franchise litigation in

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128. *See id.* at 479–83 (discussing parties’ negotiations and contract terms), 487 (because defendant franchisee “established a substantial and continuing relationship with Burger King’s Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would be fundamentally unfair,” Florida forum had personal jurisdiction over franchisee).

129. *Id.* at 477–78.

130. *Id.* at 487–88 (Stevens, J., dissenting).

131. *Id.* at 487–89.

132. *Id.*

133. *Id.* at 468. Under the agreement, John Rudzewicz was personally liable for over \$1 million of payments over twenty years. *Id.* at 467.

134. *Id.* at 468

135. *Id.*

136. *Id.*

137. *Id.* at 469. Burger King was awarded \$228,875 in damages. *Id.* In addition, the district court ordered the defendants to close the restaurant. *Id.*

Florida.<sup>138</sup> The Supreme Court granted certiorari and reversed the Court of Appeals.<sup>139</sup>

Justice Brennan's decision for the Court set out the precedent related to state court jurisdiction over non-resident defendants and the nature of the Due Process liberty interest articulated in *International Shoe*.<sup>140</sup> A defendant who has "'deliberately' . . . engaged in significant activities" in the state<sup>141</sup> or created "'continuing obligations' between himself" and a resident of the state is considered to have "availed himself of the privilege of conducting business there."<sup>142</sup> Because the defendant benefitted from that state's laws, it is reasonable for that defendant to bear the burden of litigating there.<sup>143</sup> Once the defendant's contacts have been established as purposeful, the Court explained, to avoid jurisdiction, the defendant must present a compelling argument that the burden is nonetheless unreasonable and does not comport with "fair play and substantial justice."<sup>144</sup> More specifically, the defendant must show that litigation in the forum state poses extraordinary difficulty and inconvenience, leaving him at a severe disadvantage to his opposition.<sup>145</sup>

The Court then detailed the defendants' contacts with Florida, describing the franchisees' relationship with the corporate office in Miami. It described the "day-to-day monitoring of franchisees" by Burger King's district office in Michigan.<sup>146</sup> Brennan described Burger King's two-tiered administrative structure, which gave primary responsibility and authority to the Miami headquarters, and the franchise contract, which required payments and certain notifications to Miami and established that the relationship began in Miami and was governed by Florida law.<sup>147</sup> The Court reasoned that even though Rudzewicz had no physical ties to Florida,

138. *Id.* at 469–70. Only Burger King's contract damages were at issue on appeal. *Id.* at 469 n.11. The Court explained that MacShara did not appeal and Rudzewicz settled with respect to Burger King's trademark claim and the District Court's entry of injunctive relief. *Id.*

139. *Id.* at 471.

140. *Id.* at 471–72. Quoting Justice Stevens's concurrence in *Shaffer*, the Court noted that "individuals [must] have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign'" so that they can conduct their affairs accordingly. *Id.* at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). The Court stated that where a defendant has "purposely directed" his activities at residents of the forum, "fair warning" is satisfied. *Id.* at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

141. *Id.* at 475–76 (quoting *Keeton*, 465 U.S. at 781).

142. *Id.* at 476 (quoting *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 648 (1950)).

143. *Id.*

144. *Id.* at 476–77 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

145. *Id.* at 478 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). The Court noted, however, that measures such as application of choice-of-law rules or changing venue often would provide the appropriate relief. *Id.* at 477.

146. *Id.* at 464–66.

147. *Id.* at 465–66.

his franchise dispute arose directly from “a contract which had [a] substantial connection with that State.”<sup>148</sup>

The Court found that rather than operating a local, independent business, Rudzewicz voluntarily and deliberately reached outside Michigan and negotiated with a Florida corporation for a long-term franchise agreement in order to enjoy the many benefits associated with a nationwide organization.<sup>149</sup> Rudzewicz negotiated and entered into a twenty-year relationship that resulted in “continuing and wide-reaching contacts with Burger King in Florida.”<sup>150</sup> The Court added that Rudzewicz’s continued refusal to make payments in Miami and use of Burger King’s trademarks after termination of the contract caused foreseeable injuries to the Florida corporation and served as fair warning that he should have reasonably anticipated litigation in that state.<sup>151</sup>

Although it acknowledged the argument that Rudzewicz had no reason to anticipate suit outside of Michigan given the dealings with and supervision by the Michigan office, the Court nonetheless concluded that he “most certainly knew” that he was associating himself with a Florida corporation based on the contract itself.<sup>152</sup> The choice-of-law provision stated that all disputes would be governed by Florida law and demonstrated Rudzewicz’s deliberate affiliation with Florida, establishing that he should have expected to defend himself there should litigation occur.<sup>153</sup>

As to whether any factors outweighed purposeful availment and established that Florida’s jurisdiction was unconstitutional, the Court concluded that Florida had a legitimate state interest in holding Rudzewicz answerable on a claim related to his contacts in the State.<sup>154</sup> The Court rejected Rudzewicz’s argument that many aspects of the franchise agreement were governed by Michigan’s Franchise Investment Law<sup>155</sup> and stated that he failed to show how Michigan’s concurrent interest rendered Florida’s jurisdiction unconstitutional.<sup>156</sup> Addressing the Eleventh Circuit’s conclusion that Florida litigation would severely impair Rudzewicz’s ability to call essential Michigan witnesses, the Court stated that these claims lacked support in the record and that, regardless, the

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148. *Id.* at 479 (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

149. *Id.* at 479–80.

