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# Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction

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## SOVEREIGN AUTHORITY, FAIRNESS, AND PERSONAL JURISDICTION: THE CASE FOR THE DOCTRINE OF TRANSIENT JURISDICTION

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The concept of transient jurisdiction—the theory that states may always exercise personal jurisdiction over a person served within its territorial boundaries—has proven to be a tenacious adversary for legal academics. For years, commentators repeatedly have attacked transient jurisdiction, viewing it as an outmoded relic of a now-discredited theory of personal jurisdiction. Some courts have accepted this argument and abandoned the concept; others, however, have continued to view transient jurisdiction as an acceptable basis for the assertion of personal jurisdiction over defendants.

This Article challenges the conventional scholarly wisdom and contends that transient jurisdiction fits comfortably within the Supreme Court's basic structure of personal jurisdiction analysis. Part I traces the development of transient jurisdiction and the arguments against it. Part II discusses the Court's current approach to personal jurisdiction problems generally, concluding that the case law reflects the principle that a defendant is generally subject to the jurisdiction of any sovereign with which the defendant has voluntarily associated itself. Part III demonstrates that the exercise of transient jurisdiction is perfectly consistent

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with this principle, and that to deny states jurisdiction over transients would create an imbalance in the transients' rights and obligations.

## I. THE HISTORY OF TRANSIENT JURISDICTION

Historically, the concept of transient jurisdiction has been associated with the jurisdictional approach of *Pennoyer v. Neff*.[1] The theory of the *Pennoyer* Court was that the right of a court to exercise personal jurisdiction was a function of the physical power of the forum state. Thus, in an in personam action, state courts had jurisdiction if the parties to the lawsuit were served within the state. Similarly, in in rem and quasi in rem actions, state courts possessed jurisdiction if the state was the situs of the property at issue.

*Grace v. MacArthur*[2] presented an extreme example of the exercise of transient jurisdiction. In *Grace*, an Illinois resident was served with a summons to appear in an Arkansas federal court while flying in a commercial airliner that was passing over Arkansas. The district court refused to quash service, holding that the defendant had been within the territorial limits of the state when the summons was delivered. Although the issue of the case was one of service, the court implied that the service also satisfied the requirement that the state have jurisdictional power over the defendant.

During this period, courts generally recognized only one exception to transient jurisdiction. Where the plaintiff had lured the defendant into the forum state under false pretenses, courts at times held that the forum lacked jurisdiction over the defendant. *Wyman v. Newhouse*[3] is a classic example.

In *Wyman*, the defendant was a New York resident who had never lived in Florida. For some years he had been engaged in an extramarital love affair with the plaintiff, a Florida resident. The plaintiff sent a series of communications to the defendant, expressing love and affection for the defendant. She stated that she was soon departing for Ireland to care for her mother and that she "[m]ust see" the defendant. In response to these entreaties, the defendant flew to Florida, whereupon he was served with process in a lawsuit for $500,000. The defendant quickly left the state and the plaintiff obtained a default judgment. In an enforcement action,

1. 95 U.S. 714 (1877).
2. 170 F. Supp. 442 (E.D. Ark. 1959).
3. 93 F.2d 313 (2d Cir. 1937), *cert. denied*, 303 U.S. 664 (1938).

the United States Court of Appeals for the Second Circuit declined to enforce the judgment, holding that "[a] fraud affecting the jurisdiction is equivalent to a lack of jurisdiction."[4]

This exception was not a serious threat to the basic concept of transient jurisdiction. Indeed, despite claims that the theory of transient jurisdiction was inherently unsound,[5] so long as *Pennoyer* reigned supreme the foundations of the concept were unassailable. But, as any first year law student knows, in 1945 the Supreme Court displaced *Pennoyer* with *International Shoe Co. v. Washington.*[6] *International Shoe* replaced the power theory with one based on fairness to the defendant. The key question became whether the defendant had "minimum contacts" with the forum state such that the maintenance of the lawsuit "does not offend traditional notions of fair play and substantial justice."[7]

Post-*Shoe* commentators vigorously attacked the theory of transient jurisdiction. Why, they asked, is it "fair" to subject a defendant to a lawsuit in a state that he may have only entered once in his lifetime? The critics contended that the concept was simply a vestige of the discredited power theory.[8]

The critics intensified their attack after the 1977 Supreme Court decision in *Shaffer v. Heitner.*[9] In *Shaffer* a shareholder of the Greyhound Corporation initiated a derivative action in Delaware state court. The complaint stated that several present and former officers of Greyhound and one of its subsidiaries had violated their respective duties to the corporation, causing liability to Greyhound for penalties and damages under the antitrust laws. Greyhound was a Delaware corporation, but the defendants did not reside in the state. Nonetheless, the Delaware Supreme Court found that the state courts had personal jurisdiction over the defendants because the courts had seized the defendants' Greyhound stock, and under state law the stock was "located" in Delaware, even though it

4. *Id.* at 315 (citations omitted).

5. *See, e.g.*, W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 100 (1942); Dodd, *Jurisdiction in Personal Actions*, 23 U. ILL. L. REV. 427 (1929).

6. 326 U.S. 310 (1945).

7. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463).

8. *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS LAW § 27 (3d ed. 1977); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 (1965); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569 (1958); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

9. 433 U.S. 186 (1977).

was not physically in the state.[10] Applying the rule of *Pennoyer*, the court held that state courts could, on a quasi in rem theory, base jurisdiction on that seizure.

On appeal, the Supreme Court reversed.[11] Overruling *Pennoyer*, Justice Marshall's majority opinion argued that the "minimum contacts" standard established in *International Shoe Co.* should determine the validity of all assertions of personal jurisdiction—even jurisdiction based on an in rem or quasi in rem theory.[12] Applying that standard in *Shaffer*, the majority found that the due process clause prohibited the assertion of state jurisdiction.

The commentary on the *Shaffer* case concluded almost unanimously that the Court's opinion mandated the death of transient jurisdiction.[13] Obviously, this conclusion could not be based on the specific facts in *Shaffer*. The *Shaffer* Court based its argument on the theory that the seized property was unrelated to the litigation,[14] while the transient defendant herself will always be related to the dispute that gives rise to service upon her. Indeed, Justice Stevens's concurrence implicitly endorsed transient jurisdiction.[15]

The commentators, however, focused on the majority's sweeping asser-

10. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1975), *rev'd*, 433 U.S. 186 (1977).

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

12. *Id.* at 212.

13. *See, e.g.*, R. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.04(2)(c) (1983); Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); Fyr, Shaffer v. Heitner: *The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739 (1977); Lacy, *Personal Jurisdiction and Service of Summons After* Shaffer v. Heitner, 57 ORE. L. REV. 505 (1978); Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33 (1978); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 670 (1987); Vernon, *Single Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273; Zammit, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15 (1978). *But see* Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 24-25 (1982) (transient jurisdiction survives *Shaffer*); Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 611-612 (1979) (same). *Cf.* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82 (*Shaffer* unclear on transient jurisdiction).

14. *Shaffer*, 433 U.S. at 213 (Delaware court could not base jurisdiction on property located in Delaware but not related to the suit. Jurisdiction would have to be based on something more.).

