JURISDICTION AS AN EVOLUTIONARY PROCESS: THE DEVELOPMENT OF QUASI IN REM AND IN PERSONAM PRINCIPLES

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The development and evolution of quasi in rem and in personam jurisdiction principles are in large part a reflection of the constant soci-

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

COURT RECORDS OF PRINCE GEORGES COUNTY, MARYLAND 1696-1699 (J. Smith & P. Crowl eds. 1964) [hereinafter cited as COURT RECORDS OF PRINCE GEORGES COUNTY];

RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND (N. Shurtleff ed. 1853-54) [hereinafter cited as RECORDS OF MASSACHUSETTS];

B. BAILYN, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY (1955) [hereinafter cited as BAILYN];

O. CHITWOOD, A HISTORY OF COLONIAL AMERICA (1931) [hereinafter cited as CHITWOOD];

J. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS (1917) [hereinafter cited as DAVIS];

E. DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954) [hereinafter cited as DODD];

E. DOUGLASS, THE COMING OF AGE OF AMERICAN BUSINESS (1971) [hereinafter cited as DOUGLASS];

H. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 (1970) [hereinafter cited as FARNAM];

H. FAULKNER, AMERICAN ECONOMIC HISTORY (1954) [hereinafter cited as FAULKNER];

L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973) [hereinafter cited as FRIEDMAN];

J. FURNAS, THE AMERICANS, A SOCIAL HISTORY OF THE UNITED STATES, 1587-1914 (1969) [hereinafter cited as FURNAS];

G. HASKINS, LAW & AUTHORITY IN EARLY MASSACHUSETTS (1960) [hereinafter cited as HASKINS];

G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) [hereinafter cited as HENDERSON];

C. HILKEY, LEGAL DEVELOPMENT IN COLONIAL MASSACHUSETTS, 1630-1686 (1910) [hereinafter cited as HILKEY];

M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) [hereinafter cited as HORWITZ];

J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970) [hereinafter cited as HURST];

H. JOHNSON, THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK 1664 TO 1730 (1963) [hereinafter cited as JOHNSON];

etal adjustment to the winds of change which have always swept this country. The continual interplay of the nation's physical setting, personal economic needs, shifting substantive law and available judicial resources have all contributed to the generation of changes in basic jurisdictional principles. In shaping the principles of jurisdiction and grappling with the forces of change, the courts have reflected the values of the dominant political groups, which generally were also the dominant economic interests. This process can be traced through more than 300 years of American legal history.

The first section of this Article discusses early colonial America where the first significant jurisdictional development transpired.¹ In the beginnings of colonial America a simple form of in personam jurisdiction constituted the basis for the assertion of jurisdiction over defendants. At that time the power of a court to enter a judgment was dependent upon the actual physical presence of the defendant before the court. This idea, carried from England, was compatible with the simple, compact, agricultural society that existed initially, but it was soon found to be inadequate. Both the economic and physical setting of colonial America differed from that of England. Credit arrangements were an essential feature of the American economy and, when debt collection became a problem, the colonial legislatures and courts responded to the demands of the creditor class by employing quasi in rem jurisdiction—the predicating of a judgment not upon the physical presence of a defendant but upon the ability to seize under judicial process the property of the defendant—to meet these needs. This process of securing credit arrangements provided the foundation for later industrialization in nineteenth-century America.

The next section of the Article focuses upon the period from 1790 to the 1930s.² This was a period of substantial jurisdictional evolution as the legal system confronted the rise and expansion of one of the major forces of industrialization—the business corporation. It was a

S. MORISON & H. COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* (5th ed. 1962) [hereinafter cited as MORISON & COMMAGER];

W. SWINDLER, *COURT & CONSTITUTION IN THE 20TH CENTURY—THE OLD LEGALITY 1889-1932* (1969) [hereinafter cited as SWINDLER];

2 W. WEEDEN, *ECONOMIC AND SOCIAL HISTORY OF NEW ENGLAND, 1620-1789* (1890) [hereinafter cited as WEEDEN];

Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958) [hereinafter cited as Kurland].

1. See text accompanying notes 7-91 *infra*.

2. See text accompanying notes 92-220 *infra*.

time of territorial and economic growth, accompanied by a change in attitudes. During the first part of the period the attempts of states to control corporate activities and to protect local businesses from outside competition produced jurisdictional rules predicated upon corporations having only limited legal existence outside the states in which they were chartered.³ During the second half of the period the increased activities of business corporations and the extension of the interstate commerce clause required broader jurisdictional principles, but the laissez-faire philosophy of the times operated as a constraint on any jurisdictional assertions that might seriously impair the activities and growth of such corporations.⁴ As a result, personal jurisdiction expanded, but the approach was defendant oriented, and concern focused on the disadvantages suffered by a defendant forced to litigate in a forum where it had only minimal business contacts.

A major shift in social attitudes and in jurisdictional principles occurred in the post-World War II era, which is the subject of the third section of the Article.⁵ Ideologically, this was the heyday of the social welfare philosophy; economically, it was the advent of the technological age. Businesses were no longer as powerful politically as they had been before the Great Depression. The focus of society and of the legal system was on the protection of the individual from the adverse effects of economic and social forces over which it was felt he had no control. As a result, a drastic shift in in personam jurisdiction principles occurred. The new rules were plaintiff oriented; concern centered on the disadvantage suffered by a plaintiff forced to litigate a claim in a forum with which he had little or no contact. Thus, the social welfare society gave birth to the "minimum contacts" test.

The last section of the Article looks at the inevitability of jurisdictional change as a component of social change.⁶ It briefly examines one factor in our present society and the possibility that it could play a substantial role in this future evolution.

The purpose of this Article is not to rehash well-known cases, but rather to identify the forces which brought particular principles into existence and which led to their subsequent replacement by other theories of jurisdiction. A caveat is in order, however. Jurisdictional development has not been wholly uniform, largely as a result of the nation's size and the regional differences within its borders. Nonetheless, despite inevitable variation among the approaches adopted by the

3. See text accompanying notes 100-87 *infra*.

4. See text accompanying notes 188-220 *infra*.

5. See text accompanying notes 221-51 *infra*.

6. See text accompanying notes 252-80 *infra*.

several states, several trends are discernible. These trends are the subject of this Article.

I. SECURING CREDIT ARRANGEMENTS: QUASI IN REM JURISDICTION IN EARLY COLONIAL AMERICA

The most significant factor influencing the course of development of jurisdictional principles in colonial America was the problem of debt collection in an economy heavily dependent on credit.⁷ Its influence can be traced in the expanding forms of original process⁸ that were authorized by colonial legislatures.⁹ An excellent illustration is provided by a comparison of the economic and social history with the evolution of the forms of process in the Massachusetts Bay Colony.

In the 1630s, when the Massachusetts Bay Colony was in its embryonic stage, it consisted of small self-contained agricultural communities whose inhabitants were united in purpose by a mixture of religious and political philosophy and by the common need to survive in a new and hostile environment.¹⁰ The whole colony consisted only of approximately one thousand people living in scattered towns on a small segment of the eastern seacoast.¹¹ Their society was a closed

7. "The bulk of the civil business of the court was taken up with serious matters . . . and this business originated usually from the most controversial phases of the economic life of the times, the acquisition of land and the collection of debts." BURLINGTON COURT BOOK OF WEST NEW JERSEY 1680-1709, at xii (H. Reed & G. Miller eds. 1944). "[D]ebt, man's constant shadow in the New World, was the chief source of litigation . . ." COUNTY COURT RECORDS OF ACCOMACK-NORTHAMPTON VIRGINIA 1632-1640, at xlv (S. Ames ed. 1954); see COURT RECORDS OF PRINCE GEORGES COUNTY lvii-lx; Klein, *The Rise of the New York Bar: The Legal Career of William Livingston*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 392 (D. Flaherty ed. 1969). See also PROCEEDINGS IN THE MARYLAND COURT OF APPEALS 1695-1729, at xxiii (C. Bond ed. 1933).

8. Original process issues to compel the defendant to appear in court. It is distinguished from mesne or intermediate process, which issues on collateral matters such as summoning juries and witnesses, and final process or process of execution. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 279 (Oxford 1768).

9. Although there was no uniform growth of law throughout the colonies, see, e.g., Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907), and the responses to particular problems varied because of factors peculiar to a region, see, e.g., W. RIDDELL, MICHIGAN UNDER BRITISH RULE 1760-1796, at 64-69 (1926), there was a similarity among the major factors influencing development of colonial civil procedure. The general manner in which the various colonies responded was consistent, with the variations being more in the time, the details and the breadth of the particular responses.

10. Haskins, *Law & Colonial Society*, 9 AM. Q. 354, 361 (1957); see CHITWOOD 433-40. See also BAILYN 39-40.

11. HASKINS 23; MORISON & COMMAGER 60. "Originally, the leaders had contemplated building a single fortified town, but the prevalence of sickness, together with the shortage of food and water, compelled them to abandon that project, with the result that the colonists divided and grouped themselves into a number of compact settlements in the tidewater area about Boston Bay." HASKINS 67; see BAILYN 1.

one¹² in which religious conformity was demanded.¹³ Outsiders were unwelcome because the colony's leaders feared that newcomers might become either a source of religious dissent¹⁴ or a burden on those already struggling to survive.¹⁵ Economically, the colony existed at the subsistence level.¹⁶ Trade with other colonies was nonexistent,¹⁷ while trade with England consisted for the most part of the exportation of fish, furs and forest products¹⁸ and the importation of almost all manufactured necessities.¹⁹ Both the courts that were established and the process they authorized were compatible with the objectives of the colony, the simplicity of life within the colony and the physical environment.

The courts were viewed by the colony's leaders as having a major role in the preservation of the goals of religious and social homogeneity and stability.²⁰ These goals would have been materially assisted by the establishment of a single court with judicial, administrative and religious authority. The advantages of such a single centralized court,²¹ however, had to be balanced against the physical separation of the towns, the danger and difficulty of travel,²² and the need for some sort of judicial body to resolve local disputes in a speedy and inexpensive

12. D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 7 (1958); HASKINS 28. Strangers who could not give before the General Court a good account of their business or security for their good behavior were put in prison unless they departed immediately. 5 RECORDS OF MASSACHUSETTS 47. Towns were not required to support those brought in without the consent of the "prudential men." 4 RECORDS OF MASSACHUSETTS Pt. 1, at 230; *see* CHITWOOD 473.

13. HASKINS 29; *see* D. BOORSTIN, *supra* note 12, at 6-9; T. HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY* 196 (1936).

14. *See* FURNAS 59.

15. HASKINS 71-72, 78. "In 1671 Dorchester, Massachusetts, actually fined a man for letting his own daughter stay with him though it was unadvisable for her to return to her distant home and husband in heavy winter weather." FURNAS 59; *see* 1 RECORDS OF MASSACHUSETTS 196.

16. *See* FARNAM 74, 92-93; HASKINS 67, 107. *But cf.* D. BOORSTIN, *supra* note 12, at 108 (in Virginia, where tobacco was grown as a money crop, life was lived on a grander and more comfortable scale).

17. In the seventeenth century the only commerce of any importance was fur trading, though fairly soon a considerable interchange of products grew up between the various colonies. COURT RECORDS OF PRINCE GEORGES COUNTY xiv; CHITWOOD 480, 485; HASKINS 107; Haskins, *supra* note 10, at 361. By the mid-1700s, inter-colonial trade was growing. CHITWOOD 486; FARNAM 77, 92; FAULKNER 59; FURNAS 181; JOHNSON 5.