150. *Id.* at 480.

151. *Id.*

152. *Id.*

153. *Id.* at 482.

154. *Id.* at 482–83.

155. *Id.* at 483 & n.25 (citing MICH. COMP. LAWS § 445.1501 *et seq.* (1979)) (noting in footnote 26 that Burger King complied with Michigan’s Franchise Act and that the Act does not confer exclusive jurisdiction in Michigan).

156. *Id.* at 483.

remedy typically was change of venue rather than dismissal for lack of jurisdiction.<sup>157</sup>

The Court also rejected the arguments that Rudzewicz was a victim of unequal bargaining power who did not receive “fair notice.”<sup>158</sup> It instead deferred to the District Court’s factual finding that he and MacShara were “sophisticated” and that they were never under economic duress or disadvantaged by Burger King.<sup>159</sup> Stating that there is no standard formula and that the facts in each case must be weighed individually, the Court also rejected the assertion that its ruling would permit jurisdiction over franchisees or consumers owing more modest debts and result in default judgments.<sup>160</sup> The Court concluded that because Rudzewicz had a continuous and substantial relationship with the Miami headquarters, received fair notice from the course of dealing and the contract documents themselves, and failed to demonstrate that Florida’s jurisdiction would be unfair, “the District Court’s exercise of personal jurisdiction [over the defendants] did not offend due process.”<sup>161</sup>

Justice Stevens dissented, arguing that the result was unfair.<sup>162</sup> He noted Rudzewicz’s lack of contacts with Florida, the forum state.<sup>163</sup> Specifically, Stevens observed that Rudzewicz did not maintain a place of business or employees in Florida, nor was he licensed to do business in Florida.<sup>164</sup> In addition, “his business, property, and payroll taxes were [all] payable in [Michigan], and he sold all of his products there.”<sup>165</sup> Moreover, Stevens contended that the Michigan district office handled all of the “principal contacts” with Rudzewicz.<sup>166</sup> In his dissent, Stevens adopted Judge Vance’s opinion for the Court of Appeals for the Eleventh Circuit.<sup>167</sup>

Judge Vance found that Rudzewicz also was financially ill-equipped for suit in Florida.<sup>168</sup> Despite the fact that the franchise was nationally

157. *Id.* at 483–84; *see also id.* at n.25.

158. *Id.* at 484.

159. *Id.* “Rudzewicz was represented by counsel,” and he was an experienced accountant who engaged in a five-month negotiation with Burger King and “obligated himself personally to contracts” requiring over \$1 million in payments over time. *Id.* at 485 (quoting *Burger King Corp. v. Macshara*, 724 F.2d 1505, 1514 (11th Cir. 1984)). *But see id.* at 489–90 (Stevens, J., dissenting).

160. *Id.* at 485–86 (majority opinion).

161. *Id.* at 487.

162. *Id.* (Stevens, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.* (Rudzewicz “did not prepare his French fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce ‘with the expectation that they [would] be purchased by consumers in’ Florida” (quoting *id.* at 473 (majority opinion))).

166. *Id.*

167. *Id.* at 488.

168. *Id.* at 489 (quoting *Burger King*, 724 F.2d at 1512).

affiliated, the restaurant was primarily a local business serving a specific geographic community, and its revenues typically would not support the cost of remote litigation.<sup>169</sup> Furthermore, Rudzewicz did not benefit from price concessions in exchange for the added risk of suit in Florida and instead signed a standard-form contract with non-negotiable terms.<sup>170</sup> Since Rudzewicz lacked reasonable notice of litigation in Florida and was financially unprepared for such a suit, the Court of Appeals concluded that jurisdiction in Florida “offend[ed] the fundamental fairness which is the touchstone of due process.”<sup>171</sup>

Although Justice Brennan canvassed the relevant facts, he emphasized the precedential rules governing specific jurisdiction rather than the notion of “fundamental fairness” that informed Justice Stevens’s dissent.<sup>172</sup> Stevens was particularly critical of the majority’s reliance on standard contract language, such as provisions concerning choice of law, payments, and authority.<sup>173</sup> He characterized that analysis as “superficial” and contended that it created the “potential for unfairness . . . in negotiations between franchisors and their franchisees [and] . . . the resolution of . . . disputes.”<sup>174</sup>

Stevens relied on Judge Vance’s discussion of Rudzewicz’s contacts with the two states and his conclusion that the contacts with the district office in Michigan were so substantial that it was reasonable for Rudzewicz to not anticipate litigation in Florida. Furthermore, the question for Stevens was not whether there was some minimal basis for personal jurisdiction in Florida over Rudzewicz, but whether it would be fair to hale the local franchisee from Michigan into the Florida forum when the activity under the contract was focused on Michigan. This fact-specific approach illustrates his overarching concern with arriving at a fair result in the dispute between the parties.

Justice Stevens also expressed concern about the potential for unfairness in negotiations between franchisors and franchisees where the franchisor is typically dominant.<sup>175</sup> Justice Brennan focused on Rudzewicz’s sophistication and concluded that Florida’s exercise of personal jurisdiction over him was fair.<sup>176</sup> Stevens, however, argued that regardless of Rudzewicz’s sophistication, he nevertheless was an individual who did not stand on equal footing in his negotiations with Burger King.<sup>177</sup> Stevens viewed the relationship between a national franchisor and a local

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169. *Id.* (quoting *Burger King*, 724 F.2d at 1512).