15. 433 U.S. at 218 (Stevens, J., concurring) ("If I visit another State . . . I knowingly assume some risk that the State will exercise its power over . . . my person while there").

tions regarding the reach of the minimum contacts analysis. Professor David H. Vernon captured the essence of the argument:

> *Shaffer* requires that "all" state-court assertions of jurisdiction meet the standards of *International Shoe*. The Court held presence of property in the forum permitted assertions of jurisdiction only if the forum also had a nexus with both the litigation and the defendant. Unless *Shaffer* is limited to jurisdiction based on the presence of property, the validity of the transient defendant rule after *Shaffer* is doubtful. The single factor of the defendant's transient presence in the forum contributes nothing more than the presence of the defendant's property in the forum to the existence of a forum interest in the outcome, the convenience of the forum as a place to litigate, or a reason for defendant to anticipate suit there. Because it was unfair to assert jurisdiction in *Shaffer*, it is unfair to assert jurisdiction in the transient defendant case.[16]

*Nehemiah v. Athletics Congress of the U.S.A.*[17] is the leading case adopting the position of those who oppose transient jurisdiction. In *Nehemiah* a champion hurdler lost his eligibility to compete in amateur track and field competition when he signed a contract to play professional football. He brought an action in Federal District Court for the District of New Jersey against the International Amateur Athletic Foundation (IAAF)—the body responsible for setting standards internationally for amateur track and field competition—seeking to force arbitration of his disqualification.[18]

IAAF, an unincorporated association, has its headquarters and only offices in London, England. IAAF created its only connection with New Jersey when the organization lent its name to the world cross-country championships that took place in that state. When the president of IAAF and another representative of that body attended the cross-country championships, the defendant's attorneys personally served them with the complaint.[19]

The United States Court of Appeals for the Third Circuit adopted Professor Vernon's position and found that this service was not sufficient to allow the New Jersey courts to assert jurisdiction over IAAF.[20] Noting that *Shaffer* expressly made the *International Shoe* standards applicable to all attempts to exercise personal jurisdiction, the court declined to cre-

16. Vernon, *supra* note 13, at 303 (citations omitted).
17. 765 F.2d 42 (3d Cir. 1985).
18. *Id.* at 43-44.
19. *Id.* at 44-45.
20. *Id.* at 47.

ate a "*sui generis* niche for jurisdiction over the individual who purposefully enters the jurisdiction and is served."[21] The court argued that "[i]f the mere presence of property cannot support quasi in rem jurisdiction, it is difficult to find a basis in logic and fairness to conclude that the more fleeting physical presence of a nonresident person can support personal jurisdiction."[22]

Other courts have taken similar positions. *Schreiber v. Allis-Chalmers Corp.*[23] and *Bershaw v. Sarbacher*[24] present typical examples. In *Schreiber*, the plaintiff, a Kansas resident, was injured in Kansas while working on a Roto-Baler manufactured by the Allis-Chalmers Corporation. Seeking to secure the benefit of the Mississippi statute of limitations, the plaintiff brought suit in federal district court in Mississippi, a state in which Allis-Chalmers maintained an unrelated manufacturing facility and was duly licensed, qualified and authorized to do business.[25] The court obtained jurisdiction over the defendant by service on the defendant's designated agent for receiving service and by personal service on the general manager of the manufacturing facility. After a motion by Allis-Chalmers, the Mississippi court transferred the lawsuit to the Kansas federal district court.[26]

Despite the transfer, the plaintiff argued that the Mississippi statute of limitations still applied by virtue of Mississippi conflicts law and the rules of *Klaxon v. Stentor Manufacturing Corp.*[27] and *Van Dusen v. Barrack.*[28] Assuming that Mississippi conflicts law required this conclusion, this re-

21. *Id.*

22. *Id.* at 47.

23. 448 F. Supp. 1079 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979).

24. 40 Wash. App. 653, 700 P.2d 347 (1985). *See also, e.g.*, Pitman v. Typecraft Software Ltd., 626 F. Supp. 305, 310-312 (N.D. Ill. 1986); Grendene, S.A. v. Brazam Int'l. Trading Corp., No. 83 Civ. 9782 (S.D.N.Y. Sept. 24, 1986) (WESTLAW, All. Fed. database) ("serious doubts"); Oden Optical Co., Inc. v. Optique Du Mond, Ltd., 268 Ark. 1105, 598 S.W.2d 456 (Ark. App. 1980) ("may need reevaluation"); Duehring v. Vasquez, 490 So. 2d 667 (La. App. 1986); Brent v. Board of Trustees of Davis and Elkins College, 163 W. Va. 390, 256 S.E.2d 432 (1979) (by implication).

25. 448 F. Supp. at 1081.

26. *Id.* at 1081-82. The court transferred the lawsuit pursuant to 28 U.S.C. § 1404(a). Section 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

27. 313 U.S. 487 (1941) (federal courts exercising diversity jurisdiction must follow conflict of laws rules of the states in which they sit).

28. 376 U.S. 612 (1964) (when a defendant procures a transfer to another district court the transferee court must apply the state law that would have applied had there been no change of venue).

sult could only be avoided if (a) the Mississippi state courts lacked personal jurisdiction over the defendant or (b) the application of the Mississippi statute of limitations would be unconstitutional. The district court chose the former ground, concluding, *inter alia*, that after *Shaffer* the simple presence of Allis-Chalmers in Mississippi was constitutionally insufficient to grant the courts of that state jurisdiction over an unrelated cause of action.[29]

*Bershaw* was a Washington paternity action in which the plaintiff, a Washington resident, claimed that the child was conceived during sexual intercourse that had taken place in Idaho. The defendant, an Idaho resident, was served with process while visiting the state of Washington at the plaintiff's invitation. Citing *International Shoe* and *Shaffer*, a Washington state court concluded with little discussion that "[the defendant's] transient presence in Washington was insufficient to require him to conduct his defense in Washington."[30]

Cases such as *Nehemiah*, *Schreiber* and *Bershaw* have not, however, been universally followed. A number of courts that have addressed the issue have rejected the conclusion that *Shaffer* sounded the death knell for transient jurisdiction. For example, in *Humphrey v. Langford*[31] a state court was forced to confront the question directly and emphatically reaffirmed the viability of transient jurisdiction.

*Humphrey* was a breach of contract action involving the sale of a South Carolina business. When the agreement was executed, all parties were residents of South Carolina. Later, however, the prospective plaintiffs moved to Georgia. The defendant, still a resident of South Carolina, was served with process when he came to Georgia one day to bowl.[32]

The Georgia Supreme Court held that this service was sufficient to vest the state courts with personal jurisdiction over the defendant. The court explicitly noted the variety of scholars who had contended that *Shaffer* represented the end of transient jurisdiction. It rejected these contentions, however, relying primarily on the practical difficulties involved in distinguishing between different classes of nonresidents for jurisdictional purposes:

> We believe that it is not practical to have classifications of sojourners in the state. Where does a court draw the line between sojourners here for an

29. 448 F. Supp. at 1090.
30. 40 Wash. App. at 657, 700 P.2d at 349 (citation omitted).
31. 246 Ga. 732, 273 S.E.2d 22 (1980).
32. *Id.*

> evening of bowling and sojourners who commute to the state on a daily basis? Some individuals are constant or perennial sojourners. Some have no identifiable place of residence. Still others are able to avoid personal service by remaining away from an otherwise indentifiable place of abode. Others to avoid a responsibility can terminate on a moments notice a legal residence and otherwise disrupt the judicial process. Others can terminate residence in a forum favorable to the plaintiff and establish residence in a forum considered favorable to the defendant.[33]

The specific argument employed by the Georgia court is rather weak; distinguishing between different types of sojourners is no more difficult than applying the minimum contacts methodology generally. The United States Court of Appeals for the Fifth Circuit dealt more plausibly with the issues in *Amusement Equipment, Inc. v. Mordelt*.[34] *Mordelt* involved an action by a Florida corporation (Amusement) against a German corporation (Heimo) and the general manager of that corporation (Mordelt). While visiting Heimo's factory in Germany, a representative of Amusement discussed the possibility of acquiring certain of Heimo's products for exhibition at a trade show in New Orleans on November 17. Amusement ordered the goods from Florida.[35] When they failed to arrive on time, Amusement sued in Federal District Court for the District of Louisiana to recover its payment.

The plaintiffs claimed jurisdiction based upon personal service delivered to Mordelt while he was attending the New Orleans trade show. Heimo's only connection with Louisiana was as a member of the organization that sponsored the trade show. Mordelt had no prior connection with Louisiana. The court of appeals reversed a contrary district court holding[36] and held that Louisiana law barred the assertion of jurisdiction over Heimo.[37] The court, however, also held that the trial court had jurisdiction over Mordelt.

While it noted various factors that would support such jurisdiction independently of Mordelt's presence in Louisiana, Judge Goldberg's opinion of the court clearly reflected approval of the concept of transient

33. 246 Ga. at 734, 273 S.E.2d at 24.