18. WEEDEN 590. *See generally* BAILYN 26-30, 49-60; CHITWOOD 457, 467-69; FURNAS 28-43, 60; L. WRIGHT, *THE ATLANTIC FRONTIER: COLONIAL AMERICAN CIVILIZATION (1607-1763)*, at 102, 108 (1947).

19. *See* BAILYN 61, WEEDEN 590. For a general account of colonial industry, *see* CHITWOOD 452-57, 460.

20. HASKINS 25. *See generally id.* 43-65, 80-84, 115-16, 141-62.

21. *Cf.* COUNTY COURT RECORDS OF VIRGINIA, *supra* note 7, at xli (broad powers of the colonial court in Virginia).

22. *See, e.g.,* HILKEY 22.

manner.²³ The result was the establishment of both a central General Court and a system of local courts.²⁴ All important legal, administrative and religious matters as well as appeals from local courts could be taken to the General Court.²⁵ The local courts consisted of county courts that convened quarterly and justice of the peace courts in each town.²⁶ These inferior courts were intended to adjudicate most claims which arose within the individual communities and which, although important to the community's stability, were not important enough to bring before the General Court.²⁷

Such a system of local courts was not alien to the colonists but was part of the tradition they brought with them to the New World. Most of the colonists were middle-and lower-class Englishmen,²⁸ and the society they formed in Massachusetts Bay was not unlike the rural society they had left behind.²⁹ The legal problems they faced, such as the pro-

23. "Court records, as well as contemporary accounts, amply attest to the zest of the humbler classes for contention, gossip, and the fellowship of the tavern; and the low cost of colonial justice afforded them ample freedom to indulge their litigious instincts." HASKINS 95. See generally *id.* 35, 212-13. At first litigation was very inexpensive, but so many actions were brought that it became a great burden, and it was necessary to raise the fees from time to time. HILKEY 70-71.

24. See generally HILKEY 1-48.

25. The General Court was established in 1636. HASKINS 32-33. For similarities in the Connecticut court system, see THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772-1773 (J. Farrell ed. 1942).

26. A comprehensive description of the number and organization of the various courts appears in HASKINS 32-35. See also *id.* 212. There is some subject matter and organizational similarity between the Massachusetts courts and the Maryland courts. COURT RECORDS OF PRINCE GEORGES COUNTY xviii. See also E. PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE 1640-1700, at 3-4 (1959); Reinsch, *supra* note 9, at 372-86, 400-03. For a while the colony also had special Strangers Courts to try all causes of action that arose between strangers or in which a stranger was a party. The concern appears to have been that nonresidents only temporarily within the colony could not stay to attend one of the regular sessions of the established courts. 1 RECORDS OF MASSACHUSETTS 264. However, the Strangers Court was discontinued in 1672 as being inconvenient and expensive for strangers. HILKEY 46-47. See also 4 RECORDS OF MASSACHUSETTS Pt. 1, at 20 (repealing orders establishing special courts); HILKEY 35, 40-41.

27. "Assault, battery, debt, defamation, drunkenness, fornication, Sabbath-breaking, theft, and trespass were among the most frequent types of suits that came before [the courts]." HASKINS 33. See 2 RECORDS OF MASSACHUSETTS 279; see, e.g., FARNAM 57, 60; FRIEDMAN 70. See COURT RECORDS OF PRINCE GEORGES COUNTY lxxiii-cxiv for a description of the litigation in Maryland courts.

In addition to their general powers, the county courts had jurisdiction over a number of special matters, such as admitting church members to be freemen, purging towns of heterodoxy, appointing certain persons to look after bridges, laying out highways, judging profaners of the Sabbath, granting licenses, settling paupers, instructing the Indians and exercising certain jurisdiction over them. HILKEY 42.

28. HASKINS 98-101. Professor Haskins notes, however, that "[m]any of the colonists were nevertheless persons of wealth and substance." *Id.* 98.

29. The Massachusetts Bay colonists, like the Puritans to the south, adopted the medieval manor village as a model for their settlements. FAULKNER 65; FURNAS 59. See generally HASKINS 76-78, 94-98, 107, 167-68.

tection of crops from straying animals, the division of land, or the collection of a small debt or the wages of a worker, were the same type that had arisen in the rural communities in which they had lived in England and that formerly had been resolved in the local baronial or manorial courts.³⁰

The procedures adopted for the exercise of judicial power in the local courts were the product of the same mixture of tradition and pragmatism. During the first years of the colony, civil cases were begun by the service of a summons upon the defendant,³¹ a procedure that corresponded to that used in baronial and manorial courts in England.³² This procedure was compatible with life in a small, agricultural community bound together by a strong sense of community, common religious beliefs and the mutual need to survive. Most disputes were bound to involve individuals in the same community, and community pressure as well as official sanctions could be brought to bear upon any defendant who defied a summons.³³ In such an environment, a summons, which could be followed if necessary by more coercive means, was all that was reasonably required to make the system work adequately. The records reveal few significant failures to respond to the initial summons in the early years of the colony.³⁴

It was during the 1640s that the gradual changes which had been taking place in the economic, social and political structure of the colony began to have a significant impact upon the development of jurisdiction, for it was during this time that the factors which caused debt

30. HASKINS 167-68. See note 27 *supra*.

31. "It was ordered, that, in all ciuill accoons, the first pcesse or sumons by the beadle or his deputy shalbe directed by the Gouor, or Deputy Gounr, or some other of the Assistants, being a justice of the peace; the next pcesse to be a capias or distringas, att the discrecon of the Court." 1 RECORDS OF MASSACHUSETTS 74; see COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639-1702) 174 (J. Smith ed. 1961).

32. HASKINS 167-69.

33. The church was a powerful agency of law enforcement, and offenses were frequently independently punishable by both church and civil authorities. The two jurisdictions generally cooperated closely with each other to proscribe moral and civil offenses. HASKINS 89. See generally *id.* 88-93; Haskins, *supra* note 10, at 361. That community pressure could be a powerful force in securing compliance with the law is shown by the extensive use of public admonition as a civil punishment. HASKINS 209-10. In 1639 a merchant charged with overcharging found the most painful part of the episode to be not the fine or the admonition but the public insistence that he was a sinner. BAILYN 42.

34. The experience of the New York courts with procedural matters during the colonial period is reflected in H. SCOTT, THE COURTS OF THE STATE OF NEW YORK 42-45 (1909), in which the author, after describing the procedure required before a default judgment could be entered, concludes that "these extreme measures were rarely required, as the original summons was generally obeyed." *Id.* 43. However, in colonies that lacked the initial social and religious cohesion found in Massachusetts, the nature of frontier society or the pressures of the credit economy significantly reduced the effectiveness of the summons. See note 51 *infra* and accompanying text.

collection to become a principal influence upon the forms of process became clearly identifiable. These factors, which continued to be endemic to American society until the nineteenth century, were of two categories: those conditions that generated credit transactions and consequential debt and those that made collection of debts a source of special concern.

The economy of colonial America was based upon credit transactions.³⁵ With the development of any substantial manufacture of secondary products hampered by English economic policy,³⁶ the colonies were heavily dependent upon England for manufactured goods.³⁷ There was little hard cash within the colonies.³⁸ Since colonial exports did not generate sufficient cash to pay for these imported goods, what money existed rapidly flowed out of the colonies.³⁹ This resulted in heavy reliance within the colonies on barter and credit transactions.⁴⁰

The lack of colonial cash to pay debts was not a serious problem

35. See WEEDEN 480-81, 485-87, 588-89. "Almost the only capital beside [*sic*] funds brought in by immigrants came in the form of long-term commercial credits advanced by British merchants." DOUGLASS 14. See also COUNTY COURT RECORDS OF VIRGINIA, *supra* note 7, at xxii, xlii-xliii; 5 RECORDS OF MASSACHUSETTS 203.

36. British mercantilism considered the colonies to be useful only "to round out the economic life of the home country as producers of raw materials and markets for manufactured goods." FAULKNER 108. England sought to control the imports and exports of the colonies and to prohibit local manufacturing and issuance of paper money. See *id.* 69, 78-79, 84-85, 107-12. See generally CHITWOOD 465-67, 502-15; M. KAMMEN, *EMPIRE AND INTEREST* (1970). The colonies were permitted, and often encouraged, to engage in primary manufacturing, but were discouraged and often prohibited from engaging in secondary manufacturing, the making of finished products. Agricultural exportation was also restricted by navigation laws forbidding trade between the colonies and foreign countries except through England and on English ships. For example, the Navigation Act of 1660 sent tobacco prices plummeting to as little as a farthing a pound. L. WRIGHT, *supra* note 18, at 73.

37. See text accompanying note 19 *supra*. The colonies were also dependent upon England for living comforts—tools, wines and finery. COURT RECORDS OF PRINCE GEORGES COUNTY xiv; FURNAS 128; JOHNSON 14. See generally FAULKNER 83-84.

38. The General Court issued an order in 1669 authorizing a number of individuals to search departing ships and persons on horseback for money being carried out of the jurisdiction. 4 RECORDS OF MASSACHUSETTS Pt. 2, at 421. For a detailed look at the colonial money situation, see J. HUGHES, *SOCIAL CONTROL IN THE COLONIAL ECONOMY* 144-53 (1976). The colonists tried a number of schemes to deal with the shortage of money. BAILYN 184-89; JOHNSON 13; MORISON & COMMAGER 112-14. See also BAILYN 46-47; DOUGLASS 14.

39. See COURT RECORDS OF PRINCE GEORGES COUNTY xiii-xiv. For the period 1760-69, the southern colonies had exports totalling \$42,297,705, while the Northeast, New York, and Pennsylvania, exported only \$9,350,035, even though the population of the two areas was about the same. 1 VIRGINIA COLONIAL DECISIONS 117-18 (R. Barton ed. 1909). See FAULKNER 76, 111; FURNAS 128-29. Cash necessary to pay Britain for the large surplus of imports over exports was generated by sales of produce to a number of foreign countries, often made in violation of Britain's mercantilistic rules. BAILYN 182-83; CHITWOOD 483, 487-88; FAULKNER 80-81; see M. KAMMEN, *supra* note 36, at 48. See generally M. KAMMEN, *A ROPE OF SAND* (1968).

40. See BAILYN 46; CHITWOOD 490; DOUGLASS 15-16; FARNAM 88-89; FAULKNER 76-77; FURNAS 128-29. See also COURT RECORDS OF PRINCE GEORGES COUNTY xiv.

so long as the economy appeared to be growing. Creditors were willing to grant extensions and further advances of credit with the payment of interest only. Once the Great Migration of 1630-1640⁴¹ ended and the replenishment of the monetary supply by this source ceased, however, creditors pressed for payment,⁴² the economy convulsed⁴³ and the Depression of 1640 ensued.⁴⁴ Economic instability,⁴⁵ the scarcity of cash,⁴⁶ dependence upon outside sources for manufactured products,⁴⁷ insufficient exports to provide an adequate balance of payments⁴⁸ and the necessity of credit⁴⁹ would continue to haunt the colonists.

Concurrent with the advent of periodic depressions, there occurred changes in the social and physical structure of colonial life, changes which increased the difficulties of collection of the debts incurred through the necessary extensions of credit. Lack of cash and fluctuating business cycles, of course, made payment difficult; but the gradual disintegration of colonial solidarity brought about by the dramatic increase in population⁵⁰ and by the increased opportunities for evasion of the payment of debts⁵¹ became an increasingly significant source of

41. BAILYN 46.

42. *Id.* 47.