170. *Id.* at 489–90 (quoting *Burger King*, 724 F.2d at 1512–13).

171. *Id.* at 490 (quoting *Burger King*, 724 F.2d at 1513).

172. *See id.*

173. *Burger King*, 471 U.S. at 488 (Stevens, J., dissenting).

174. *Id.*

175. *Id.* at 489 (quoting *Burger King*, 724 F.2d at 1512).

176. *Id.* at 485 (majority opinion).

177. *Id.* at 489 (Stevens, J., dissenting).

franchisee as embodying a “characteristic disparity of bargaining power” borne out by the history of the relationship between the parties.<sup>178</sup> Although Stevens’s consideration of the future impact of the ruling would seem to be at odds with his preference for narrow decisions,<sup>179</sup> his discussion was not the “conjuring up [of] horrible possibilities that never happen in the real world,”<sup>180</sup> but instead a practical acknowledgment of the inevitable disputes between franchisors and franchisees.<sup>181</sup>

## 2. Carnival Cruise: Enforcing a Forum-Selection Clause Against a Passenger on a Cruise Line

The issue of fundamental fairness in the personal jurisdiction context also was addressed in *Carnival Cruise Lines, Inc. v. Shute*.<sup>182</sup> In *Carnival Cruise*, the Court addressed whether a forum-selection clause printed on a cruise ticket issued by Carnival Cruise Lines, Inc. (“Carnival”), a Florida corporation, to Washington State residents Eulala and Russel Shute was reasonable and enforceable.<sup>183</sup>

The Shutes purchased passage for a cruise on the *Tropicale* through a Washington State travel agent who forwarded the payment to Carnival’s headquarters in Florida.<sup>184</sup> The Shutes then received the tickets from Carnival in Washington State.<sup>185</sup> Each ticket contained a forum-selection clause specifying that by accepting the ticket, the purchaser agreed that “all disputes . . . arising under . . . this Contract shall be litigated . . . [only] in the State of Florida.”<sup>186</sup>

The Shutes boarded the ship in California, which sailed to Mexico and back.<sup>187</sup> Eulala Shute was injured when she slipped and fell during a tour while the ship was in international waters off the Mexico coast.<sup>188</sup> The Shutes filed suit in the United States District Court for the Western District of Washington, asserting a claim sounding in negligence against Carnival.<sup>189</sup> Carnival moved for summary judgment, contending that

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178. *Id.* (quoting *Burger King*, 724 F.2d at 1512).

179. See Popkin, *supra* note 2, at 1109 (noting that Justice Stevens’s objection to the Court’s consideration of hypothetical scenarios is closely related to his concern with overly broad rulings).

180. John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 281 (2005) (quoting with approval Justice Blackmun in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985)).

181. *Burger King*, 471 U.S. at 488 (Stevens, J., dissenting).

182. 499 U.S. 585 (1991).

183. *Id.* at 587.

184. *Id.*

185. *Id.*

186. *Id.* at 587–88.

187. *Id.* at 588.

188. *Id.*

189. *Id.*

Florida was the forum agreed upon for resolution of any dispute.<sup>190</sup> Ultimately, the Ninth Circuit refused to enforce the forum-selection clause, prompting Carnival to petition the Supreme Court.<sup>191</sup> The Court reversed the Ninth Circuit.<sup>192</sup> Justice Blackmun wrote the opinion of the Court, which received seven votes.<sup>193</sup>

The Supreme Court initially noted that because this was a case in admiralty, federal law would govern enforceability of the forum-selection clause.<sup>194</sup> In addition, because the Shutes conceded that they were aware of the clause, they could not and did not assert that enforcement of the contract violated due process on notice grounds.<sup>195</sup>

Before the Supreme Court and the Ninth Circuit, both parties relied on a prior Supreme Court decision, *The Bremen*,<sup>196</sup> to support their contentions.<sup>197</sup> *The Bremen* involved a commercial contract negotiated between an American corporation and a German corporation “for the towage of . . . [a] rig from Louisiana to” a location “off the coast of Italy.”<sup>198</sup> The corporations agreed that any contractual dispute was to be resolved in the London Court of Justice.<sup>199</sup> The Court recognized that the agreement in *The Bremen* involved a “far from routine transaction” where the forum was likely to have been selected with great care. The Shutes contended—successfully before the Court of Appeals—that *The Bremen* could not be invoked to validate the forum-selection clause in their case because they were “not business persons and did not negotiate the terms of the clause” with Carnival Cruise.<sup>200</sup> The Supreme Court disagreed, holding that the evaluation of “reasonableness” required under *The Bremen* meant that the Court had to “refine [its] analysis . . . to account for the realities of

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190. *Id.*

191. *Id.* at 588–89.

192. *Id.* at 597.

193. *Id.* at 586.

194. *Id.* at 590. Although the only question before the Supreme Court was whether the forum-selection clause should be enforced, there was extensive litigation in the lower courts over the issue of minimum contacts. The District Court granted Carnival Cruise’s motion for summary judgment on the grounds that its contacts “with Washington were constitutionally insufficient to support the exercise of personal jurisdiction.” *Id.* at 588. The Court of Appeals reversed, reasoning that “but for” Carnival Cruise’s “solicitation of business in Washington,” the Shutes “would not have taken the cruise and Mrs. Shute would not have been injured.” *Id.*; see also *id.* at 588 n.\* (explaining that the Court of Appeals had filed an earlier opinion that was withdrawn and then modified after the Washington Supreme Court provided an affirmative answer to the certified question of whether the Washington long-arm statute conferred personal jurisdiction over Carnival Cruise).