34. 779 F.2d 264 (5th Cir. 1985).

35. *Id.* at 265-66. In order to meet the November 17 deadline, the products needed to have arrived in Miami by November 12. Heimo required prepayment prior to shipment of the goods overseas. In response to a telex sent by Amusement from Florida, Heimo responded that it could "guarantee [compliance with Amusement's] delivery requirements" if Heimo's bank received the payment by November 7. Heimo received the payment on time.

36. 595 F. Supp. 125 (E.D. La. 1984).

37. *Id.* at 267.

jurisdiction. Goldberg began his analysis by quoting a passage from *International Shoe* itself that explicitly excluded transient jurisdiction from the minimum contacts analysis:

> due process requires only that in order to subject a defendant to a judgment in personam, *if he be not present within the territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[38]

To support his conclusion that "[w]hen the defendant is present within the forum state, notice of the suit through proper service of process is all the process to which he is due,"[39] Goldberg characterized the problem as one of sovereign authority:

> By entering Louisiana, [the defendant] subjected himself to sovereign powers from which, had he remained outside the state, he was otherwise protected.
>
> . . . .
>
> . . . While the due process clause necessarily restricts the state's sovereign power, no case has yet held that it eliminates that power altogether. That the requirement of personal jurisdiction rests in all cases on the due process clause does not weaken the proposition that the exercise of jurisdiction, as distinguished from its limitation, is a sovereign act. If there is anything that characterizes sovereignty, it is the state's dominion over its territory and those within it. Fairness does not operate in a vacuum. To abstract it from context and elevate it blindly over sovereign prerogatives is ultimately to free the individual from the obligations inherent in a statist system.[40]

Viewing the case from this perspective, the court had no difficulty in holding that the exercise of transient jurisdiction in *Mordelt* was constitutional.

One could distinguish *Mordelt* from the typical transient jurisdiction case on a variety of grounds. Indeed, the contacts between Mordelt and the forum might well have been sufficient to support the assertion of jurisdiction under more general principles of specific jurisdiction.[41] The reasoning of the case, however, is consistent with the views expressed by a number of other courts—most often in dicta.[42] The Wisconsin

38. 779 F.2d at 269 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (emphasis in *Mordelt*).

39. 779 F.2d at 270.

40. *Id.* (citation omitted).

41. *See infra* notes 48-87 and accompanying text.

42. Leab v. Streit, 548 F. Supp. 748 (S.D.N.Y. 1984). *See also, e.g.*, Rittenhouse v. Mabry, 832 F.2d 1380 (5th Cir. 1987) (dictum); Driver v. Helms, 577 F.2d 147, 156 & n.25 (1st Cir. 1978) (dictum), *cert. denied*, 439 U.S. 1114 (1979); Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581

Supreme Court captured the essence of these courts' position in *Oxmans' Erwin Meat Co. v. Blacketer*.[43] Noting first that "[p]hysical presence is the traditional basis of judicial jurisdiction," the *Blacketer* court then continued:

> In our view the United States Supreme Court has not imposed a "minimum contacts" requirement on a state's assertion of jurisdiction over a natural person upon whom personal service within the state has been achieved. Neither *International Shoe* nor its progeny, including the recent case of *Shaffer v. Heitner* addresses the issue of the constitutionality of the state's exercising jurisdiction based solely on the service of process upon an individual physically present within state borders.[44]

Similarly, in *Leab v. Streit*,[45] the Federal District Court for the Southern District of New York stated that "[p]resence within a state, even temporary or transitory presence, is still a common law basis instilling competence in the courts of that state to adjudicate claims against a person."[46]

In short, the issue of transient jurisdiction presents a situation in which commentators have almost unanimously advocated one position, while many courts have continued to support the opposing view. The key question is whether these courts are acting totally irrationally or whether they have simply failed to articulate a plausible rationale for transient jurisdiction that has also escaped the notice of the academy. To adequately address this question, one must first analyze in greater detail the basic structure of personal jurisdiction analysis. The next section of this Article will attempt such an analysis.

## II. THE SUPREME COURT'S APPROACH TO PERSONAL JURISDICTION

The Court has divided personal jurisdiction problems into two basic categories. *Specific* jurisdiction rests on the power of the forum court to adjudicate the defendant's rights in the specific case before the court. By contrast, *general* jurisdiction allows the court to bind the defendant in all cases in which the court also has subject matter jurisdiction. In the ab-

(1987); Wolfson v. Wolfson, 455 So. 2d 577 (Fla. Dist. Ct. App. 1984); Ruggieri v. General Well Service, Inc., 535 F. Supp. 525 (D. Colo. 1982) (dictum); Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982); Aluminal Indus. v. Newtown Commercial Assoc., 89 F.R.D. 326 (S.D.N.Y. 1980); Stevens v. Stevens, 44 Colo. App. 252, 611 P.2d 590 (1980) (dictum).

43. 86 Wis.2d 683, 273 N.W.2d 285 (1979).

44. *Id.* at 687-88, 273 N.W.2d at 287 (footnotes and citations omitted).

45. 584 F. Supp. 748 (S.D.N.Y. 1984).

46. *Id.* at 755-56.

stract, at least, the presence of the defendant might be relevant to either situation.

### *A. Specific Jurisdiction*

#### *1. Preliminary Comment: Specific Jurisdiction and the Transient Defendant*

All of the specific jurisdiction cases faced by the Court have involved defendants who were served outside the forum state. In theory, one could construct a rule that related the transient presence of the defendant to the basic concept of specific jurisdiction. For example, the rule could provide that a state court can exercise jurisdiction in all cases in which the defendant has been served within the forum state *and* the transaction giving rise to the lawsuit is related to that state.

Such a rule, however, would be inconsistent with the basic structure of specific jurisdiction. Commentators have suggested various approaches to the specific jurisdiction issue.[47] Despite the differences among these approaches, all share a distinguishing characteristic: each of the proposed systems centers on the relationship between the defendant and the relevant transaction, and between the transaction and the forum. The mere presence of the defendant in the forum, without more, is irrelevant to either of these considerations. To add this factor to the specific jurisdiction calculus would therefore be wildly incongruous. Thus, if transient jurisdiction is to be defended, it must be in the context of its origin—the theory of general jurisdiction.

Nonetheless, the resolution of specific jurisdiction problems has an important bearing on the transient jurisdiction issue. As this Article discusses below, the structure of general jurisdiction analysis is best understood by considering it in tandem with specific jurisdiction. Thus, in order to lay the groundwork for a discussion of transient jurisdiction, the next section describes in detail the Court's treatment of specific jurisdiction cases, together with the views of commentators who have discussed this problem.

#### *2. The Approach of the Supreme Court*

Specific jurisdiction has attracted the bulk of the attention of both the Supreme Court and the academic commentators. Four cases—*Burger*

47. *See infra* notes 70-75 and accompanying text.

*King Corp. v. Rudzewicz*,[48] *Keeton v. Hustler Magazine Inc.*,[49] *World-Wide Volkswagen v. Woodson*,[50] and *Asahi Metal Industry Co. v. Superior Ct. of California*[51]—define the parameters of the Court's approach to the specific jurisdiction problem.[52]

In *Burger King*, the defendant had never physically been present in the state of Florida. He had, however, entered into a franchise agreement with a Florida corporation which contemplated a continuing relationship with the defendant and required payments to be made in Miami, Florida. Under these circumstances, the Court held that in a lawsuit over an alleged breach of the franchise agreement, the Florida courts could constitutionally exercise personal jurisdiction over the defendant. The majority opinion asserted that

> where the contacts [with the forum] proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.[53]

*Keeton v. Hustler Magazine Co.* involved facts which were, in some respects, even more dramatic. In *Keeton*, the plaintiff brought a libel action in the federal district court for the state of New Hampshire. The defendant was an Ohio corporation whose principal place of business was California. Its only connection with New Hampshire was that a small proportion of the total number of magazines which it produced (some of which contained the allegedly libelous statements) were sold in that state. The plaintiff was a New York resident. Her only connection with the forum was that her name appeared on the masthead of several magazines which were distributed in New Hampshire. Plaintiff suffered only a small portion of her claimed damages in the forum state. Nonetheless, the Court unanimously held that the fourteenth amendment did not prevent the New Hampshire courts from asserting jurisdiction over the de-

48. 471 U.S. 462 (1985).