43. *Id.* 32-33 (severe inflation haunted the colony in the 1630s).

44. *See id.* 47; HASKINS 107-08, 215.

45. Depressions and panics occurred in the following years:

(1) 1678. This decline left the entire country greatly impoverished. *See* 5 RECORDS OF MASSACHUSETTS 203; JOHNSON 7;

(2) 1753-55. London business houses pressed their New York correspondents for payment, and the latter, in turn, pressed their debtors for payment as trade fell off. Klein, *supra* note 7, at 401. Inflationary pressures also affected the economy. *See generally* BAILYN 32-33; WEEDEN 473-78;

(3) the Confederation Period. C. Morgan, *The Legal Origins of the Bankruptcy Act of 1800*, at 29 (1973) (unpublished Master's thesis at University of Virginia). *See also* Feer, *Imprisonment for Debt in Massachusetts before 1800*, 48 MASS. VALL. HIST. REV. 252, 265 (1961).

46. *See* notes 38-39 *supra* and accompanying text. Labor was also scarce, and the courts often ordered that a debt be satisfied by a period of labor. *See, e.g.*, COUNTY COURT RECORDS OF VIRGINIA, *supra* note 7, at xlvii; COURT RECORDS OF PRINCE GEORGES COUNTY xii.

47. Though raw material was widely available and some crude manufacturing was done in the colonies, prestige often required that luxury items and items requiring much skill be imported from the mother country. *See, e.g.*, FURNAS 189. *See* notes 36-37 *supra*.

48. CHITWOOD 483, 487-88; FAULKNER 76, 111; FURNAS 128; JOHNSON 13; MORISON & COM-MAGER 81.

49. *See* WEEDEN 480-81; T. WERTENBAKER, *THE FOUNDING OF AMERICAN COLONIZATION: THE MIDDLE COLONIES* 25 (1938). Another factor contributing to the credit problem in colonial America was an inability to determine profit through proper bookkeeping methods. *See* DOUGLAS 25.

50. *See* note 53 *infra* and accompanying text.

51. In Maryland "from an early date it was found necessary to contrive some special security for creditors, and statute required that passes be obtained for departure of debtors from the province." PROCEEDINGS IN THE MARYLAND COURT OF APPEALS, *supra* note 7, at xi. In New Amsterdam it was common for parties to ignore a summons. JOHNSON 23.

creditor concern.

In early Massachusetts Bay, the social cohesiveness of the colony may have provided some pressure upon debtors to pay their debts,⁵² but during the 1630s the population of the Massachusetts Bay colony had increased dramatically, from a population of 1,000 in 1630 to 14,000 to 15,000 by 1640.⁵³ This population increase resulted in people with differing attitudes and beliefs being dispersed over larger areas. As a result the economic and social cohesiveness of the early colonial years began to break down.⁵⁴

With both English creditors and local creditors pressing for payment, debtors began attempting to avoid debts by moving from one colony to another or by transferring assets to friends and family.⁵⁵ Both the absconding and the evasive debtor presented difficult problems for the creditor.⁵⁶ If the debtor fled, tracking him down was not an easy task. Before the establishment of a national postal system, communication between colonies was difficult and very expensive.⁵⁷ Transportation was in a similar state.⁵⁸ Overland transportation was

52. See notes 33-34 *supra* and accompanying text.

53. HASKINS 3; MORISON & COMMAGER 62. Although the number of migrants declined substantially by the end of 1640, the general pattern of population growth continued. 3 RECORDS OF MASSACHUSETTS 244; BAILYN 46; FARNAM 100-01; MORISON & COMMAGER 62.

54. In early colonial Massachusetts, Puritan merchants had been required to give rather than to lend necessities to those who were not capable of repaying and even in lending were required to forgive the debt if the debtor became unable to pay. BAILYN 21-22. However, through most of the later colonial period this "Modell of Christian Charity" did not appear in the laws, where interest was always recognized as justifiable and the only question was the proper rate. FARNAM 90.

55. See, e.g., 4 RECORDS OF MASSACHUSETTS Pt. 1, at 5. Debtors also attempted to defraud creditors by delivering property that was not the debtor's to the sheriff who was serving a writ of execution. 5 RECORDS OF MASSACHUSETTS 3. See also R. HINMAN, *THE BLUE LAWS OF NEW HAVEN COLONY* 185 (1838) (a debtor, or others assisting him, could be fined by the court for concealing property from judgment creditors).

56. See SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 19-21, 41, 76, 78, 80, 83 (R. Morris ed. 1935); Feer, *supra* note 45, at 253, 263.

57. In the earliest years there were no organized arrangements for carrying and delivering mail. Massachusetts in 1639 did designate a tavern as a collection and distribution point, but it was not a monopoly. The first organized mail plan in 1673 was limited to official documents; private systems began a few years later. Intercolonial postal systems were attempted, but the need for them was not great, and it was 1691 before a proprietor with a monopoly from the king established weekly mail service between Portsmouth and Philadelphia. An Act of Parliament in 1710 linked the colonial post office with the imperial postal system, and Benjamin Franklin was appointed joint postmaster-general for the colonies in 1753. Under his leadership the system was made much more efficient, with the time a letter had to travel sometimes cut in half. CHITWOOD 474-78; see FURNAS 181, 208-09; WEEDEN 509-11.

58. "As late as 1794 it took a week under the most favorable circumstances to travel by coach from Boston to New York." FAULKNER 76 (citation omitted). A delightful description of travel in colonial America is given in Musser, *To Grandmother's House? No Way!*, SMITHSONIAN, Nov.

not only difficult, expensive and time consuming, but also dangerous.⁵⁹ The further inland one wished to travel, the greater the difficulty, danger and expense.⁶⁰ Sea and inland water transportation, although quicker, was unpredictable.⁶¹ Locating a debtor was further compounded by the gradual opening and settlement of new inland areas to which a debtor could flee.⁶² Moreover, even if a creditor had obtained a valid judgment against a debtor before the debtor absconded, and the debtor was subsequently located with adequate funds for repayment, the creditor was not assured of collection of the debt. The colonies were politically as well as physically separated,⁶³ and a judgment obtained in one colony was not necessarily enforceable in another.⁶⁴

Like many of the other colonies, Massachusetts at this time adhered to the English common law custom requiring the physical presence of the defendant before a judgment could be entered.⁶⁵ Thus, nonappearing defendants could delay or avoid the entry of an adverse judgment and only be faced with the imposition of relatively minor court costs.⁶⁶ The less scrupulous could also use the delay either to abscond or to engage in fraudulent transfers of property.⁶⁷ Of course, if a defendant failed to appear, it was within the discretion of the trial

1975, at 62. See also CHITWOOD 470-73; S. TYLER, MEMOIR OF ROGER BROOKE TANEY 57 (1872).

59. See FURNAS 144; HILKEY 22; WEEDEN 508-11, 693. In 1794, the best road in the country lay between Boston and New York, and yet even during the most favorable season of the year, with relays of horses, the journey took a week, with each day beginning at two-thirty in the morning and stopping for the night at ten o'clock. 1 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 256 (1916). "Three years after our present Government was established, twenty out of twenty-six lawsuits pending in Philadelphia were settled out of court 'rather than go ninety miles from Philadelphia for trial.'" *Id.* 258 (quoting 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 450 (H. Johnston ed. 1890)). See also *id.* 250-51 n.1, 255, 259; FAULKNER 261-63. The hazards and difficulties of travel are further illustrated by the statements in a 1679/80 petition of the people of the upper half of Whorekill County, Delaware, to have a local court established so they would not have to make the sixty-mile journey to the present court. COURT RECORDS OF KENT COUNTY, DELAWARE 1680-1705, at xv-xvii (L. de Valinger ed. 1959).

60. E.g., D. BOORSTIN, *supra* note 12, at 107, 141.

61. See generally FURNAS 144-47.

62. DOUGLASS 17-18. "The movement inland commenced almost immediately after the first settlements were made . . ." FAULKNER 91. See generally *id.* 91-102.

63. MORISON & COMMAGER 64, 84; Klein, *supra* note 7, at 403.

64. See generally Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 38-39 (1957). Some relief for the creditor existed, if the debtor could be found, by the ready assignability of debts for collection. 2 RECORDS OF MASSACHUSETTS 133; Reinsch, *supra* note 9, at 374.

65. See, e.g., A. MARTIN, CIVIL PROCEDURE AT COMMON LAW 11 (1905). Default judgments were not permitted by statute in Massachusetts until near the end of the seventeenth century. COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, *supra* note 31, at 190.

66. 3 RECORDS OF MASSACHUSETTS 185, 187; HILKEY 72.

67. 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 629 (1869). See note 65 *supra*.

judge to issue either a writ of *capias* or a writ of attachment.⁶⁸ Any property seized pursuant to the writ of attachment, however, was not held for the benefit of the plaintiff but only served as a means of forcing the defendant into court.⁶⁹ Not surprisingly, debtors served with a summons increasingly began to fail to appear in court. In such a climate, creditors feared that debtors would attempt to evade the payment of just debts by fraud or by other means.⁷⁰ On the other hand, fear of overzealous concern for the creditor's rights led residents to seek protection of their persons and property from unnecessary arrest and seizure.⁷¹ The initial response of the government of Massachusetts Bay was an attempt to balance the interests of the debtors and creditors while giving residents of the colony protection from the potential for harassment and frivolous litigation.⁷²

In 1641, in response to these conflicting pressures, the legislature enacted a statute⁷³ that permitted a plaintiff to initiate a lawsuit with a writ of attachment when the defendant was a "stranger" or was "going

68. See note 31 *supra*. See A. MARTIN, *supra* note 65, at 11.

69. R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 486-87 (1952). Originally an attachment seems to have been instituted merely for the purpose of compelling the appearance of the defendant in court to answer to the writ. Consequently, defendants would appear in court, a judgment would be entered against them and the defendants would then make "away their estates & absent their persons before the twelve hours be expired for granting execution . . ." 3 RECORDS OF MASSACHUSETTS 211. But as early as 1650, attachment was authorized for the additional purpose of securing the payment of such judgment as might be recorded in the motion. *Hubbard v. Hamilton Bank*, 48 Mass. (7 Met.) 340, 342 (1844). Attachment was also used as a means of satisfying any court costs assessed against the nonappearing defendant. In 1686-87 the colony enacted a statute that authorized the issuance of a warrant of contempt if the defendant had failed to appear, but few apparently took advantage of this procedure. *COLONIAL JUSTICE IN WESTERN MASSACHUSETTS*, *supra* note 31, at 188.

70. See also HASKINS 215; Shaiman, *The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law*, 4 AM. J. LEG. HIST. 205, 209 (1960).

71. Evidence of the misuse of process appears in Maryland, where in 1696 an act was passed requiring that declaration be served with the *capias* so that friends of the arrested party, who might be willing to provide bail, would know the basis of the action. It appears that prior to 1696 many litigious persons commenced actions out of spite and malice, did not set out the cause of action in the "original writ" and laid damages to a vast sum in order to deter a defendant's friends from providing bail. COURT RECORDS OF PRINCE GEORGES COUNTY lxxxvi; see HASKINS 213. See also 1 LAW OF PENNSYLVANIA, ch. CCLXIII (1723), which provided that a writ of attachment should not issue unless the plaintiff believed that the defendant had absconded from his usual place of abode for six days with the intent of defrauding his creditors and that the defendant had not left real estate in fee simple sufficient to pay the debt.