195. *Id.*

196. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

197. *Carnival Cruise*, 499 U.S. at 590–91.

198. *Id.* at 591.

199. *Id.*

200. *Id.* at 592.

form passage contracts.”<sup>201</sup> According to Justice Blackmun, the Ninth Circuit ignored the circumstances in which cruise line tickets were sold to passengers when it applied the reasonableness factors set out in *The Bremen* and thus distorted that holding.<sup>202</sup> The Court held that in the context of form passage contracts, a forum-selection clause that has not been negotiated nonetheless may be enforceable.<sup>203</sup>

The Court cited several reasons for enforcing such a clause: the “special interest” a cruise line has in limiting where it can be subject to suit; sparing litigants the time and expense of pretrial motions to determine the correct forum, thus conserving judicial resources; and the money saved by limiting the forum in which it can be sued, which could then be passed on to purchasers in the form of reduced ticket prices.<sup>204</sup> The Court rejected the Circuit Court’s finding that the Shutes were “physically and financially incapable of pursuing this litigation in Florida,” characterizing it as “conclusory.”<sup>205</sup> In analyzing the “serious inconvenience” of the forum as required by *The Bremen*, the Court of Appeals incorrectly analogized Florida to a “remote alien forum” and characterized the dispute as a local one better suited to resolution in Washington rather than Florida.<sup>206</sup> Because of these distinctions, and the fact that the Shutes acknowledged that they had notice of the forum selection clause, the Court concluded that “heavy burden of proof” required to set aside the forum-selection clause on grounds of inconvenience” had not been met.<sup>207</sup>

In evaluating the fundamental fairness of the forum-selection clause, the Court found no indication that Carnival was acting in bad faith by selecting Florida as the forum. Carnival’s principal place of business was in Florida and many of its cruises departed from and returned to there.<sup>208</sup> In addition, the Court found no evidence of fraud or overreaching.<sup>209</sup> Finally, the Court concluded that the Shutes’ argument that the forum-selection clause violated 46 U.S.C. App. § 183c was unavailing.<sup>210</sup> The statute prohibited a vessel owner from inserting a provision in any contract that deprived a claimant of a trial “by court of competent jurisdiction” for loss of life or personal injury resulting from negligence.<sup>211</sup> Here, the forum-selection clause specifically stated that Florida was the forum for all

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201. *Id.* at 591–93.

202. *Id.* at 593.

203. *Id.*

204. *Id.* at 593–94.

205. *Id.* at 594 (quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 389 (9th Cir. 1990), *rev’d*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

206. *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)).

207. *Id.* at 594–95 (quoting *The Bremen*, 407 U.S. at 17).

208. *Id.* at 595.

209. *Id.*

210. *Id.*

211. *Id.* at 595–96 (quoting 46 U.S.C. app. § 183c (1988)).

disputes, and a court in the state of Florida was a “court of competent jurisdiction” within the meaning of the statute.<sup>212</sup> According to Justice Blackmun, § 183c did not prohibit the use of a forum selection clause.<sup>213</sup>

Justice Stevens dissented, concluding that the forum-selection clause was unenforceable because it did not provide adequate notice, violated the Limitation of Vessel Owner’s Liability Act, 46 U.S.C. App. § 183c, and was invalid as contrary to public policy and common law prior to *The Bremen*.<sup>214</sup>

Justice Stevens disagreed with the Court’s assumption that a passenger is “fully and fairly” notified of the forum-selection clause when it was in fine print on the back of ticket.<sup>215</sup> Asserting that only the most meticulous and careful reader would find the forum-selection clause, Stevens emphasized the point by attaching a copy of the ticket in its original size to his dissent.<sup>216</sup> He argued that even a careful reader would have little choice but to be bound by the forum-selection clause because the first opportunity to examine it did not occur until after the non-refundable ticket had already been purchased.<sup>217</sup> Presented with a choice between risking suit in Florida and losing money by canceling the ticket, Stevens reasoned that most passengers would choose the former.<sup>218</sup> Furthermore, he noted that the fact that the cruise line benefitted financially did not make the forum-selection clause reasonable.<sup>219</sup>

Justice Stevens also contended that the Limitation of Vessel Owner’s Liability Act was violated by the use and enforcement of the forum-selection clause.<sup>220</sup> The doctrine prohibiting express exculpatory clauses also applied to restrictions that weakened the passenger’s opportunity for recovery, such as unreasonably short notice of claim periods and choice-of-law clauses favorable to the defendant.<sup>221</sup> In addition, Stevens noted two common law contract principles that authorized judicial scrutiny of the forum selection clause.<sup>222</sup> First, the courts review adhesion contracts, where the offeror has stronger bargaining power, with heightened scrutiny.<sup>223</sup> At common law, adhesion contracts are scrutinized for reasonableness.<sup>224</sup> Second, contracts limiting the place or court where an

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212. *Id.* at 596 (quoting 46 U.S.C. app. § 183c (1988)).

213. *Id.*

214. *See generally id.* at 597–605 (Stevens, J., dissenting).

215. *Id.* at 597.

216. *Id.* The copy of the ticket can be found after the last page of the dissent.

217. *Id.*

218. *Id.*

219. *Id.* at 597–98.