49. 465 U.S. 770 (1984).

50. 444 U.S. 286 (1980).

51. 107 S. Ct. 1026 (1987).

52. Other specific jurisdiction cases decided in the post-Warren era include: Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Calder v. Jones, 465 U.S. 783 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Rush v. Savchuk, 444 U.S. 320 (1980); Kulko v. California Superior Court, 436 U.S. 84 (1978); and Shaffer v. Heitner, 433 U.S. 186 (1977).

53. 471 U.S. at 475-76 (emphasis in original) (citations and footnote omitted).

fendant.[54] The Court stated that "[w]here, as in this case, [the defendant] has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."[55]

*Burger King* and *Keeton* demonstrate clearly that when the defendant himself has deliberately created a connection with the forum in a particular transaction, the forum courts will generally have jurisdiction to adjudicate his rights and liabilities in connection with that transaction. By contrast, *World-Wide Volkswagen* held that creation of such a connection by the plaintiff was insufficient to vest jurisdiction in the forum.[56]

In *World-Wide Volkswagen* the plaintiffs, then New York residents, had purchased an automobile from the defendants in Massena, New York. The following year the plaintiffs decided to move to Arizona. En route to their new home, they had an automobile accident in Oklahoma in which one of the plaintiffs suffered severe injuries. The plaintiffs sued on a products liability theory in an Oklahoma state court.

The plaintiffs based their jurisdictional argument on the theory of actual foreseeability. They reasoned that because of the nature of the product, the defendants should have foreseen the possibility that it would be used in another state and cause injury there. Thus, notwithstanding the fact that the relevant defendants had no other contacts with the forum state, plaintiffs contended that the assumption of jurisdiction by an Oklahoma court was consistent with constitutional norms.[57]

Speaking for a six-member majority, Justice White disagreed. He conceded that "foreseeability is [not] wholly irrelevant."[58] White, however, was addressing *legal* rather than actual foreseeability.

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.[59]

This type of foreseeability in turn was to be determined by reference to the judicial interpretations of the *International Shoe* standards. Finding a "total absence of those affiliating circumstances that are a necessary

54. 465 U.S. at 772.
55. *Id.* at 781 (citation omitted).
56. 444 U.S. at 291-92.
57. *Id.* at 288-91.
58. *Id.* at 297.
59. *Id.* (citations omitted).

predicate to any exercise of state court jurisdiction,"[60] White concluded that these standards had not been met in *World-Wide Volkswagen*.

*Asahi Metal Industry* presented an intermediate level of involvement with the forum state. The case began as a products liability action arising from a motorcycle accident which occurred in California. The cause of the accident was a rear tire blowout. The rider of the motorcycle sued, among others, Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese manufacturer which had produced the tube within the tire. The defendant made twenty percent of its total United States sales in California. Cheng Shin filed a cross-complaint seeking indemnity from Asahi, the manufacturer of the tube's valve assembly. Asahi, a Japanese corporation, sold 1,350,000 valve assemblies to Cheng Shin in the period from 1978 to 1982. In addition, Asahi sold valve assemblies to numerous other manufacturers selling their products in California. Asahi itself, however, had no offices, property or agents in California and neither solicited business nor made any direct sales in that state.

Reversing the California Supreme Court,[61] the United States Supreme Court held unanimously that the due process clause prevented California from asserting jurisdiction over Asahi. The Court was deeply divided on the question of whether the Japanese manufacturer had purposefully availed itself of the privilege of doing business in California. Justice O'Connor, Chief Justice Rehnquist, and Justices Powell and Scalia (the O'Connor group) argued that Asahi's position was analogous to that of the defendant in *World-Wide Volkswagen*. They contended that because Asahi itself had not made the choice to send its products to California, the assertion of jurisdiction was unconstitutional.[62] By contrast, Justices Brennan, White, Marshall and Blackmun (the Brennan group) argued that once a manufacturer inserts its product into the stream of commerce with the knowledge that the product will eventually be used in the forum state, the requirement of purposeful availment is satisfied.[63] While Justice Stevens declined to reach the issue, he indicated that he would have adopted an intermediate approach, basing the constitutional analysis on

60. *Id.* at 295.

61. Asahi Metal Industry Co. v. Superior Court, 39 Cal.3d 35, 210 Cal. Rptr. 385, 702 P.2d 543 (1985) (holding jurisdiction constitutional because once a manufacturer delivers its product into the stream of commerce with the expectation that it will be purchased by a consumer in the forum state the manufacturer has invoked the benefits and protections of the forum state's laws).

62. 107 S. Ct. at 1031-33 (opinion of O'Connor, J.).

63. *Id.* at 1035-1038 (Brennan, J., concurring in part and concurring in judgment).

the "volume, value and the hazardous nature of the components"[64] at issue. Stevens suggested that "in most circumstances" he would find jurisdiction over a manufacturer such as Asahi permissible.[65] Thus, five members of the Court appeared to believe that Asahi's activities constituted purposeful availment; the result apparently turned on other factors.

The portion of Justice O'Connor's opinion supported by all the Justices except Justice Scalia therefore is of paramount importance. In that part of her opinion, Justice O'Connor concluded that whatever one's view of the purposeful availment issue, the assertion of jurisdiction over Asahi would offend traditional notions of fair play and substantial justice.[66] The opinion recited the familiar litany of factors that the Court considers in personal jurisdiction analysis: the defendant's burden, the forum state's interest, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the efficient resolution of controversies, and the common interest of the several states in furthering fundamental substantive policies.[67] In finding the assertion of jurisdiction improper, Justice O'Connor relied heavily on two factors which derived from the international scope of the jurisdictional problem: "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system" and the potential implications for federal foreign policy.[68] The near-unanimous opinion also focused on the distance which the defendant would be forced to travel to defend itself and the fact that the rider's claim against Cheng Shin had been settled, leaving only the indemnity issue to be adjudicated. Finally, O'Connor argued that because no California resident was a party to the cross-claim, the interest of the state in the resolution of the claim was "slight," and thus insufficient to justify the imposition of the "serious burdens" on Asahi.[69]

### 3. *The Views of the Commentators*

Commentators advocate a variety of approaches to the specific jurisdiction problem. Some argue that the existence of state interests should be crucial.[70] Others suggest that the convenience of the defendant should

64. *Id.* at 1038 (Stevens, J., concurring in part and concurring in judgment).
65. *Id.*
66. *Id.* at 1033-35.
67. *Id.* at 1034 (citation omitted).
68. *Id.* at 1034-35.
69. *Id.* at 1035.
70. *See, e.g.*, McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35

be determinative.[71] Still others contend that the Court should consider the entire laundry list of factors to which the Court has referred in *Asahi* and other cases.[72] In the abstract, any one of these approaches might arguably generate the most fair result. Many of the suggestions, however, are totally inconsistent with the existing pattern of decisions from the Court.

Methodologies that focus on the actual inconvenience that the defendant would suffer if forced to defend in the forum are clearly inconsistent with the Court's personal jurisdiction analysis. Two related concepts which have been central to the structure of the Court's analysis preclude the application of such theories. The first is the dichotomy between the constraints placed on the respective reaches of state and federal jurisdiction. Under currently accepted case law, Congress may establish nationwide personal jurisdiction for the federal courts.[73] Thus, in a diversity case the Constitution may prohibit a state from forcing a defendant to appear and defend the merits, while the federal court located across the street would be under no such restrictions. Such a situation is hardly consistent with a system of jurisdictional analysis based on convenience.[74]

Some commentators have challenged the proposition that there are no constitutional limitations on the ability of the federal courts to assert nationwide personal jurisdiction.[75] While lower court opinions occasionally support this skepticism,[76] the Supreme Court seems to entertain no such doubts. The Court clearly stated this proposition contemporane-

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VAND. L. REV. 1, 12-15 (1982); Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 926 (1985).