72. See, e.g., HASKINS 215-19.

73. As a matter of convenience for the reader the familiar term "legislature" is used in this Article to designate the body that promulgated the rules that governed judicial procedure in the various courts and the term "statute" to designate the "rules." In fact, the body was known as the General Court and it exercised administrative and judicial, as well as legislative, functions. Its pronouncements, which had the force of law, were known as "orders." For a full description of governmental organization within the Massachusetts Bay Colony, see HILKEY.

out of [our jurisdiction]" or was "about to make away [with] his estate to defraude his creditors," or when he was "doubtfull in" his estate.⁷⁴ The attachment authorized appears to have been only an attachment of the defendant's goods and not of his person. This new statute suffered from many of the defects found in prior jurisdictional procedures. Neither default judgment nor execution of the judgment upon the seized property was permitted. Furthermore, if the defendant appeared the attachment was dissolved, which meant that a dishonest defendant could appear and then use the time between the entry of the judgment and the issuance of a writ of execution to dispose of the property that had been under attachment.⁷⁵

As the debt collection problem became more acute, the division between debtor and creditor widened.⁷⁶ A result of the often greater political power of creditors⁷⁷ and the growing recognition of the economic importance of securing the credit relationship⁷⁸ was that the Massachusetts Bay legislature and courts began to accord creditors greater procedural protection.⁷⁹

74. 1 RECORDS OF MASSACHUSETTS 344-45; *see* HASKINS 216. However, a nonresident was not entitled to have an attachment issued against a "settled inhabitant" unless the nonresident first posted sufficient security. 2 RECORDS OF MASSACHUSETTS 80. *See also* 2 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691, at 233 (J. Cushing ed. 1976).

75. *See* 4 RECORDS OF MASSACHUSETTS Pt. 1, at 21 (defendant given a week to satisfy a judgment against him); 3 RECORDS OF MASSACHUSETTS 211.

76. HASKINS 215-16.

77. The governments were not, however, insensitive to the plight of the debtor and balanced the increased procedural protections for the creditor with relief for the honest resident overburdened by debt. This was reflected in the gradual enactment of insolvency laws, bankruptcy laws and the provision for payment of debts with commodities. *See Ex parte* William McDonald, 5 Pa. 237, 1 Addison 268 (1795); 1 RECORDS OF MASSACHUSETTS 92, 304; HASKINS 217-18; W. WYCHE, TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK IN CIVIL ACTIONS 229-32 (1794); C. Morgan, *supra* note 45, at 22-23. *See generally* Feer, *supra* note 45; Shaiman, *supra* note 70.

In East New Jersey, the plaintiff was required to plead and prove the exact amount of debt. A variance could lead to a motion for partial satisfaction by the defendant, which if proven defeated the plaintiff's claim. JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY 1683-1702, at 68 (1937). A 1654 statute forbade the selling of judgments and made any attempted sale, assignment or assumption of a judgment void. 3 RECORDS OF MASSACHUSETTS 357. Maryland passed a statute that required a formal demand for payment from the debtor before the creditor could sue. PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, JULY 1727-AUGUST 1729, ch. XX, at 478 (Session July 10-August 8, 1729) (B. Steiner ed. 1916). *See also* SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 21 (R. Morris ed. 1935).

78. "The problem of the absconding debtor was perhaps more pressing in the New World [than in England] and attachments became part of the general pattern of business practices sanctioned by the courts in favoring creditors, particularly local creditors, and the mercantile class generally." MAYOR'S COURT OF NEW YORK, *supra* note 77, at 19-20; *cf.* JOHNSON 33 (authorization of local commissioners to deal with such matters).

79. *See, e.g.*, JOURNAL OF THE COURTS OF NEW JERSEY, *supra* note 77, at 43; Blume, *Civil*

The legislature first dealt with the problem of obtaining a judgment against a person whose property had been attached⁸⁰ but who was physically outside the colony at the time the attachment occurred. A 1644 statute provided for the entry of a default judgment in such cases so long as the plaintiff posted adequate security to compensate the defendant in the event the defendant returned to the colony and was able to have the judgment set aside. The defendant generally had one year in which to attempt to accomplish this.⁸¹

In 1650 the legislature eliminated all restrictions on the use of attachments as initial process. Plaintiffs were given the option "to take out . . . summons or attachments agaynst any defendant," resident or nonresident.⁸² In addition, another statute enacted in 1650 provided a new function for attachment.⁸³ It provided that "all goods attached vppon any action shall not be released upon the appearance of the [party] or judgmt giuen, but shall stand ingaged untill the judgmt, or the execution graunted vppon the [said] judgmt, be discharged."⁸⁴

In the courts, two practices associated with the use of writs of at-

Procedure on the American Frontier, 56 MICH. L. REV. 161, 197 (1957); cf. 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 13, 160 (1896) (actual arrest of alleged debtor was advantageous to creditor in that debtors were then more inclined to settle or pay the debt in full). By 1647 attachment of the body was in use in Massachusetts, though the prosecuting party was required to put up security for the costs of imprisonment over 12 hours. 2 RECORDS OF MASSACHUSETTS 187.

The special status of debt actions is also illustrated by a 1642 order of the General Court that in all actions of debt, account and actions on the case concerning debts, the plaintiff could choose between the court where he resided and the court where the defendant resided, and in all other cases the actions had to be filed where the cause of action arose. 2 RECORDS OF MASSACHUSETTS 16.

80. See note 74 *supra* and accompanying text.

81. The 1644 statute provided:

[I]f hee be out of [this] iurisdiction, [the] cause shall pceed to tryall, but iudgmt shall not be entered before [the] next Cort; if ye defdt do not [then] appear, iudgmt shalbe entered; but execution shall not be granted before [the] plaintiffe hath given security to be responsall to [the] defdt if [f] hee shall revrse [the] iudgmt within one yeare, or such further time as [the] Cort shall limitt.

2 RECORDS OF MASSACHUSETTS 80.

82. Whereas, by an order of the Courte heretofore made, all playntiues were restrayned from takinge out attachmts agaynst any deffendant, (except in some cases in the sajd order expressed, some of which cases also were of a doubtfull interpretation,) whereby many playntiues haue ben sumtimes delayed, & at other times frustrated, in obtayning their just debts, the deffendants choosing rather to pay some small costs for non appearance vppon a summons, & so win time to convay away their goods, or sell their estates, it is therefore hereby ordred & enacted, that, from this time forwards, it shalbe at every playntifs choise to take out either summons or attachments agaynst any defendant, any thinge in the former recited order notwithstandinge.

3 RECORDS OF MASSACHUSETTS 187. But before a foreigner could obtain a writ of attachment against a resident, he had to post sufficient security. 2 RECORDS OF MASSACHUSETTS 80.

83. See note 69 *supra*.

84. 3 RECORDS OF MASSACHUSETTS 211. See COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, *supra* note 31, at 179. There were limits to the extent of execution on a judgment. *Id.* 185.

tachment also assisted creditors attempting to collect a debt. The 1650 statute providing for satisfaction of the judgment from the attached property, unlike the one of 1644, did not provide expressly for the entry of default judgments in the event the defendant failed to appear in court following the attachment of his property; however, as a matter of practice, the courts may have entered default judgments in all cases begun by writ of attachment.⁸⁵ The courts also may have permitted creditors to attach the defendant's goods in the hands of third parties even though this practice was not expressly authorized until later.⁸⁶

This development of the characteristics and consequences of the writ of attachment—jurisdiction based upon the judicial seizure of the defendant's property—provided creditors with a procedural weapon adequate to cope with the serious problems of debt collection in colonial America. Thus, within a relatively short period the Massachusetts Bay legal system had responded to a major social and legal problem of the times. Debt collection presented similar problems in other colonies⁸⁷ and their response was essentially the same as that of Massachusetts Bay.⁸⁸

85. See note 81 *supra* for text of the 1644 statute. Professor Haskins interprets the 1650 statute as authorizing default judgments whenever a defendant's property has been attached and the defendant fails to appear. HASKINS 216. This does not appear to be the correct interpretation, however.

The exact language of the 1650 act was: "[A]ll goods attached vpon any action shall not be released vpon the appearance of the [party], or judgement given, but shall stand jngaged vntill the judgement, or the execution graunted vpon the [said] judgement, be discharged." 4 RECORDS OF MASSACHUSETTS 27. This act was intended to overcome the problem caused by defendants who did appear and upon an adverse judgment either fled the jurisdiction with the property that had been released upon their appearance or otherwise disposed of the property released. See note 69 *supra*. This is apparent from the preamble to the statute which states:

Vpon information of some inconvenjences accrewed, and more that may accrew, to seuerall persons, in that men take themselves acquitted and free from all legall obligations in case of appearance in courts according to expresse termes of the bond, or, at most if the principall there stay till verdict and judgement be given, which if they be, they may then make away their estates, or absent their persons before the twelve howres be expired for graunting execution, whereby the partje recouering may be deprived of or much damaged in his just rights . . .

Id. 26-27. Default judgments, however, do appear to have been granted in some courts at this time even in situations not covered by the 1644 act. See COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, *supra* note 31, at 193. Thus, default judgments in all attachments cases as a matter of judicial practice may have preceded express legislation authorizing the entry of such judgments.

86. See, e.g., HASKINS 216-17.

87. See BURLINGTON COURT BOOK OF WEST NEW JERSEY, *supra* note 7, at xii; PROCEEDINGS IN THE MARYLAND COURT OF APPEALS, *supra* note 7, at xi; MAYOR'S COURT OF NEW YORK, *supra* note 77, at 19-21, 41, 76, 78, 80, 83; JOURNAL OF THE COURTS OF NEW JERSEY, *supra* note 77, at 41; H. SCOTT, *supra* note 34, at 47; W. WYCHE, *supra* note 77, at 28-33.

88. See CHARTER AND LAWS OF PENNSYLVANIA, 1682-1700, at 171-72 (Ch. CLXVII 1683), 200 (1699); COURT RECORDS OF PRINCE GEORGES COUNTY lxxxvi-lxxxviii; JOURNAL OF THE COURTS OF NEW JERSEY, *supra* note 77, at 41; MAYOR'S COURT OF NEW YORK, *supra* note 77, at 19; Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 10-11 (1942).

Territorial sovereignty played a role in the development of these quasi in rem principles because of the potential difficulty of enforcing an in personam judgment in a sister colony;⁸⁹ however, practical considerations such as the difficulty and expense of travel, the lack of satisfactory communication facilities, the inconvenience and cost of pursuing absconding debtors, the potential for evasion of payment of debts, and the desire to protect residents and honest debtors from harassment and other abuses of process played a more substantial role. The evolution of the writ of attachment is an excellent illustration of this process. Once established as an acceptable device for instituting a civil lawsuit, the judicial concepts underlying the writ of attachment were to remain essentially the same well into the twentieth century when a changed society, still attempting to cope with the different interests of creditors and debtors in securing credit arrangements, began to restrict the use of writs of attachment in the line of cases beginning with *Sniadach v. Family Finance Corporation*⁹⁰ and continuing through *North Georgia Finishing, Inc. v. Di-Chem, Inc.*⁹¹

II. JURISDICTION AND INDUSTRIALIZATION

Although the adoption of the United States Constitution and the existence of the full faith and credit clause provided greater enforceability of personal judgments in sister states, mobility of debtors, difficulties of travel and similar problems necessitated the continued use of quasi in rem jurisdiction when suing individual defendants. There was also a refinement of the principles governing in personam actions against individuals following the adoption of the Constitution. However, the most significant area of jurisdictional evolution was in the treatment of corporations.