220. *Id.* at 598.

221. *Id.* at 599.

222. *Id.* at 600–01.

223. *Id.* at 600.

224. *Id.*

action may be brought are “invalid as contrary to public policy.”<sup>225</sup> Stevens insisted that “the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy.”<sup>226</sup>

Although the Court relied on *The Bremen* to decide the case, Justice Stevens believed that the federal statute addressing measures to limit ship owner liability should control.<sup>227</sup> Although § 183c did not mention forum selection clauses, the statutory language was “broad enough to encompass them,” according to Stevens.<sup>228</sup> He quoted from the House Report accompanying the enactment of the statute in 1936, which indicated Congress’s intent to put a stop to ticketing practices such as arbitration clauses and “all such practices . . . of a like character.”<sup>229</sup> This intent was reflected in the statutory language, which stated that it was unlawful to insert language into a contract that purported to “lessen, weaken, or avoid the right of any claimant to a trial . . . on the question of liability.”<sup>230</sup> In the *Shutes*’ case, Stevens believed the clause weakened their ability to recover.<sup>231</sup> The cruise originated and terminated in California, so jurisdiction in Washington would allow the *Shutes* to call witnesses with “less expense and inconvenience” than in Florida.<sup>232</sup> Stevens further noted that “an analogous provision of the Carriage of Goods by Sea Act” had been construed by the circuit courts as invalidating forum-selection clauses that limited suits to a foreign jurisdiction.<sup>233</sup> He reasoned that the same principle applied in this case, where the burden on the *Shutes* of litigating in Florida was proportional to the burden for corporations to litigate in a foreign jurisdiction.<sup>234</sup>

Justice Stevens’s common law approach to judging is reflected in his emphasis on the case law regulating adhesion contracts and his reliance on statutory authority rather than expanding the holding in *The Bremen* into a more general rule. Stevens preferred to apply the statute written by legislators vested with the “[t]he primary responsibility for line-drawing”<sup>235</sup> rather than apply the rule from *The Bremen*. This reliance on the statutes

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225. *Id.* at 601 (Justice Stevens concluded that the forum-selection clause in this case would be unenforceable under common law before *The Bremen* and under the current prevailing rule).

226. *Id.*

227. *Id.* at 598. See 46 U.S.C. § 183c.

228. *Id.* at 603.

229. *Id.* at 602 (quoting H.R. REP. NO. 76-2517, at 6–7 (1936)).

230. *Id.* at 603 (quoting 46 U.S.C. app. § 183c (1988)).

231. *Id.*

232. *Id.*

233. *Id.* at 604.

234. *Id.*

235. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 447 (1989).

was consistent with his policy of judicial restraint and deference to other legal decision-makers. In addition, Stevens's analysis of the specific facts of the case enabled him to arrive at a fair result based upon the positions of the parties.

C. Burnham: *Eschewing Constitutional Politics*

*Burnham v. Superior Court*<sup>236</sup> differs from the preceding cases in at least two ways. First, *Burnham* involved what is known as transient jurisdiction—the exercise of personal jurisdiction over a “nonresident” who is served with process while in the forum state “temporarily . . . in a suit unrelated to his activities in the State.”<sup>237</sup> The case therefore did not squarely involve the exercise of specific jurisdiction (although, as noted below, Justice Brennan relied upon the notion of minimum contacts set out in *International Shoe* in his concurrence). Second, in *Burnham*, the parties were individuals; in all of the preceding cases, at least one of the parties was a corporation and in every case except *Burger King* the defendant seeking to avoid the forum state's exercise of personal jurisdiction was a corporation. In Justice Stevens's view, *Burnham* was an easy case to decide.<sup>238</sup> It nevertheless generated four different decisions.<sup>239</sup> That is primarily because the principal dispute in the case did not concern the rules governing specific jurisdiction (as in *Shaffer* and *Asahi*) or the application of jurisdictional rules to the particular facts of the case (as in *Burger King* and *Carnival Cruise*). Instead the principal dispute was one of constitutional interpretation, with the familiar clash between Justice Brennan's belief in the evolving Constitution and Justice Scalia's competing adherence to Originalism taking center stage. Because he did not believe it was necessary to address this debate to decide the case, Stevens did not side with either Justice.<sup>240</sup> As in *Shaffer*, he wrote a separate concurrence that prevented any decision from commanding more than four votes.<sup>241</sup>

*Burnham* addressed the constitutionality of transient jurisdiction. The Burnhams had been married for eleven years and had two children when they decided to separate in July 1987.<sup>242</sup> They agreed that Mrs. Burnham would move to California with their children and Mr. Burnham would remain in New Jersey.<sup>243</sup> Before Mrs. Burnham left for California, she and Mr. Burnham also agreed that she would file for divorce on grounds of

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236. 495 U.S. 604 (1990).

237. *Id.* at 607.

238. *Id.* at 640 (Stevens, J., concurring in the judgment).

239. *Id.* at 604, 628, 640.

240. *Id.* at 640 (Stevens, J., concurring in the judgment).