71. *See, e.g.*, Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1, 41-43 (1984); Redish, *supra* note 13, at 1137-39.

72. *See, e.g.*, Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 451-55 (1981); Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen v. Woodson, 20 ARIZ. L. REV. 861, 890-98 (1978).

73. *See, e.g.*, Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Board, 268 U.S. 619, 622 (1925).

74. One should note, however, that every circuit has held that in typical diversity cases under the current Federal Rules of Civil Procedure, the personal jurisdiction of a federal district court reaches no further than that of the courts of the state in which it sits. *See, e.g.*, Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966); Arrowsmith v. United Press Int'l, 320 F.2d 219 (2nd Cir. 1963); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 116 n.15 (2d ed. 1980). Thus, the minimum contacts test continues to have a strong impact on litigation in the federal courts.

75. *See, e.g.*, Clermont, *supra* note 51, at 435-37; Fullerton, *supra* note 50.

76. *See* Clermont, *supra* note 51, at 435 n.116.

ously with *International Shoe*.[77] Moreover, four of the Justices who participated in *Shaffer* explicitly reaffirmed the doctrine,[78] while no sitting Justice has even implicitly cast doubt on its continued vitality.[79] Thus, in the absence of some clear signal to the contrary from the Court, one may assume that the due process clause of the fifth amendment would not prevent Congress from establishing nationwide federal jurisdiction in all cases cognizable under Article III.

Moreover, even if convenience theorists were able to ignore the apparent dissonance between the respective jurisdictional reaches of state and federal courts, they would still be faced with another concept which is inconsistent with a convenience theory. The distance that a defendant must travel appears to be irrelevant in the Court's personal jurisdiction decisions dealing with *state* courts. Instead, the key issue has been whether the defendant will be forced to cross a state line to defend.[80] Thus, the same contacts which will suffice to subject a New Jersey defendant to the jurisdiction of a Pennsylvania court will also allow a California court to assert jurisdiction over the same defendant. At the same time, the fourteenth amendment is irrelevant to an Alaska court's decision to force a resident of Juneau to defend a lawsuit in Nome in the dead of winter. This type of pattern is totally inconsistent with a convenience-based theory of constraints on personal jurisdiction.

The status of interest-based analyses is more equivocal. Clearly, the mere fact that a state has an interest in a controversy cannot justify the assertion of personal jurisdiction under existing precedent. Simply limiting judicial jurisdiction to cases in which the forum state has an interest would provide little protection for nonresident defendants. One of the

77. Mississippi Pub. Corp. v. Murphree, 326 U.S. at 442 ("Congress [can] provide for service of process anywhere in the United States.").

78. Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., joined by Brennan, J., dissenting); Leroy v. Great Western United Corp., 443 U.S. 173, 191-92 (1979) (White, J., joined by Brennan and Marshall, JJ., dissenting).

79. The most recent suggestion that the fifth amendment restricts the authority of the federal courts exercise national jurisdiction came from former Justice Lewis Powell. Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 714-16 (1982) (Powell, J., concurring).

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

most basic duties of any sovereign is to provide protection for the legal rights of its citizenry. The courts of a state therefore have an interest in any case in which one of its citizens is a plaintiff. Thus, if the existence of a state interest were the touchstone for power to assert personal jurisdiction, defendants would almost always be subject to jurisdiction in the forum chosen by the plaintiffs. Obviously, the Supreme Court does not take this position.

Nonetheless, the Court does seem concerned about state interests in some cases. In *Asahi*, for example, the Court explicitly noted the lack of state interest as a reason for holding that California did not have jurisdiction over the defendant.[81] Similarly, in both *Burger King* and *Keeton* the Court embarked on extended discussions of the interests of the forum in holding that the state court could exercise personal jurisdiction.[82] Given these opinions, one cannot say that forum state interests are irrelevant to the Court's analysis.

Despite cases such as *Asahi*, *Burger King* and *Keeton*, the basic concept of purposeful availment—not the search for state interests—is clearly the dominant factor in contemporary specific personal jurisdiction analysis. First, the Court has never found constitutional the exercise of personal jurisdiction in the absence of purposeful availment by the defendant.[83] Second, the cases that focus on state interests are somewhat equivocal. The *Asahi* decision may well reflect the special problems involved in asserting jurisdiction over foreign defendants. Moreover, in that case four justices found no purposeful availment[84] and four others

81. Asahi Metal Industry Co. v. Superior Court of California, 107 S. Ct. 1026, 1034 (1987).

82. *Burger King*, 471 U.S. at 482-83; *Keeton*, 465 U.S. at 775-78.

83. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), is the one exception to the purposeful availment principle. *Phillips* concerned the application of a Kansas class action statute to out-of-state members of a plaintiff class. Under the statute, once a court had certified a class of plaintiffs, all members of that class were notified of the pendency of the action. Unless an absent class member affirmatively "opted out" of the lawsuit, the ensuing lawsuit would adjudicate his rights. This provision was challenged on the ground that it violated the due process rights of members of the plaintiff class who were otherwise unconnected with the state. The Court held that the Kansas statute did not violate the due process clause.

Obviously, even with the "opt-out" provision, the absent plaintiffs in *Phillips* did not voluntarily associate themselves with the forum state. Moreover, as the Court noted, they ran the risk of being deprived of a species of "property"—a chose in action. *See id.* at 807-08. Nonetheless, *Phillips* does not undermine the *general* principle that voluntary association with the forum is necessary for the exercise of personal jurisdiction. The Court specifically noted that the case was sui generis, governed by principles different from those that apply in cases where a *defendant* is resisting the authority of the court. *See id.* at 808-12.

84. 107 S. Ct. at 1031-35 (opinion of O'Connor, J.).

described their conclusion as a "rare" instance in which purposeful availment existed, but the forum nonetheless lacked jurisdiction.[85] In *Burger King*, the Court discussed state interests only after it concluded that the defendant's purposeful availment created a presumption that personal jurisdiction was constitutional.[86] Similarly, in *Keeton*, Justice Rehnquist discussed state interests only after noting that the defendant's contacts "ordinarily" would give rise to personal jurisdiction over it. He then strained to find a forum state interest notwithstanding the lack of a resident plaintiff.[87] In short, it seems fair to conclude that at most, state interests are relevant only in marginal cases.

From a purposeful availment perspective, *Burger King*, *Keeton*, *World-Wide Volkswagen* and *Asahi* together establish the basic principles that govern the Court's specific jurisdiction jurisprudence. First, specific jurisdiction must concern a transaction that is connected with the forum state. Second, in the absence of unusual circumstances, specific jurisdiction will attach to a defendant if, in connection with that transaction, he creates a contact with the forum state. Third, specific jurisdiction will not apply to a defendant if the contacts are created only by the unilateral activity of the plaintiff. Fourth, the Justices are split on the significance of the defendant's insertion of goods into the "stream of commerce" with knowledge that they may reach the forum state. Finally, in some marginal cases, the lack of a state interest may render otherwise constitutional assertions of jurisdiction unacceptable.

### *B. General Jurisdiction*

Unlike specific jurisdiction, in modern times the Supreme Court has decided few general jurisdiction cases. The paradigm for general jurisdiction analysis is the pre-*International Shoe* decision in *Milliken v. Meyer*.[88] *Milliken* was a lawsuit brought in Colorado to enforce a Wyoming judgment. In the Wyoming action the defendant, a Wyoming domiciliary, had been personally served with process in Colorado, but had declined to appear and defend. The Supreme Court held that the Wyoming judgment must be enforced because the Wyoming court had constitutionally exercised jurisdiction over the absent defendant. The Supreme Court stated:

85. *Id.* at 1035 (Brennan, J.).
86. Burger King v. Rudzewicz, 471 U.S. 462, 482-83 (1985).
87. Keeton v. Hustler Magazine Co., 465 U.S. 770, 774 (1984).
88. 311 U.S. 457 (1940).