The rise, development and expansion of the business corporation constitutes the second significant occurrence affecting the development of American jurisdictional principles. During the initial stages of corporate development, the generally accepted rule was that a corporation could only be sued in personam in the state in which it was chartered because it lacked any legal existence outside that state.⁹² In other

89. *Kibbe v. Kibbe*, 1 Kirby (Conn.) 119 (1786). "[T]he judgment obtained in Massachusetts cannot be considered as conclusive evidence of the debt, and therefore, the defendant ought still to be at liberty to controvert and deny it." *Phelps v. Holker*, 1 Dall. (Pa.) 281, 284 (1788). Several of the colonies passed laws during the eighteenth century to deal with the problem of proving and enforcing foreign judgments. Nadelmann, *supra* note 64, at 38-44.

90. 395 U.S. 337 (1969).

91. 419 U.S. 601 (1975).

92. At common law, a corporation could only be sued by service of summons on its head officer, and this was thought impossible in the case of a foreign corporation because the officer was

states, the foreign corporation was subject only to quasi in rem jurisdiction⁹³ through the seizure of corporate property located within the forum state.⁹⁴ These principles gradually gave way to the "consent,"⁹⁵ "implied consent,"⁹⁶ "presence"⁹⁷ and "doing business"⁹⁸ theories, which recognized the possibility of in personam jurisdiction in states other than the one in which the corporation was chartered but not necessarily in all the states in which corporate agents actively promoted the corporation's business. Finally, these jurisdictional principles were replaced by the expansive "minimum contacts" doctrine of *International Shoe Co. v. Washington*.⁹⁹

A. *The Pre- and Post-Revolutionary Periods.*

1. *A Short History of Early Corporate Development.* Except for municipal bodies and a scattering of charitable, educational and ecclesiastical bodies, prior to 1780 a scant seven business enterprises had

said to drop his official capacity as soon as he left the state of incorporation. Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 686 (1917). See also *Peckham v. North Parish in Haverhill*, 33 Mass. (16 Pick.) 274, 286 (1834) ("no writ can, by our laws, be legally served against a corporation in another State. . . . [W]e hold that all foreign corporations are without the jurisdiction of the process of the courts of this Commonwealth"); *M'Queen v. Middletown Mfg. Co.*, 16 Johns. (N.Y.) 4, 7 (1819) ("we think, a foreign corporation never could be sued here. The process against a corporation, must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists").

This early view of corporate existence resulted from the fact that the law of private corporations was only an unimportant branch of the law of public corporations, which, of course, could neither migrate nor have a legal existence outside the state. Cahill, *supra*, at 687; see DODD 51-52; HENDERSON 77-80. See also Farrier, *Jurisdiction Over Foreign Corporations*, 17 MINN. L. REV. 270, 271-72 (1933).

93. *Quasi in rem*, against-specific-persons: The action concerns the claims to particular property of specifically named persons who are made parties to the proceeding, and has the effect of determining the interests of those persons but not others. *Quasi in rem*, attachment: The action concerns a claim that does *not* relate to the property. Through attachment or sequestration, property concededly owned by defendant is seized at the beginning of the action and held with a view to giving it to the plaintiff if his claim against the defendant is sustained on its merits.

F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 629 (2d ed. 1977).

94. *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & Rawl. (Pa.) 173, 177 (1827); J. ANGELL & S. AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* 228 (Boston 1832); HENDERSON 77-78. But cf. *Middlebrooks v. Springfield Ins. Co.*, 14 Conn. 301, 306 (1841) (leaving open the "serious question" of foreign attachment). In some early decisions, even quasi in rem jurisdiction was unavailable against foreign corporations. *M'Queen v. Middletown Mfg. Co.*, 16 Johns. (N.Y.) 4 (1819).

95. See note 157 *infra*.

96. See note 158 *infra*.

97. See text accompanying notes 188-210 *infra*.

98. See text accompanying notes 211-20 *infra*.

99. 326 U.S. 310 (1945). See text accompanying note 232 *infra*.

received charters from royal governors or colonial assemblies.¹⁰⁰ This paucity of corporations in American business life prior to 1780 is attributable to a number of factors.¹⁰¹ This was the era of the individual merchant and of the ordinary partnership.¹⁰² The economy was a simple one. Agriculture, the exportation of agricultural products, fish, and forest products, and the importation of finished simple manufactured goods were the dominant economic activities.¹⁰³ These activities did not ordinarily require large accumulations of capital or a complex organization. The partnership and joint venture satisfied the organizational needs of colonial businessmen, with the partnership being dominant in the last half of the eighteenth century.¹⁰⁴ Furthermore, the seekers of early corporate charters were generally asking that the government grant them a special privilege, such as a monopoly of trade in a particular area, as consideration for their risks and labors in developing commerce.¹⁰⁵ Two consequences flowed from this. The first was that a corporation could only be created with the express consent of the government.¹⁰⁶ Second, because of the special privilege attached to a corporate charter, the charter seekers had to demonstrate that the particular business activity served a public need or function in addition to any private profit motive.¹⁰⁷ Thus, both the simple nature of the economy and the special circumstances surrounding the issuance of a corporate charter combined to limit the number of such charters in early colonial America.

After the Revolution, the two most important economic concerns facing the United States were to increase the supply of money and the availability of credit¹⁰⁸ and to improve internal transportation to facilitate the movement and marketing of agricultural products.¹⁰⁹ It was in these areas of economic activity during the period from 1780 to 1830 that the corporation as a business organization made its real debut in American social, economic and legal life.¹¹⁰

The surge of corporate activity in this period occurred in areas of

100. See 2 DAVIS 4-5, Appendix A (1917); DOUGLASS 46.

101. See 2 DAVIS 5-6; I. WORMSER, FRANKENSTEIN, INCORPORATED 28-30 (1931).

102. See 2 DAVIS 5, 256; HURST 5, 14; S. LIVERMORE, EARLY AMERICAN LAND COMPANIES 37-40 (1939); I. WORMSER, *supra* note 101.

103. FAULKNER 59, 79-80, 83-85; MORISON & COMMAGER 109-11.

104. See authorities cited at note 102 *supra*; I. WORMSER, *supra* note 101, at 30-31.

105. DOUGLASS 45. See also *id.* 50-51; HORWITZ 113-14, 116-18.

106. 2 DAVIS 8-9; HURST 4, 15.

107. See DOUGLASS 45-46, 50-51; HORWITZ 111-14; HURST 4-5, 15, 17-18.

108. See, e.g., DOUGLASS 52; FAULKNER 142-43, 241; FRIEDMAN 158-59; HURST 22-23.

109. DOUGLASS 71; FAULKNER 185, 198, 240-41, 260-61; FRIEDMAN 159-61; FURNAS 262; HURST 22-23.

110. See 2 DAVIS, Appendix B at 332-45; DOUGLASS 46-47; FRIEDMAN 166-67; HURST 23-24.

economic activity associated with some public purpose¹¹¹—banking,¹¹² insurance,¹¹³ turnpike¹¹⁴ and canal¹¹⁵ construction—and was caused by increased economic opportunities in these fields¹¹⁶ and the desire or need for some special privilege that could only be obtained from the legislature.¹¹⁷

In banking the principal impetus for a corporate charter was the desire to acquire a monopoly, with minimal public regulation, over banking services¹¹⁸ within an area in exchange for meeting the growing need and demand for circulating currency.¹¹⁹ Insurance was necessary to spread the risk of economic activity, and the corporate form provided a vehicle for accumulation of necessary capital. Builders of turnpikes and canals, on the other hand, in addition to wanting a monopoly to protect their substantial investment,¹²⁰ also needed, as a practical matter, the power of eminent domain, which could only be acquired from the legislature.¹²¹

During the early 1800s manufacturing enterprises were the principal newcomers to the corporate scene.¹²² Development of manufacturing was stimulated both by improvements in transportation¹²³ and by

111. *See, e.g.*, 2 DAVIS 6-8, 21-29; DODD 197; FRIEDMAN 166-67; HURST 15, 17-18.

112. *See, e.g.*, 2 DAVIS 34-108; DODD 273-92; DOUGLASS 41-45, 51, 131-36, 295-97; FRIEDMAN 159; I. WORMSER, *supra* note 101, at 33-37. By 1866, 1,934 national banks were chartered.

113. *See, e.g.*, 2 DAVIS 231-47, DODD 218-24, 292-309; DOUGLASS 55-61, 149-51; I. WORMSER, *supra* note 101, at 44.

114. *See, e.g.*, 2 DAVIS 216-30; DODD 241-47, 349-50; DOUGLASS 73-74, 76-79; G. EVANS, BUSINESS INCORPORATIONS IN THE UNITED STATES 1800-1943, at 21 (1948).

115. *See, e.g.*, 2 DAVIS 109-85; DOUGLASS 223-40; G. EVANS, *supra* note 114, at 26.

116. *See* DOUGLASS 47-48, 51-52, 55-61, 71-72, 223-34.

117. *See, e.g.*, DOUGLASS 46-47; HORWITZ 116-17. Neither limited liability nor perpetual existence was a factor in the upswing of incorporation because neither was a customary feature of the corporate charter at the time. *See* DODD 197, 230 n.12, 232-33, 312-26, 364-437; DOUGLASS 46; HORWITZ 113. *But see* DODD 85, 88-93.

118. DOUGLASS 42-43.

119. DOUGLASS 46. The early banks often obtained monopolistic powers. *See, e.g., id.* 43, 46, 47, 52.

120. "In order to protect stockholders' enjoyment of monopoly of route, public or private roads paralleling turnpikes—often called 'shunpikes'—were forbidden." DOUGLASS 76; *see* FURNAS 275.

121. *See, e.g.*, DODD 44, 242, 243-44, 249, 253; DOUGLASS 46. State compensation to individuals for property taken for public use was not a widely established principle in America before the nineteenth century. At the turn of the century, the opinion existed that individuals held their property at the sufferance of the state, and although statutes and constitutional provisions began to be enacted requiring compensation, there was a strong current of thought that the compensation was given out of kindness rather than justice. Through the first half of the nineteenth century, entrepreneurial groups resisted the compensation principle as a threat to low cost economic development, and other groups feared the power of eminent domain would bring about redistributions of wealth. *See* HORWITZ 63-66.

122. *E.g.*, DODD 123-24, 197, 226-36, 310-11, 326; FAULKNER 242-43; HURST 18.

123. *See, e.g.*, FAULKNER 239, 242, 257-59, 399.

the need for internal production of manufactured goods, which resulted from the embargoes of British products in the years preceding the War of 1812, and from the war itself.¹²⁴ Manufacturing endeavors often needed the legal power to interrupt the flow of a stream, to flood upstream land and to impair the rights of lower riparian owners, powers that they sought to obtain from the legislatures in their corporate charters.¹²⁵ The public service component was satisfied by the production of necessary manufactured goods and the resulting development of the national economy.¹²⁶ Limited liability for stockholders had started to become a common feature of corporate charters by 1830,¹²⁷ making such charters even more desirable for manufacturing enterprises. After 1830 railroad corporations entered the business scene.¹²⁸ Railroad construction required charters with the necessary eminent domain powers as well as the other features that were becoming common in corporate charters.¹²⁹

2. *The Evolution of the Consent and Implied Consent Theories.* In post-revolutionary America, the prevailing jurisdictional rule was that a corporation could be sued in personam only in the courts of the state in which it was chartered.¹³⁰ Initially, the application of this rule, derived from the law of municipal corporations,¹³¹ made sense because the geographic operations of most early business corporations did not differ radically from those of a municipal corporation,¹³² in that they lacked significant contacts with states other than the state in which they were chartered. With few exceptions, their primary business activities were confined to a single town, area or state.¹³³ The bridges, tollroads, canals and early railroads were normally constructed wholly within one state.¹³⁴ In those rare instances when construction

124. *See, e.g., id.* 242.