241. *Id.*

242. *Id.*

243. *Id.*

“irreconcilable differences.”<sup>244</sup> Despite the agreement to part amicably, in October 1987, Mr. Burnham “filed for divorce in New Jersey state court on grounds of ‘desertion.’”<sup>245</sup> However, he did not “obtain an issuance of summons against his wife and did not attempt to serve her with process.”<sup>246</sup> Mrs. Burnham then “brought suit for divorce in California state court in early January 1988” when it became clear that Mr. Burnham did not plan to honor their prior agreement.<sup>247</sup>

In late January, Mr. Burnham traveled to California on business and visited his children at Mrs. Burnham’s home in the San Francisco Bay area.<sup>248</sup> While there, he “was served with a California court summons and a copy of Mrs. Burnham’s divorce petition” during the visit and then returned to New Jersey.<sup>249</sup> Mr. Burnham sought to quash service of process on the grounds that there was no personal jurisdiction over him in California, but none of the state courts granted him relief.<sup>250</sup>

He then petitioned the United States Supreme Court, which granted certiorari.<sup>251</sup> The Court unanimously affirmed the decision below, but none of the four separate opinions or any of their parts constituted a majority of the Court. Justice Scalia announced the judgment of the Court and delivered an opinion, joined by Justices Rehnquist and Kennedy.<sup>252</sup> Justice White joined Parts I, II-A, II-B, and II-C and also filed an opinion concurring in part and concurring in the judgment.<sup>253</sup> Justice Brennan filed an opinion concurring in the judgment joined by Justices Marshall, Blackmun and O’Connor,<sup>254</sup> and Justice Stevens filed an opinion concurring only in the judgment.<sup>255</sup>

In Parts II-A and II-B, Justice Scalia, adopting the Originalist approach, traced the roots of personal jurisdiction and concluded that transient jurisdiction was deeply embedded in “traditional notions of fair play and substantial justice.”<sup>256</sup> Citing extensively to early American cases, English common law, treatises, and restatements,<sup>257</sup> he explained that assertion of state jurisdiction over a non-resident present in that state was

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244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 607–08.

248. *Id.* at 608.

249. *Id.*

250. *Id.*

251. *Id.*; 493 U.S. 807 (1989).

252. *Burnham*, 495 U.S. at 607.

253. *Id.* at 628 (White, J., concurring in part and concurring in the judgment).

254. *Id.* (Brennan, J., concurring in the judgment).

255. *Id.* at 640 (Stevens, J., concurring in the judgment).

256. *Id.* at 609 (plurality opinion) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

257. *See generally id.* at 608–23.

common practice when the Fourteenth Amendment was adopted in 1868 and continued until the present. Transient jurisdiction therefore comported with due process as contemplated by the authors of the Fourteenth Amendment.<sup>258</sup>

Although Justice Scalia acknowledged that the precedents including *International Shoe* and *Shaffer* established the “minimum contacts” analysis and “weaken[ed]” the *Pennoyer* rule requiring personal service, he distinguished those cases from *Burnham* by pointing out that they dealt with absent defendants as opposed to those present in the state and personally served.<sup>259</sup> He further stated that this analysis was developed by analogy to territorial jurisdiction and applied to “novel, non-traditional assertions of jurisdiction” where non-resident defendants who were not personally served in the state may nonetheless be subject to jurisdiction based on their contacts with the state and the relatedness of those contacts to the litigation.<sup>260</sup> In Scalia’s view, neither case stood for the proposition that all bases of personal jurisdiction must conform to the *International Shoe* standard.<sup>261</sup> Ultimately, Justice Scalia concluded that California’s jurisdiction over *Burnham* was constitutional “[b]ecause the Due Process Clause [did] not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process.”<sup>262</sup>

Justice Brennan’s concurrence advocated the “minimum contacts” analysis and focused on the fairness of exercising personal jurisdiction in the forum state.<sup>263</sup> Although he agreed that “historical pedigree” was relevant to fair notice, he asserted that *International Shoe* and *Shaffer* required the Court to abandon earlier rules based on “legal fictions” generated by such cases as *Harris v. Balk* and *Pennoyer*.<sup>264</sup> Because Mr. *Burnham* was voluntarily present in California, Justice Brennan concluded that he had sufficient contacts such that jurisdiction was not unreasonable.<sup>265</sup> Furthermore, *Burnham* enjoyed the state’s protection, infrastructure, services, access to courts, and economic advantages during his three-day visit, and therefore he “availed himself of its benefits” so that he could anticipate being called to defend himself there.<sup>266</sup> Brennan also considered the burdens on *Burnham* of litigating in the state and concluded

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258. *Id.* at 611, 615.

259. *See generally id.* at 616–22.

260. *Id.* at 619.

261. *Id.* at 619–21.

262. *Id.* at 628.

263. *Id.* at 630 (Brennan, J., concurring in the judgment).

264. *Id.* at 629–30; *see also Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

265. *Burnham*, 495 U.S. at 635–37 (Brennan, J., concurring in the judgment).

266. *Id.* at 637–38.

that they were not prohibitive and could be ameliorated through various procedures.<sup>267</sup>

Justices Scalia and Brennan devoted many footnotes and more than a “few words”<sup>268</sup> to refuting the merits of the other’s jurisprudential methodology. In what Justice Stevens characterized as “a very easy case” to decide,<sup>269</sup> the Justices nevertheless engaged in a lengthy debate over the appropriate approach to constitutional interpretation of due process and the lawmaking role of the Court generally. Justice Scalia emphasized the primacy of the intent and understanding of the framers<sup>270</sup> and the role of the people through their states in the evolution of law.<sup>271</sup> Justice Brennan emphasized the importance of contemporary societal norms and modern justifications for legal rules<sup>272</sup> and noted the need for the Court to check the states’ potentially unfair expansion of jurisdiction.<sup>273</sup>

Although *Burnham* was a procedural due process case, scholars have speculated that the divisions in the *Burnham* decision reflected the larger fundamental disagreement over the Court’s substantive due process jurisprudence.<sup>274</sup> At the time *Burnham* was decided, the Court was deeply

267. *Id.* at 638–39. Justice Brennan elaborated:

For example, in the federal system, a transient defendant can avoid protracted litigation of a spurious suit through a motion to dismiss for failure to state a claim or through a motion for summary judgment. . . . He can use relatively inexpensive methods of discovery . . . . Moreover, a change of venue may be possible. . . . In state court, many of the same procedural protections are available, as is the doctrine of *forum non conveniens*, under which the suit may be dismissed.