> [T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. . . . The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state.[89]

After the *International Shoe* opinion, *Perkins v. Benguet Consolidated Mining Co.*[90] extended the reach of general jurisdiction. The defendant in *Perkins* was a corporation chartered by the government of the Philippine Islands. During the Japanese occupation of the Philippines during World War II, the corporation carried on a continuous and systematic, but limited, part of its general business in the state of Ohio. The Ohio activities of the corporation included directors' meetings, business correspondence, banking, stock transfers, payment of salaries and purchases of machinery for mining operations. Under these circumstances, the Supreme Court held that the due process clause did not prevent the Ohio courts from asserting postwar jurisdiction over the corporation in an action which did not relate to or arise out of the Ohio activities of the corporation.

Neither *Milliken* nor *Perkins* used the term "general jurisdiction" to describe the basis on which state court authority to adjudicate was premised. Both cases, however, stand for the fundamental principle that in some circumstances a state court may constitutionally assert jurisdiction over a cause of action that is unrelated to the state. This principle is the essence of the concept of general jurisdiction.

In the only two recent cases in which the Supreme Court has faced the issue, the Justices have declined to expand the reach of general jurisdiction. The first of these cases was *Shaffer*[91] itself. The Court in *Shaffer* plainly saw quasi in rem cases as presenting problems of general jurisdiction, arguing that "[in] the present case. . .the property which now serves as the basis for state-court jurisdiction is completely unrelated to the

89. *Id.* at 463-64 (citations omitted).

90. 342 U.S. 437 (1952).

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

plaintiff's cause of action."[92] Viewing the case from this perspective, the Court found the assertion of jurisdiction unconstitutional.[93]

*Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*[94] was the first case in which the Court explicitly relied upon the distinction between general and specific jurisdiction. *Helicol*, an action brought in Texas state court, arose from a Peruvian helicopter accident. The defendant was a Colombian corporation which had contracted to provide helicopter transportation for a Peruvian consortium. The consortium in turn was the alter ego of a joint venture headquartered in Houston. The defendant had sent its chief executive officer to Houston to negotiate the transportation contract; accepted checks drawn on a Texas bank; purchased helicopters, equipment and training sessions from a Texas manufacturer; and sent personnel to that manufacturer's facilities for training. These actions constituted the defendant's only contacts with the forum state.

The plaintiff's strongest claim would have been based on the concept of specific jurisdiction. The majority opinion noted, however, that the plaintiffs had conceded that the defendant's contacts with Texas were unrelated to the cause of action and thus a specific jurisdiction theory was not viable.[95] The Court then concluded that under the rubric of general jurisdiction, the defendant lacked the continuous and systematic contacts necessary to subject it to the Texas court's general jurisdiction.[96]

### *1. The Commentators' View of General Jurisdiction*

Perhaps because of the paucity of the case law, until quite recently post-Warren Court scholars devoted little effort to developing a theory of general jurisdiction.[97] Instead, they focused their attention on problems of specific rather than general jurisdiction. In the past year, however,

92. *Id.* at 208-09. The Court also concluded that the forum could not constitutionally rely on the theory of specific jurisdiction to assert power over the defendant. *Id.* at 211-12.

93. Elsewhere, I have argued that *Shaffer* should have been conceptualized as a dispute over the property that the state of Delaware had seized. *See supra* notes 11-16 and accompanying text. Maltz, *Reflections on a Landmark*: Shaffer v. Heitner *Viewed from a Distance*, 1986 B.Y.U.L. REV. 1043, 1046-51.

94. 466 U.S. 408 (1984).

95. *Id.* at 415 & n. 10.

96. *Id.* at 416.

97. Exceptions include Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM L. REV. 960, 979-86 (1981) and Richman, *Review Essay Part I—Casad's Jurisdiction in Civil Actions Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CALIF. L. REV. 1328 (1984). *See also* Lewis, *A Brave New World for Personal Jurisdiction: Flexible*

this situation has changed; two major efforts to construct a detailed theory of general jurisdiction have appeared in the literature.

In one such theory, Professor Mary Twitchell views general jurisdiction as a device to fill gaps left in a system that should be based primarily on specific jurisdiction analysis.[98] Functional considerations dominate her approach. While noting that judicial and legislative inertia have no doubt played a large role in the continued use of general jurisdiction, she also identifies two policy reasons for the survival of the concept: the possibility that it may fill a "legitimate societal need" not addressed by specific jurisdiction, and the fact that for most defendants, being subject to general jurisdiction in many contexts is foreseeable.[99] Twitchell argues that in a properly ordered judicial system, general jurisdiction should serve a single purpose—that of "provid[ing] plaintiffs with a forum whose power over a defendant is so undisputed that the parties and the judiciary will not need to expend significant resources in the preliminary jurisdictional inquiry."[100] Viewing the problem from this perspective, she would limit the application of general jurisdiction to a defendant's "home base" and (perhaps) a limited number of cases in which defendant corporations have particularly extensive connections with the forum.[101] Twitchell dismisses transient jurisdiction because in her view it "carries few benefits and many risks, particularly the risk of forum shopping."[102]

A group of scholars led by Professor R. Lea Brilmayer takes a more expansive view of the proper scope of general jurisdiction.[103] Brilmayer argues that a state has general jurisdiction over any entity that rises to the level of an "insider, such that the defendant may be safely relegated to the political processes and such that the defendant receives that amount and types of benefits that justify the reciprocal responsibility of being subject to jurisdiction."[104] She would define insider status by comparing the defendant to what she views as the paradigm bases for general jurisdiction—domicile, place of incorporation, and principle place of

*Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984) (arguing that general and specific jurisdiction should be merged into single unified approach).

98. Twitchell, *supra* note 13.

99. *Id.* at 630-33.

100. *Id.* at 676.

101. *Id.* at 667-79.

102. *Id.* at 670.

103. Brilmayer, Haverkamp, Logan, Lynch, O'Brien & Neuwirth, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

104. *Id.* at 742.

business.[105] Under the Brilmayer model, states could exercise general jurisdiction over defendants whose in-state activities were similar to those of the paradigm cases.[106]

Brilmayer analyzes the transient jurisdiction problem in much greater detail than Twitchell. She first rejects the claim that transient jurisdiction is justifiable simply because defendants are on notice that they may be served while in the forum state. She then contends that a state has no interest in regulating the activities of a person who is simply passing through the state, and rejects the notion that the defendant may "consent" to jurisdiction simply by being present voluntarily within the forum state.[107] While conceding that the doctrine of transient jurisdiction provides a straightforward, easily applied rule, Brilmayer concludes that "[o]n balance, transient jurisdiction has outlived its theoretical justification."[108]

Either the Twitchell or Brilmayer model might seem attractive in the abstract. Once again, however, one relevant question remains whether either approach fits well with the established case law. Taken alone, the Supreme Court's sparse pronouncements on general jurisdiction are insufficiently detailed to make such a judgment. When analyzed with the specific jurisdiction cases, however, a rather clear picture of an overarching vision of personal jurisdiction analysis emerges—a vision that is inconsistent with the theories of both Twitchell and Brilmayer.

The Court's approach is based on a subtle interaction between concepts of sovereignty and fairness. In analyzing this interaction, Professor Allen Stein argues that *International Shoe* and its progeny should be viewed as being fundamentally concerned with the allocation of sovereign authority among the various states.[109] One can reasonably treat subject matter jurisdiction issues in this fashion; in theory at least, the parties cannot confer subject matter jurisdiction by consent.[110] Personal

105. *Id.* at 728-35.

106. *Id.* at 742.

107. *Id.* at 748-55.

108. *Id.* at 755.

109. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 738-48 (1987).

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

jurisdiction questions raise different issues, however. If subject matter jurisdiction objections are surmounted, the parties can generally allocate sovereign authority by agreement to the courts of any state which both parties find congenial. Problems arise when the parties disagree on which forum is the most desirable. The legal system must provide principles by which the courts can solve such disputes. Thus, personal jurisdiction analysis should represent concern for the allocation of authority between the parties, not for the allocation of authority among the states.