125. *See, e.g.,* HORWITZ 116.

126. *See, e.g.,* DOUGLASS 46-67.

127. DODD 310; DOUGLASS 47.

128. DODD 123-24, 258-60, 263; DOUGLASS 242-45; FAULKNER 275-77, 480-83. *See generally* FURNAS 344-57.

129. *See, e.g.,* DODD 260; FAULKNER 481.

130. *See* authorities cited at note 92 *supra*.

131. *See* note 92 *supra*.

132. *See* DODD 325.

133. *See id.*

134. Of 219 charters granted by colonies and later by states in the eighteenth century to companies for transportation (inland navigation, toll bridges and turnpikes), only nine of the companies had charters in two or more states. 2 DAVIS 26 (Table II), 27 (Table III), 30 (Table V). Early canals such as the Erie Canal (begun 1817) and early railroads such as the Charleston to Hamburg, South Carolina, line (begun 1830) were wholly within one state and in fact were intended for the benefit of one particular city. FAULKNER 261-62, 267-69, 275-77.

occurred in more than one state,¹³⁵ the necessity of possessing the power of eminent domain or similar powers meant that the enterprises had to be separately chartered in each state.¹³⁶

The pattern with respect to manufacturing corporations, although occurring later in time, was similar. Although there were a few sizeable companies,¹³⁷ most manufacturing operations were small,¹³⁸ and even the largest were physically restricted to a specific locality.¹³⁹ Banks and insurance companies also started as essentially local operations. The primary activity of early banks consisted of satisfying a local demand for credit and for the availability of paper money by the making of loans and the issuance of their own currency.¹⁴⁰ Similarly, the insurance business—maritime and fire—initially developed to satisfy a local demand for its services.¹⁴¹

The limited nature of corporate activities, however, soon began to change, although the corporations dealing in the more tangible products and services retained a substantially local flavor longer than those dealing in the more intangible products and services. This is not to say that tollroad, manufacturing and similar companies lacked any signifi-

135. See, e.g., DODD 57, 243-44, 253-54, 329-30, 332.

136. It has been suggested that the "prevalent belief that express legislation was necessary to give a foreign corporation legal standing" explains the number of concurrent incorporations in two or more states. HENDERSON 28.

Farnum v. Blackstone Canal Corp., 8 F. Cas. 1059 (C.C.D.R.I. 1830) (No. 4675), was the first case involving the status of a business chartered in more than one state. The court stated the now universally accepted view that such an enterprise is legally two corporations rather than one. DODD 57. Railroad expansion in the next thirty years greatly increased the number of multi-chartered corporations, but there was little litigation peculiar to them. See DODD 181. See also Bishop v. Brainerd, 28 Conn. 289 (1859); Sprague v. Hartford, P & F R.R., 5 R.I. 233 (1858). The former case held that the union of a Connecticut and a Rhode Island railroad created a new corporation legally distinct from the old ones. This, says Dodd, "suggests that [the court] did not fully grasp the point that, according to Bank of Augusta v. Earle [38 U.S. (13 Pet.) 519 (1839)], [such a] corporation . . . must either be a foreign corporation in one of those states or have two separate and distinct legal personalities." DODD 181. See also 2 DAVIS 29-31.

137. The Society for Establishing Useful Manufactures (S.U.M.) was an early venture on a national scale. Incorporated only in New Jersey, the corporation did transact business outside the state, but not to a large extent. See 1 DAVIS 349-518; HENDERSON 31-34. See also DOUGLASS 83-86.

138. See, e.g., 2 DAVIS 256; FAULKNER 421-22.

139. The textile industry, the first to develop to any extent, is typical of the pattern. Each early manufacturer had but one location in one town; towns often developed about the local plant. FAULKNER 245, 250-52. Even the plan for S.U.M., see note 137 *supra*, which was to encourage various manufacturing processes in different fields, called for only one specific location for all the varied factories. A town was to be established in northern New Jersey on the falls of the Passaic River. See also 2 DAVIS 256-69.

140. "[G]rowth was slow because the directors made no attempt to build up reserves or attract a clientele outside the commercial community. The bank's most important service during its first two decades was creating a market for commercial paper." DOUGLASS 50.

141. See, e.g., 2 DAVIS 233-34, 245.

cant multistate contacts, but that the impact of those contacts was substantially different from that of banking and of insurance corporations.

Agents of tollroad, canal, railroad and manufacturing corporations often went into other states and entered into contracts in those states on behalf of their principals.¹⁴² These activities did not pose a direct economic threat to similar local businesses because the activities of the agents within the state were only incidental to their primary objectives, which were being carried on in their state of incorporation.¹⁴³ In fact, in most situations the activities of the agents of foreign corporations were economically beneficial to local merchants and thus were encouraged.¹⁴⁴ But such encouragement was not the equivalent of legally recognizing the existence of the foreign corporation outside of its state of incorporation by subjecting it to in personam jurisdiction.¹⁴⁵ There was ample precedent for permitting a business to act through an agent within a state without subjecting the proprietor or owners of the business to in personam jurisdiction.¹⁴⁶ In such situations, jurisdiction

142. See, e.g., DODD 48, 54, 325; HENDERSON 33, 37.

143. Although the corporate privileges were, in legal form, thus strictly limited to the boundaries of the incorporating state, in its ordinary business activities the corporation naturally tended to transcend any artificial limits. Necessarily, purchases must be made and agents employed in other states. Loans were negotiated in New York, and machinery bought in Pennsylvania. But these transactions were hardly of sufficient extent to constitute an exercise of corporate functions outside of the state.

HENDERSON 33.

144. The cotton trade in the South, where the raw product of the plantation was purchased by manufacturer's agents, is an example of the system at work to the benefit of local economic interests. However, where the agent's activities did not benefit the state, as where insurance premium money was drained from a state having its own incorporated insurance companies or where a foreign bank's agent discounted local promissory notes, then the states did react to protect resident corporations through express prohibitory statutes. See C. SWISHER, ROGER B. TANEY 380-82, 391 (1935). Another situation where states often stepped in was in the case of peddlers who took business away from local merchants. Particularly in the latter half of the nineteenth century, peddlers were heavily burdened with prohibitory occupational licensing statutes. FRIEDMAN 397-99.

145. In discussing the implications of the recognition of a foreign corporation's right to sue in court outside the state of its incorporation, Dodd makes a similar point:

Analytically speaking, it may be argued that when a court permits a foreign corporation to bring suit, it necessarily decides that the corporation has capacity to own a kind of personal property—a chose in action—which, although intangible, has a situs in the non-domiciliary state in the sense that it may be enforced there Even if the question be approached from the standpoint of abstract theory rather than of economic policy, it may be argued with some plausibility that to permit a Massachusetts corporation to bring suit in New York on a Massachusetts transaction is a lesser inroad on the theory that it has only the powers that Massachusetts can give and has given to it than would be made by recognizing its legal capacity to engage in activities in New York resulting in the acquisition of real estate or chattels in that state For to permit a corporation to do business in New York in competition with New York enterprises is to affect that state and its citizens more substantially than is done merely by allowing the corporation to sue in New York.

DODD 52-53. See also HENDERSON 33-35.

146. *Libbi v. Hodgdon*, 9 N.H. 394 (1838).

was limited to quasi in rem jurisdiction.¹⁴⁷ Since the foreign corporation was simply another form of business organization, permitting its agents to act on its behalf and subjecting the corporation only to quasi in rem jurisdiction was consistent with the manner in which other non-residents were treated.¹⁴⁸

In contrast to the multistate activities of manufacturing and transportation corporations, the courts found it difficult to assimilate the multistate activities of insurance and banking corporations into the then existing jurisdictional jurisprudence. The activities of these corporations became the catalyst for jurisdictional change. The significant multistate character¹⁴⁹ of these enterprises was generated by: the demand of commercial communities for their special services;¹⁵⁰ in the case of insurance companies, the need for a large membership to provide the capital fund necessary for payment of claims;¹⁵¹ the lucrative profits to be reaped by expanding their operations to other areas;¹⁵² and the mobility of their operations, which required only an agent and a piece of paper.¹⁵³

As these foreign corporations entered the local market, their activi-

It has been thought, that if a corporation can sue within a foreign jurisdiction . . . there is no reason why it should not be liable to be sued without its jurisdiction in the same manner, and under the same regulations as domestic corporations. The technical difficulty which is said to stand in the way, is that the process against a corporation, must, by the common laws, be served on its head or principal officer, within the jurisdiction of the sovereignty, where this artificial body exists.

J. ANGELL & S. AMES, *supra* note 94, at 227-28 (footnote omitted); see HENDERSON 79-80. See also *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850); *Hume v. Pittsburgh, C. & St. L. Ry.*, 12 F. Cas. 870 (C.C.D. Ind. 1877) (No. 6865).

147. See authorities cited at note 94 *supra*.

148. See generally J. ANGELL & S. AMES, *supra* note 94, at 227-33. The courts subjecting foreign corporations to quasi in rem jurisdiction either analogized to the law with respect to "persons" or relied upon statutes granting quasi in rem jurisdiction over out-of-state persons to include corporations within the meaning of person. HENDERSON 79-80.

149. The federalist-supported national bank, which existed in several forms until 1836, established branches in various parts of the country. HENDERSON 24-28. The Insurance Company of North America, which was incorporated in Pennsylvania in 1794, decided to take on risks anywhere in the United States in 1796. Within a year's time, it had insurance policies or risks in western Pennsylvania, New York, New Jersey, Massachusetts, Delaware, Maryland, Virginia, North Carolina and South Carolina. Oviatt, *Historical Study of Fire Insurance in the United States*, 26 ANNALS 335, 343 (1905).

150. DODD 197, 216-17; see, e.g., DOUGLASS 131-32.

151. DOUGLASS 56-58.

152. *Id.* 46, 48. But see DODD 214 ("[t]he eagerness to organize new banks was in many cases due more to the desire of prospective borrowers to create a bank from which they could create credit than to the desire of prospective investors to profit by means of dividends on bank shares").