*Id.* at 639 n.13 (citations omitted).

268. *Id.* at 622 (plurality opinion).

269. *Id.* at 640 (Stevens, J., concurring in the judgment).

270. *Id.* at 610–11, 622 (plurality opinion).

271. *Id.* at 621–22, 627.

272. *Id.* at 630–31 & n.2 (Brennan, J., concurring in the judgment).

273. *Id.* at 639 n.14.

274. See, e.g., Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on Burnham v. Superior Court*, 22 RUTGERS L.J. 689, 698–99 (1991) (noting that “[u]ltimately the Scalia/Brennan dispute in *Burnham* reflects a fundamental difference of opinion on the virtues of an unconstrained judiciary” with respect to whether “the judiciary is the appropriate body to make fundamental moral judgments on issues ranging from abortion and sex discrimination to affirmative action and rent control”); Paul C. Wilson, *A Pedigree for Due Process?*, 56 MO. L. REV. 353, 367, 385 (1991) (noting that “[t]he split revealed by the two principal opinions . . . strikes to the heart of due process analysis” and discussing the same split in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), where Justice Scalia relied on the tradition-based analysis to reject the construction of a substantive due process right); see also R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357, 1361 n.22 (1991) (noting that the *Burnham* opinions develop the pre-existing debate concerning the merits of a tradition-based analysis); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1349 (1988) (observing that “much of the contemporary debate about the foundations of constitutional law is really a debate about *Roe v. Wade* and the related line of privacy cases”) (footnote omitted).

divided over the right to abortion established in *Roe v. Wade*;<sup>275</sup> *Burnham* was decided after *Webster v. Reproductive Health Services*,<sup>276</sup> in which the prospect of overruling *Roe* was openly debated.

In his four lines and single footnote, Stevens avoided this debate and chastised his colleagues for engaging in it.<sup>277</sup> Referring to his separate opinion in *Shaffer v. Heitner*,<sup>278</sup> Stevens explained that he did not join the Court's decision because he was uneasy with the unnecessarily broad reach of that opinion.<sup>279</sup> He asserted that the same broad reach was present in the decisions of Scalia and Brennan and therefore refused to join either.<sup>280</sup> Stevens concluded that *Burnham* was a simple case as demonstrated by the "historical evidence and consensus identified" by Justice Scalia, the "considerations of fairness" articulated by Justice Brennan, and the "common sense" shown by Justice White.<sup>281</sup> Finally, as in *Asahi*, Stevens's decision to concur separately and not to join any other decision prevented Scalia or Brennan from securing five votes and establishing the controlling legal rule.

#### CONCLUSION

It is no coincidence that Justice Stevens may have been the nation's last common law Justice. He was nominated by President Gerald Ford because Ford sought to nominate a well-qualified lawyer rather than promote a particular judicial philosophy.<sup>282</sup> And as was observed after his retirement announcement, Stevens was the last Justice from the era that preceded the political-litmus tests and intense ideological scrutiny of Supreme Court nominees that began under President Ronald Reagan and have only intensified since then.

This Article has explored Stevens's common law approach to the personal jurisdiction doctrine during the period when the Court sought to

275. 410 U.S. 113 (1973).

276. 492 U.S. 490 (1989).

277. *Burnham*, 495 U.S. at 640 (Stevens, J., concurring in the judgment).

278. 433 U.S. 186, 217 (1977).

279. *Burnham*, 495 U.S. at 640 (Stevens, J., concurring in the judgment).

280. *Id.*

281. *Id.* See also *id.* at 649 n.\* ("Perhaps the adage about hard cases making bad law should be revised to cover easy cases."). In his concurrence, Justice White stated that "[t]he rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down" and added that "there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case." *Id.* at 628 (White, J., concurring).

282. See Adam Liptak, *From Age of Independence to the Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1 ("Stevens . . . may be the last justice from a time when ability and independence, rather than perceived ideology, were viewed as the crucial qualifications for a seat on the court.").

develop a more comprehensive and general framework for the doctrine. The Court succeeded only somewhat in its efforts. *Shaffer* substantially restricted quasi in rem jurisdiction and held that assertions of personal jurisdiction based on property should be evaluated according to the minimum contacts approach set out in *International Shoe*. Furthermore, the Court expanded the reach of personal jurisdiction in both *Burger King*—holding that Rudzewicz, a Michigan resident who was responsible for operating a local restaurant, could be haled into a Florida court based upon his contractual dealings with a Florida corporation—and *Carnival Cruise*—enforcing the forum-selection clause despite the Schutes' claim that application of the clause was unfair to them. However, the Court in *Asahi* was unable to articulate a more specific rule in stream-of-commerce cases and in *Burnham* could not agree on the reason why the Due Process Clause was not violated by in-state service of an individual defendant in the forum state. The more enduring lesson from the Court's often splintered decisions is that evaluating the exercise of personal jurisdiction in a particular case continues to be, as Professor Hazard wrote, a process of "arbitrary particularization."<sup>283</sup> For about two decades after *Carnival Cruise*, the Supreme Court deferred to the federal courts of appeals on personal jurisdiction, allowing those courts to develop the specific rules for their own jurisdictions.