The American system governing this allocation is based on a fairly complex set of principles. First, the system envisions a set of fora in which it would not be unfair for the defendant to be forced to defend. The plaintiff has the power to choose any forum within that set as the venue for the lawsuit. If the plaintiff chooses a court that is not within the set of fair fora, the defendant has the right to veto the plaintiff's choice (although generally not to designate specifically the court that will hear the lawsuit).[111] The key question is thus not whether the plaintiff has chosen the forum most appropriate to hear the lawsuit, but only whether the court selected by the plaintiff is included in the set of fair fora.

Despite its appropriate focus on fairness, the touchstone of the Court's theory is a traditional conception of the scope of states' sovereign authority. As Judge Goldberg recognized in *Mordelt*, an assumption of judicial jurisdiction is essentially an act of sovereign authority.[112] Traditionally,

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jurisdiction. Thus, a defendant can effectively confer subject matter jurisdiction on a court simply by failing to raise a jurisdictional objection.

This argument suffers from both practical and theoretical flaws. First, one can identify situations in which courts have held themselves to lack subject matter jurisdiction notwithstanding the failure of the parties to raise the issue. *See* Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). More importantly, when the aggrieved party has made a general appearance in the original action, the reasons for refusing to allow collateral attack on issues of personal jurisdiction are quite different from those that protect judgments on subject matter jurisdiction. In the personal jurisdiction situation the refusal to allow collateral attack is premised on the proposition that when the defendant has appeared the decision to take jurisdiction is perforce correct; by appearing she has waived any objection which she might have. By contrast, the judge may have made a mistake on the issue of subject matter jurisdiction. The system is willing to tolerate such mistakes, however, in order to serve other values such as the desirability of repose. *See* Durfee v. Duke, 375 U.S. 106 (1963). Thus the two different types of jurisdiction remain analytically quite separable. *But see* Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 787-92 (1985) (suggesting that differences between subject matter and personal jurisdiction are typically overstated).

111. The exception is a situation in which only one forum falls into the set of those that is "fair" to the defendant.

112. Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264, 270 (5th Cir. 1985).

such authority does not depend on either democratic theory[113] or the existence of a governmental interest in the matter being regulated.[114] Instead, the basis and scope of that authority can be derived from two cases: *Skiriotes v. Florida*[115] and *New York v. O'Neill*.[116]

In *Skiriotes* a state court convicted a Florida resident for violating a Florida statute that prohibited the use of diving equipment in harvesting ocean sponges. The defendant argued that he was outside the territorial waters of Florida when he took the sponges, and therefore the law could not constitutionally apply to him. The Supreme Court disagreed, recognizing that the state could enforce its criminal laws against its own citizens, even when those citizens were operating on the high seas.[117]

In *O'Neill* a visitor to Florida was subpoenaed by New York as a witness for a criminal proceeding in New York. Pursuant to an interstate agreement, Florida transported O'Neill to New York. O'Neill objected, arguing that Florida lacked power to order a nonresident to perform acts outside the state. The Supreme Court disagreed and asserted that "the Florida courts had immediate personal jurisdiction over [O'Neill] by virtue of his presence within that State."[118]

Taken together, *Skiriotes* and *O'Neill* establish two principles. First, a state has power to proscribe rules of conduct for its own citizens, wherever they may be located. Second, the state has authority to regulate all activities within its territorial boundaries. These two concepts describe the limits of state court personal jurisdiction over nonconsenting parties.

Without more, this model would be a reincarnation of the *Pennoyer* power theory. What brings the model under the more modern rubric of fairness is a second element—the concept of voluntariness. Essentially, both specific jurisdiction and general jurisdiction require that both parties voluntarily take some action that brings them within the sovereign authority of the forum state. Generally, the plaintiff takes that action simply by initiating the lawsuit.[119] The problem is thus to analyze the activities of the defendant to see if he has taken the necessary action.

113. *But see* Brilmayer, *supra* note 103, at 749.

114. *But see* Brilmayer, *supra* note 103, at 752; Stein, *supra* note 109, at 738.

115. 313 U.S. 69 (1941).

116. 359 U.S. 1 (1959).

117. 313 U.S. at 76.

118. 359 U.S. at 8-9.

119. *But see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), discussed *supra* note 83 (Members of plaintiff class need not voluntarily take some action to invoke the court's jurisdiction. Rather, the class members must "opt-out" to avoid jurisdiction.).

The purposeful availment cases illustrate this point. Each of the cases involved a dispute with elements that took place within the territorial boundaries (and thus the sovereign authority) of the forum. The question was whether the defendant in each case had voluntarily associated itself with those elements. One can view the difference between the O'Connor and Brennan groups in *Asahi* as a dispute over the nature of voluntariness.[120]

The pattern of the Supreme Court's decisions on general jurisdiction fits comfortably into the other prong of the sovereignty-based theory—the notion that a state has authority over *all* activities of its citizenry, wherever those activities take place. *Milliken*[121] presents the clearest case. The *Milliken* opinion explicitly relies on the reciprocal obligations created by the defendant's citizenship in the forum state to justify the exercise of jurisdiction. *Perkins*[122] is only slightly more problematic. While the corporation was created under Philippine law, at the time of service it maintained its main office in Ohio.[123] Moreover, by conducting such a large portion of its business in the forum state, the corporation accepted the protection of the state in quite general terms. Thus, the exercise of jurisdiction by the Ohio courts does not seem in any way unfair or unreasonable.

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120. *See supra* text accompanying notes 62-63.

*Kulko v. Superior Court*, 436 U.S. 84 (1978), presented an analogous problem. In *Kulko*, a New York couple with two children separated. The father remained in New York and the mother moved to California and obtained a Haitian divorce. Under the initial separation agreement, the children were to live with the father during the school year and the mother during vacation times. The agreement also provided that the father would pay the mother $3,000 per year as support for the children during the periods when they were with their mother. One year later, when leaving for Christmas vacation, one of the children told the father that she wished to live permanently with her mother. The father then bought the child a one-way ticket to California and sent her and her belongings to that state. Two years later, without the knowledge of the father, the other child obtained an airplane ticket and moved permanently to California to be with his mother. The mother then brought an action in California state court to have the child support payments increased. If the Supreme Court had found that the decision to change the children's residence could be attributed to the father, it would no doubt have found that the California courts had jurisdiction over the support action. Instead, however, the Court held that the California courts could not constitutionally exercise jurisdiction. The Court characterized the situation as one in which the father had simply financed the choice of others to move to California. *See id.* at 92-98. *See also* Shaffer v. Heitner, 433 U.S. 186, 213-15 (1977) (purchase of stock in Delaware corporation and acceptance of position of board of directors of corporation does not constitute purposeful availment of privilege of conducting business in Delaware).

121. Milliken v. Meyer, 311 U.S. 457 (1940).

122. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

123. *See* Weintraub, *supra* note 74, at 146.

By contrast, neither the defendants in *Shaffer*[124] nor *Helicol*[125] had entered into the kind of relationship with the forum that would support a finding that they had accepted the protections of the forum in any but the most specifically defined terms. Certainly, one would not argue that the mere ownership of stock seized by the Delaware court in *Shaffer* created any sort of special relationship between the shareholder and the state of Delaware that would justify holding that the shareholder was generally under the protection of that state. Similarly, the contacts between the defendant and the forum state in *Helicol* are best defined as episodic and narrowly focused.[126] Thus, while in both cases a strong argument could be made for the exercise of specific, transaction-related jurisdiction, the Court was clearly correct in finding that the prerequisites for general jurisdiction were not present.

By contrast, transient jurisdiction fits comfortably with the sovereignty-related analysis that has been adopted by the Court. Admittedly, by definition the transient defendant does not have all of the rights and responsibilities of citizenship in the state in which he is present at the time of service of process. He neither owes unqualified allegiance to that state nor is entitled to participate in the selection of government officials. Thus, the transient is not in precisely the same position as the defendant in *Milliken*.