153. DODD 224-25. Massachusetts in 1827 passed an act which provided that no agent of any insurance company could transact business until he had registered with the Treasurer of the Commonwealth. It was the only act passed regulating agents of foreign corporations in that state from 1780 to 1830. Fouse, *The Organization and Management of the Agency System*, 26 ANNALS 243, 244 (1905).

ties often clashed with similar local businesses. At times the benefits of the foreign corporation's competition were seen to outweigh the disadvantages of its presence.¹⁵⁴ At other times, protection of local businesses was considered to be of paramount importance.¹⁵⁵ One device for protecting local interests was to limit certain activities to corporations and then to prohibit foreign corporations from engaging in those activities.¹⁵⁶

The early theory that a corporation existed only within the state of its incorporation had the benefit of providing the state with the theoretical power to limit competition by foreign corporations. It had, however, the disadvantage of not permitting the assertion of personal jurisdiction over foreign corporations that conducted business activities within the state. Therefore, residents who had dealt with the corporation and had a claim against it were relegated to suing in the state of its incorporation, unless the foreign corporation had sufficient assets within the forum state to warrant quasi in rem jurisdiction. Quasi in rem jurisdiction, however, probably did not provide residents with an adequate means of enforcing claims against foreign corporations that engaged in banking, insurance and similar activities. In most situations, it is unlikely that such corporations would have any significant assets in any state other than the one in which they were incorporated, and thus the availability of quasi in rem jurisdiction would be of little help to a resident with a claim against such foreign corporations. This may have been less of a problem in dealing with manufacturing, transportation and similar foreign corporations either because their purchasing activities in a state would result in the temporary location of some

154. This was especially true in the field of insurance. The view in these situations was that out-of-state companies provided a desirable and needed product, one that reduced the risk associated with the operation of a local business and therefore assisted the advancement of local enterprises. In addition, any rate competition between local insurance companies and out-of-state companies was highly advantageous to local merchants. *See generally* DODD 297; Oviatt, *supra* note 149, at 352. Similarly, banking activities by foreign corporations were not always unwelcome by the general and mercantile communities since they met a need that could not adequately be satisfied locally. *See, e.g.*, DOUGLASS 131-32; FAULKNER 161-62.

155. Many of the domestic corporations had been established to promote or assist in the development of local businesses and to improve or protect the competitive position of the local community or the state. DOUGLASS 51-52. Often the state itself was heavily involved financially in these corporations. *Id.* 52. In addition, many of these enterprises were extremely profitable, *id.* 46, 48, and the holders of stock in them often sought to insulate their business from competition. *See, e.g.*, DODD 206. Given these conditions, it is not surprising that the states attempted to control or limit competition through protective legislation.

156. The Pennsylvania-New York rivalry for the leading position in insurance resulted in attempts by both states to exclude by statute foreign insurance companies (American and British) from their states. Pennsylvania passed an exclusionary statute in 1810; New York passed one in 1814. Oviatt, *supra* note 149, at 342.

significant assets within the state or because credit arrangements provided residents with sufficient security.

What was needed was a jurisdictional principle that recognized both the absolute power of the state to exclude foreign corporations when it so desired and the right of the state, through its courts, to assert in personam jurisdiction on behalf of its citizens over foreign corporations whose activities it wished to encourage. The "consent"¹⁵⁷ and "implied consent"¹⁵⁸ theories provided the intellectual device to accomplish these goals. The theories recognized that a foreign corporation could have existence outside of the state of its incorporation, and thus could be subject to in personam jurisdiction, while the state still retained the full power to grant or deny admission.

These theories were developed in part legislatively and in part judicially. Maryland and the territory of Florida enacted statutes intended to subject foreign corporations to personal jurisdiction.¹⁵⁹ The Maryland statute provided that foreign insurance companies insuring lives or property within the state and other foreign corporations transacting business in the state were subject to suit in Maryland concerning those activities and that service on any agent of the corporation was adequate.¹⁶⁰ Judicial consideration of the Maryland statute indicated

157. Actual consent may be given in advance of litigation by an agreement which calls for the submission of any dispute arising out of the transactions specified in the agreement, either to a named tribunal or to such tribunal as the future plaintiff may choose.

The mere appearance of a defendant in a law suit for a purpose other than to attack the jurisdiction of the court over him is considered a voluntary submission to the court's power. Indeed, even a special appearance to contest personal jurisdiction may be validly treated as a submission to the court. And a plaintiff may be assumed to have agreed to the court's jurisdiction over him not only for the purpose of the claims which he asserts but with reference to claims asserted against him by defendants to the action.

Kurland 575 (citations omitted).

158. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.

Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (L. Hand, J.). See also *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855); *Warren Mfg. Co. v. Etna Ins. Co.*, 29 F.Cas. 294 (C.C.D. Conn. 1837) (No. 17,206).

159. Act of November 21, 1829, § 8, COMPILATION OF THE PUBLIC ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 107 (Duval 1839) (all foreign corporations subject to process on their agents); An Act to Regulate the Proceedings of Foreign Corporations within this State, 1834 Md. LAWS, ch. 89, §§ 1-3. See note 160 *infra*.

160. The Maryland statute provided in part:

Section 1. *Be it enacted by the General Assembly of Maryland*, That any Insurance Company not chartered by the laws of this state, which shall effect, or shall have effected insurance upon any property real or personal, or upon life or lives, within this state, and

that the statute was predicated upon the theory that the foreign corporations, by transacting business within the state, consented to the personal jurisdiction of the state.

In *Warren Manufacturing Co. v. Etna Insurance Co.*,¹⁶¹ the plaintiff, a Maryland corporation, served process on the defendant, a Connecticut insurance corporation, by serving its agent in Maryland. When the Maryland judgment was brought to Connecticut for enforcement, the federal court held that the jurisdiction of the Maryland court was open to inquiry under the full faith and credit clause. Furthermore, the judgment was held to be invalid on the ground that the act of 1834 had been enacted after the loss occurred. The court, however, approved the implied consent doctrine in dictum.¹⁶²

Another early case recognizing the implied consent doctrine is *Libbey v. Hodgdon*.¹⁶³ Under a service of process statute that facilitated

any corporation, not chartered by the laws of this state, which shall transact or shall have transacted business within this state, shall be deemed to hold and exercise franchises within this state.

Section 2. *And be it enacted*, That where any Insurance company or other corporation, as aforesaid, shall hold and exercise, or shall have held and exercised franchises, as aforesaid, within this State, such Insurance company or other corporations, shall be liable to suit within this State, in the courts of this State upon contracts of insurance on property or lives within this State, or on any dealing or transaction in this State.

Section 3. *And be it enacted*, That when any suit shall be instituted against such Insurance company, or other corporations so chartered as aforesaid, that service of the writ issued in such cause upon the President or any Directors of such company, or upon any agent of such company or corporation, shall be deemed sufficient service upon such company or corporation; and if the company or corporation shall fail to appear at the first term after such service as aforesaid, judgment shall on proof to the satisfaction of the court of the agency aforesaid, be rendered by default, against said company or corporation, for the amount of the plaintiff's claim, to be proved to and ascertained by a jury upon inquiry by it executed at bar as in cases of ascertainment of damages by jury or judgments by default.

An Act to regulate the proceedings of Foreign Corporations within this State, 1834 MD. LAWS, ch. 89, §§ 1-3.

161. 29 F. Cas. 294 (C.C.D. Conn. 1837) (No. 17,206).

162. [T]he abstract justice of the law as applicable to subsequent cases, cannot be questioned. The defendants, as a body corporate, could have no right to establish themselves, or transact business in the state of Maryland, otherwise than according to the provision of the laws of that state. The provision in the constitution of the United States, "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," cannot be applied to corporations; and the state of Maryland had a right to exclude the corporation from transacting business in that state. And if the defendants, after the passage of that law, had continued underwriting policies in that state, they would be presumed to do it upon the terms and conditions of the act; and as to all causes of action thereafter arising, would subject themselves to prosecution in the mode pointed out by the act. This law may be considered as a kind of quasi incorporation of insurance companies which have not been chartered by the state; and if such companies exercise franchises there, it is just and reasonable that they should subject themselves to prosecutions for losses, in the courts of that state, and will be deemed to have assented to the mode provided by the act for instituting suits for such losses.

29 F. Cas. at 299. See also J. ANGELL & S. AMES, *supra* note 94, at 219; HENDERSON 80-81.

163. 9 N.H. 394 (1838).

the adoption of the theory,¹⁶⁴ the New Hampshire Supreme Court implicitly adopted the implied consent theory. "But if the corporation have estate here—or if it send its officer, upon whom by our law process is to be served, to reside here and transact business upon its account, we see not why an attachment of such estate, or service upon such officer, may not be sufficient."¹⁶⁵

The Supreme Court solidified the implied consent doctrine in *Bank of Augusta v. Earle*.¹⁶⁶ The Court did not directly address the question whether a state could condition the right of a foreign corporation to do business within the state upon the corporation consenting, expressly or implicitly, to being subject to the personal jurisdiction of the state's court. However, the logical consequence of the Court's opinion was the sanctioning of a right to do business conditioned upon submission to in personam jurisdiction.

In *Bank of Augusta*, banks chartered outside Alabama had been purchasing bills of exchange¹⁶⁷ within the state. When the bills were dishonored and the banks brought suit against the Alabama sellers, the defendants raised the defense that the contracts of sale were void. The defendants' argument was that the banks, not being chartered by the State of Alabama, did not exist within the state and that a party could not enter into a contract with a nonexistent entity.¹⁶⁸ The precise issue was whether, in the absence of prohibitory Alabama legislation, a foreign banking corporation could purchase bills of exchange in Alabama and sue when the bills were dishonored.

The defendants prevailed in the federal circuit court.¹⁶⁹ If the activities of corporations were to be confined to the states in which they were chartered and their legal existence outside those states drawn into

164. [W]hen any body politic or corporate are sued in this state, who have no clerk or member residing therein on whom service can be made, an attested copy of the writ shall be delivered to the agent, overseer, or person having the care or control of the corporate property, or part thereof in this state.

Id. at 397.

165. *Id.*; accord, *Day v. Essex County Bank*, 13 Vt. 97 (1841). *Contra*, *Peckham v. North Parish*, 33 Mass. (16 Pick.) 274 (1834).

166. 38 U.S. (13 Pet.) 519 (1839).

167. Bills of exchange are orders to one in custody of another's funds to pay a part of those funds to a party designated by the owner of the funds. Bills payable at a specified time after sight are presented for acceptance; once a drawer accepts the bill, he can be sued on his failure to pay. JOHNSON 38-40.

168. The Court eventually conceded that a corporation could not exist outside the state of its incorporation, 38 U.S. (13 Pet.) at 588, and by doing so created the need for the implied consent theory. HENDERSON 48-49.

169. That court had taken the extreme position that a corporation of one state could not make a contract in another state, either directly or through an agent. C. SWISHER, *supra* note 144, at 381.

question, the effect on countless out-of-town contracts would have been disastrous and developing economic growth patterns seriously threatened.¹⁷⁰

Chief Justice Taney's opinion for the Supreme Court represented both a recognition of existing economic conditions¹⁷¹ and the assertion of state sovereignty over foreign corporations.¹⁷² According to the Chief Justice,

contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular state by which they were created.

. . . .

[Though] a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created . . . it does not by any means follow that its existence . . . will not be recognised in other places

. . . .

Every power, however, . . . which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised "In the silence of any positive rule, . . . Courts of justice presume the tacit adoption of [foreign laws]"

. . . .

But . . . [w]hensoever a state sufficiently indicates that contracts which derive their validity from . . . comity are repugnant to its policy . . . the presumption in favour of [the foreign law's] adoption can no longer be made.¹⁷³

Alabama had not, however, expressly prohibited the banks' activities, and the Court stated that "when a Court is called on to declare contracts [made in good faith] to be void upon the ground that they conflict with the policy of the state; the line of that policy should be very clear

170. DODD 48, 171; C. SWISHER, *supra* note 144, at 381-82.

171. Money is frequently borrowed in one state, by a corporation created in another. . . . Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the states, that the Court cannot overlook them. . . .