Although Justice Stevens did not write the majority decision in any of the cases discussed above, his jurisprudential approach—with its emphasis on deciding cases narrowly with close attention to the facts of the particular case, rather than articulating general rules—seems to have prevailed. Despite—or more likely because of—his refusal to provide a fifth vote to any opinion in *Asahi* or *Burnham*, the Supreme Court did not revisit the doctrinal disputes at issue in those cases until after Stevens retired. In June 2011, the Supreme Court revisited stream-of-commerce doctrine in *McIntyre*—and splintered again. Indeed, *McIntyre* raises more questions than it answers. Justice Kennedy's plurality decision retreats to the past. Not only did he embrace Justice O'Connor's "stream of commerce plus" approach in *Asahi*, he also revived notions of consent and state sovereignty that the Court seemed to have abandoned no later than *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*.<sup>284</sup> In his concurrence, Justice Breyer decided the case narrowly, insisting that *McIntyre* did not involve any of the "many recent changes in commerce and communication . . . not anticipated by our precedents" and that the case

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283. Hazard, *supra* note 21.

284. 456 U.S. 694 (1982). See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (approving "Justice O'Connor's opinion in *Asahi*"). See also *id.* at 2787 ("A person may submit to a State's authority in a number of ways" including "explicit consent") (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)), 2789 ("[P]ersonal jurisdiction requires a forum-by-forum analysis").

could be decided based upon existing case law.<sup>285</sup> He seemed to gaze forward, with his eyes on the next case to update legal rules governing personal jurisdiction. Justice Ginsburg's dissent is rooted in the present, canvassing the record and arguing that through the use of an exclusive distributor—"common in today's commercial world"—the British manufacturer had purposefully availed itself of New Jersey.<sup>286</sup> It is for the Court to attempt, again, to articulate a single rule for stream-of-commerce jurisdiction. However, given the divergent approaches in *McIntyre*, the prospect of a uniform rule seems more elusive than ever. The only point of agreement among the three decisions seems to be that personal jurisdiction is a highly fact-specific doctrine.<sup>287</sup>

*McIntyre* also confirms the wisdom of Justice Stevens's common law approach to personal jurisdiction. Stevens's decisions in the cases discussed in this Article are more persuasive because they are more nuanced and more sensitive to the significance of the particular facts of case. Professor Hazard's insight about the "arbitrary particularization" that is inherent in evaluating a court's exercise of personal jurisdiction endures because it reflects the importance of the particular facts of a case to resolving any specific personal jurisdiction dispute.

It may be argued that Justice Stevens's narrow decisions prevented the Supreme Court from developing a more general and uniform set of personal jurisdiction rules and thereby perpetuated the arbitrary particularization noted by Professor Hazard. And it may be further argued that the common law approach to judging generally is not appropriate for a Supreme Court Justice. Justice Scalia, for example, has argued that the Court, which hears relatively few cases given the thousands of certiorari petitions filed each term, should decide cases according to clear, general rules that are in accord with the intentions of the framers of the Constitution.<sup>288</sup> In Scalia's view, a rule-based approach provides valuable guidance to lower courts and prevents cases from being decided on fact-

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285. *Id.* at 2791 (Breyer, J., concurring); *see also id.* at 2792 (discussing *World-Wide Volkswagen* and *Asahi*, stating that "[n]one of our precedents finds [sic] that a single isolated sale, even if accompanied by the kind of sales effort here, is sufficient" for New Jersey to establish jurisdiction over British manufacturer).

286. *Id.* at 2795–97, 2799 (Ginsburg, J., dissenting).

287. *See id.* at 2790 (noting that even with the application of Justice O'Connor's approach in *Asahi*, there still will be "many difficult questions of jurisdiction that will arise in particular cases," the "defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases," and "judicial exposition will, in common law fashion, clarify the contours of that principle"); *id.* at 2792–93 (deciding case narrowly "on the record present here" and "refusing to go further") (Breyer, J., concurring); *id.* at 2795–97, 2804 (summarizing British manufacturer's activities and holding that "[g]iven *McIntyre* UK's endeavors to reach and profit from the United States market as a whole, *Nicastro's* suit . . . has been brought in a forum entirely appropriate for adjudication of his claim") (Ginsburg, J., dissenting).

288. Scalia, *supra* note 11.

based fairness grounds that may appear to be somewhat arbitrary. Stevens's response is that the Supreme Court and the nation are best served by narrow decisions that acknowledge the Court's institutional limits and are grounded in the facts of the particular case. Like society, the law evolves. Indeed, as Stevens has written, "the vast open spaces in the text" of the Constitution "indicate that its authors implicitly delegated the power to fill those spaces to future generations of lawmakers."<sup>289</sup> By deciding cases in the manner of a common law judge, Stevens allowed for other legal actors to play an active and appropriate role in the legal process.

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289. John Paul Stevens, *Judicial Restraint*, 22 *SAN DIEGO L. REV.* 437, 439 (1985).