At the same time, the jurisdictional claims of the forum state over the transient are far less sweeping than those that the forum claims over its own citizens. *Milliken* points out that the state to which a defendant owes primary allegiance may assert its sovereignty over that defendant even if he is absent from his domicile. By contrast, transient jurisdiction is based solely on the premise that the defendant is subject to the jurisdiction of the forum state only if he is served within the physical boundaries of that state. All concede that if the transient leaves the state of which he is not a domiciliary without being served, he is not subject to the general jurisdiction of the courts of that state.

One of the key issues is temporal. If one views the question as whether the forum has jurisdiction *at the time of the trial* (or the jurisdictional hearing), then the case for transient jurisdiction appears weak. The transient generally will be outside the forum state at that point. Therefore, the forum state appears to be attempting to exercise its sovereign power

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

125. Helicol Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984).

126. *See supra* notes 94-96 and accompanying text.

over a nondomiciliary who is outside the boundaries which demarcate the authority of the state government.

This characterization is somewhat misleading, however. One must consider the issue of jurisdiction at the time the lawsuit begins. No one, for example, would claim that a court loses general jurisdiction over a party who changes his citizenship after a trial has begun. Conceptually, the lawsuit begins when process is served; the time at which judicial proceedings actually commence is largely a matter of happenstance. Thus it is the relationship between the defendant and the forum at the time of service—a time when the nondomiciliary is present in the forum state—that must be considered in assessing transient jurisdiction.

At the time of service the transient has placed himself fully within the sovereign authority of the state. Moreover, he has important claims against the government of the state in which he is present. For example, the privileges and immunities clause of article IV of the federal Constitution requires that the state government grant him a variety of rights. For purposes of considering transient jurisdiction, two of these rights are particularly important: the right to protection of the law and the right of access to state courts.

The right to protection of the law guarantees that a transient can call on state power to protect his person and property. Suppose, for example, that a resident ($R$) of the forum state ($F$) claims that a transient ($T$) owes him money under a contract totally unrelated to the forum state ($F$). While $T$ is visiting his sister in $F$, $R$ attempts to seize the money in $T$'s wallet to satisfy his claim. If $T$ invoked the sovereign authority of the $F$ government by calling upon the $F$ police, they would no doubt protect him from $R$'s action, labeling it an attempt at unlawful appropriation of $T$'s assets.

Of course, the proper course of action for $R$ would be to obtain a judicial determination that $T$ in fact owed him the money. If a court vested with the necessary jurisdiction made such a determination, the finding, coupled with an appropriate enforcement order, would in effect instruct the $F$ police not merely not to interfere with $R$'s collection efforts, but to exercise their sovereign authority to aid him in those efforts. If the $F$ courts lack jurisdiction to issue such an order, a massive asymmetry would be created. $T$ would be entitled to the full protection of $F$'s sovereign power; at the same time, however, he would be entirely free from the authority of the arm of the $F$ government designated to determine his rights and responsibilities.

Indeed, in the absence of transient jurisdiction, *no* sovereign (other than the federal government) possesses the authority to compel *T* to accede to *R*'s presumably lawful demands. While the courts of other states may issue judgments in favor of *R*, they have no power to enforce those orders directly against an absent defendant. Of course, the full faith and credit clause may compel the *F* courts themselves to enforce those orders. But this factor simply controls the decision of the *F* court on the merits; it does not alter the fact that only the *F* government has power to coerce *T* while *T* is within the territorial boundaries defining the limits of *F*'s power.

The asymmetry becomes even more apparent when one considers *T*'s right of access to the courts of the forum state. Subject only to the doctrine of forum non conveniens, an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens. This right is particularly important in cases where the defendant is a citizen of the forum state. Under *Milliken*, the plaintiff can utilize the state courts to bring *any* action against such a defendant. Thus, if courts reject the doctrine of transient jurisdiction, *T* would have the full benefit of the power of *F*'s courts while retaining his own immunity from their authority.[127]

In short, transient jurisdiction is entirely consistent with the basic premises of sovereign authority and voluntariness that underlie contemporary personal jurisdiction analysis. One might still attack the concept if it were inconsistent with some compelling functional imperative of the system. Twitchell's claim that transient jurisdiction would encourage "forum-shopping" is such an argument.[128] Close analysis, however, reveals that her concerns are unfounded.

Given the basic structure of the American judicial system, the mere fact that transient jurisdiction gives the plaintiff a choice of forums does not condemn the theory. As already noted,[129] the system presupposes that the plaintiff may choose any forum that is not fundamentally unfair to the defendant. Because transient jurisdiction fulfills the Court's basic premises of fairness, the choice of forum cannot be unfair unless it violates some other imperative.

127. The standard rationalization for this disparity is that *T* voluntarily subjected himself to *F*'s authority and jurisdiction. However, this statement does not explain why *T* has the *privilege* of so subjecting himself, i.e., why *T may* use the state courts.

128. Twitchell, *supra* note 13, at 670.

129. *See supra* notes 73-79 and accompanying text.

The most likely problem is that the transient forum might adopt a choice of law rule that would be unfair to the defendant.[130] I have argued elsewhere that the defendant will rarely have a constitutionally cognizable interest in having a particular rule chosen to govern his case,[131] but even if he did have such an interest, the problem would be better addressed directly through constitutional limitations on choice-of-law.[132] Such an approach protects the defendant's right to a "fair" choice of law and at the same time vindicates the plaintiff's interest in proceeding in any forum with which the defendant has voluntarily associated himself. Thus, concerns related to choice-of-law problems do not provide a sufficient reason to restrict the plaintiff's choice of forum.

Other considerations do suggest the need for limits on the exercise of transient jurisdiction, however. First, courts should retain the exception for situations in which the defendant has been fraudulently induced to enter the forum state. One of the critical factors in the Supreme Court's approach to personal jurisdiction has been the notion that the defendant must *voluntarily* associate himself with the forum. Where the plaintiff has lured the defendant into the forum state under false pretenses, his association cannot be deemed "voluntary" in any meaningful sense. Thus, absent some other connection, he should not be subject to jurisdiction in the courts of that state.

Cases such as *Burger King*, *Keeton*, and *Asahi* also suggest another plausible argument for limiting transient jurisdiction. Taken together, these cases might be taken to indicate that state courts cannot assert jurisdiction in cases in which they have no interest whatsoever. The applicability of this principle to transient jurisdiction cases is uncertain. The *Burger King* line of cases each involved transaction-related claims of *specific* jurisdiction, while transient jurisdiction is based on status-related *general* jurisdiction. Nonetheless, these cases may indicate that states may not constitutionally require defendants to appear in cases such as *Schreiber*[133] where the plaintiff was not a resident of the forum state and the transaction was totally unrelated to that state.

130. *See, e.g.*, Ehrenzweig, *supra* note 8, at 290-91.

131. Maltz, *Visions of Fairness: The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751 (1988).

132. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984). (The question of the applicability of the forum state's statute of limitations is a choice-of-law concern that should not complicate or distort the jurisdictional inquiry.)

133. *Schreiber*, 448 F. Supp. 1079 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979).

However, even giving the *Burger King* cases their broadest reading, much of transient jurisdiction would remain intact. As already noted, whenever the plaintiff is a forum resident, the state will have a clear interest in adjudicating his claim.[134] The presence of such an interest plainly avoids the limitations of the *Burger King* analysis. Thus, in many instances transient jurisdiction would remain comfortably within the framework of analysis that the Supreme Court has established in personal jurisdiction cases.

## III. CONCLUSION

Neither side can claim a decisive victory in the dispute over transient jurisdiction. The dispute centers on the most basic concepts of sovereign authority and fairness in the relationship between the individual and government. These concepts are not the product of reasoning from basic premises. They are themselves the type of premises from which rational argument proceeds. By definition, such premises are not subject to proof or disproof.

Nonetheless, one can identify a number of important factors that support the exercise of jurisdiction over transients. The theory of transient jurisdiction plainly reflects a concept of fairness that has deep historical roots in the American system. Moreover, the same concept is reflected in the development of the Supreme Court's contemporary personal jurisdiction jurisprudence. Thus, transient jurisdiction deserves far more respect than legal scholars generally accord to it.

134. *See supra* text accompanying note 81.