38 U.S. (13 Pet.) at 590-91.

172. "[From legislation of the states] . . . it is evident that they have regarded the comity of contract, as well as the comity of suit, to be a part of the law of the state, unless restricted by statute." *Id.* at 591. Taney cites laws of Pennsylvania and New York prohibiting foreign corporations from doing insurance or banking business, and continues: "The prohibition of certain specified contracts by corporations in these laws, is by necessary implication an admission that other contracts may be made by foreign corporations in Pennsylvania, and New York; and that no legislative permission is necessary to give them validity." *Id.* See C. SWISHER, *supra* note 144, at 383-84.

173. 38 U.S. (13 Pet.) at 585, 588, 589, 592 (quoting J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 37 (1st ed. 1834)).

and distinct to justify the Court in sustaining the defence."¹⁷⁴

Implicit in the decision was the idea that if Alabama had prohibited foreign banks from buying bills of exchange, which Alabama did the following year,¹⁷⁵ the contracts would have been void. Thus, a corporation could operate outside of its state of incorporation, but it did so at the pleasure of the host state. Existing contracts were preserved, but ultimate control over corporate activity was left in the hands of the individual states. By recognizing the possibility that a corporation could be absolutely precluded from engaging in business outside of its state of incorporation, the opinion implicitly sanctioned the conditioning of doing business within a state upon the foreign corporation being subject to the personal jurisdiction of its courts.¹⁷⁶

Despite the clear implication of *Bank of Augusta*, several federal district courts were unwilling to hold that a foreign corporation could implicitly consent to in personam jurisdiction under the federal service of process statutes.¹⁷⁷ In *Pomeroy v. New York & New Hampshire Railway*,¹⁷⁸ the court held that the federal court lacked jurisdiction over a foreign corporation where process had been served on its agent, who was located in a state other than the state of its incorporation, despite the fact that the corporation had expressly consented to in personam jurisdiction by such a method. The reasoning of the court was that since the corporation could not exist outside its state of incorporation,¹⁷⁹ and since service of process had to occur where a person was an inhabitant or where he could be found, then effective service of process could occur only in the state of incorporation.¹⁸⁰

The Supreme Court rejected this line of reasoning in *Ex parte*

174. *Id.* at 597.

175. HENDERSON 48 n.1.

176. For instance, in *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N.J.L. 222 (1853), *reh. on other grounds*, 25 N.J.L. 57 (1855), after recognizing that *Bank of Augusta* gave corporations the right to transact business in other states absent express prohibition, the court went on to state "they shall be subject to the action of the courts of the states whose comity they thus invoke. For the purposes of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state." 24 N.J.L. at 234. This dictum was the basis of the holding of the court in the later rehearing. 25 N.J.L. at 63.

177. Judiciary Act of 1789, § 11, 1 Stat. 78; Act of Mar. 3, 1875, § 1, 18 Stat. 470 ("no civil suit shall be brought . . . against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found . . .").

178. 19 F. Cas. 965 (C.C.S.D.N.Y. 1857) (No. 11,261).

179. See note 168 *supra*.

180. See *Hume v. Pittsburgh C. & St. S. Ry.*, 12 F. Cas. 870 (C.C.D. Ind. 1877) (No. 6865); *Day v. Newark India-Rubber Mfg. Co.*, 7 F. Cas. 245 (C.C.S.D.N.Y. 1850) (No. 3685). The courts recognized that consent was sufficient for jurisdiction under state law, but insisted that the federal statute required a different result. *Pomeroy*, 19 F. Cas. at 966.

Schollenberger.¹⁸¹ The circuit courts had said that consent to state service could not confer jurisdiction, but the Supreme Court took the view that by consenting to be "found" in Pennsylvania the corporation was actually found there, so that "the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding, beyond which the court will not ordinarily look."¹⁸² The Court took the view that the act of Congress was actually "not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive."¹⁸³

The Supreme Court's decision in *Ex parte Schollenberger*,¹⁸⁴ then, carried the reasoning of *Bank of Augusta v. Earle*¹⁸⁵ to its logical conclusion. The method of obtaining jurisdiction had evolved in response to the historical development of the corporation to meet the need created by that development.¹⁸⁶ As in the earlier development of quasi in rem jurisdiction, in personam jurisdiction evolved not in the legal vacuum of prior case law, but out of the changing benefits society sought to gain from the legal system.¹⁸⁷

B. *The Great Corporate Expansion: "Presence" and "Doing Business" Theories—1840-1930.*

1. *Presence.* Unlike the colonial period, when jurisdictional methods changed largely because of the breakdown of a closed society, the difficulties of communication on the frontier and the increased difficulty of obtaining judgments against debtors, or the pre-Civil War period, when the consent and implied consent doctrines developed largely in response to the multistate activities of the insurance and banking industries, the jurisdictional developments of the post-Civil War period cannot be traced directly to the social, economic and political forces of the times. The post-war approach to social organization was reflected in numerous changes in substantive areas of the law; these changes, in turn, led to the development of new theories of in personam jurisdiction.

The post-Civil War period was especially favorable to business growth and the corporate form of business. Territorial expansion and

181. 96 U.S. 369 (1877).

182. *Id.* at 377.

183. *Id.* at 378.

184. 96 U.S. 369 (1877).

185. 38 U.S. (13 Pet.) 519 (1839).

186. See text following note 156 *supra*.

187. "The law has almost always been acted upon by; or has responded to, technological change; rather than controlled it." 2 HURST 9-10.

settlement¹⁸⁸ and the increased demand for more and varied types of manufactured goods that followed the Civil War¹⁸⁹ presented the American businessman with a vastly expanding market. Improvements in machinery provided the means to produce the goods and burgeoning railroads provided ready access to markets.¹⁹⁰ Prior to the Civil War, most of the railroad construction was confined to the area east of the Mississippi. Following the war, increased immigration and settlement of the Western Plain and Mountain States led to western rail construction that provided additional markets for the industrialists of the East.¹⁹¹ Thus, during the post-Civil War period, the industrial revolution reached its zenith in America, and manufacturing gradually outstripped agriculture as the country's principal source of wealth.¹⁹²

Also during this period the corporate form became a more accessible and more popular means of doing business.¹⁹³ State legislatures passed general incorporation laws, eliminating the necessity of obtaining a charter directly from the legislature.¹⁹⁴ Some states also competed to provide the least restrictive incorporation law for the fees and taxes generated.¹⁹⁵ This increased the ability to incorporate and provided an assurance of minimal state control over the internal affairs

188. See generally FAULKNER 169, 175-83, 186-92, 404.

189. "The home market, which had been freely supplied with manufactured goods from abroad during the early decades of the century, was buying 89 per cent of its manufactured commodities from domestic producers by 1860, and 97 per cent by 1900." FAULKNER 421.

190. See generally *id.* 399; FURNAS 344-57, 794-801.

191. FAULKNER 477-80.

192. [T]he Civil War brought an Industrial Revolution . . . which was the outstanding feature of American economic life in the half-century after 1860.

. . . .

. . . . Until the decade of the eighties agriculture was the principal source of wealth, but the Census of 1890 showed that manufacturing had forged to the front, and ten years later the value of manufactured products was more than double that of agricultural.

FAULKNER 391. See also W. MENDELSON, *CAPITALISM, DEMOCRACY, AND THE SUPREME COURT* 52-53 (1960).

193. "[T]he typical [pre-Civil War] concern was owned by a single entrepreneur, a family, or a small handful of stockholders." FAULKNER 421. As the size of the average business unit grew larger and competition became harsher, there was a need for more funds than individuals could supply and for a way to spread the risks of ventures. As a result, the corporate form became popular. *Id.* 423.

194. "[I]n the late 18th century a few general laws were passed, which applied to churches, academies, and library societies. A New York law of 1811, 'relative to incorporations for Manufacturing purposes,' is considered the first general law specifically for business corporations." FRIEDMAN 172. Other states followed in enacting general laws. But they were typically not exclusive, allowing for private charters if the incorporators preferred. The next step was dual incorporation provisions: special charters to be issued only when the object of incorporation could not be obtained under the state's general laws. *Id.* 172-73. This was not a success, for most incorporators preferred special charters. Gradually, states enacted constitutional provisions forbidding the special charter altogether. *Id.* 447. See also A. CONRAD, *CORPORATIONS IN PERSPECTIVE* 145 (1976); 2 DAVIS 16-19; G. EVANS, *supra* note 114, at 10-12; HURST 18.

195. FRIEDMAN 458.

of the business. The popularity of the corporation as a device for the accumulation of capital increased as limited liability became a customary feature of corporate charters.¹⁹⁶ The limited commitment that could be made to the enterprise¹⁹⁷ as well as the central management provided by the organization¹⁹⁸ also contributed to the corporation's added popularity.

Corporations, which controlled much of the interstate business of the period, were the principal beneficiaries of a favorable post-war legal climate.¹⁹⁹ The nationalist economic philosophy had triumphed in the war,²⁰⁰ and the prevailing attitude favored promoting national commerce and giving businesses as much leeway as possible.²⁰¹ Judicially, this attitude manifested itself in a number of ways: the restrictions placed upon the states' power to control any business engaged in interstate commerce;²⁰² the expansion of the number of business activities included within the scope of the commerce clause;²⁰³ and the inclusion of corporations within the meaning of the word "persons" in the fourteenth amendment due process clause²⁰⁴ and in the Civil Rights

196. *See* HURST 27.

197. *Id.* 26.

198. By the 1850's, even in its simpler, more restricted forms, corporate structure implied a high value put upon organizational vitality. Corporation law early favored business arrangements which centralized decision making, gave it considerable assurance of tenure, and armed it for vigorous maneuver. Shareholder decisions, it was soon established, should normally be by simple majority. Active management should be concentrated in a board of directors; stockholders did not have owners' rights over the particular assets of a going corporate enterprise; unless exhibiting gross abuse of power or breach of faith, directors' decisions governed the regular course of the business. . . . Insofar as law could contribute to an undisturbed flow of operations, it favored strong central direction of pooled assets; capacity for indefinite life, uninterrupted by change of shareholders, was an enterprise-continuity value peculiar to the corporate form.

Id. 25.

199. *See, e.g.*, SWINDLER 28-31.

200. FAULKNER 330-32, 345; SWINDLER 4.

201. FRIEDMAN 446-47.

To the rising capitalist and, in fact, to the average citizen, it seemed not only unnecessary, but bad economics, to regulate private capital. Capital should be aided, not impeded, in the development of the vast natural resources of which, it was believed, there was a sufficiency for all—a theory that was given practical application through the control of the federal government by the business interests during four decades after 1860.

FAULKNER 420.

202. *See, e.g.*, *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347 (1887) (Indiana statute requiring prompt delivery of telegrams to an addressee living "within one mile of the telegraphic station or within the city or town in which such station is" held to be an encroachment on federal regulation of interstate commerce, despite the absence of a federal statute with adequate or competent service provisions). *See also* FRIEDMAN 455-56.

203. *See, e.g.*, SWINDLER 28.

204. *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26, 28 (1889) ("We admit the soundness of [counsel's] position, that corporations are persons within the meaning of the clause in question"); *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) ("under the designation of person there is no doubt that a private corporation is included"); *Santa Clara County v. Southern*

Act of 1866,²⁰⁵ which restricted the states' power to control both domestic and foreign corporations.²⁰⁶ Also, the major thrust of the commercial and tort decisions of the post-Civil War period was to free businesses from the financial burdens of having to compensate people injured during the course of the business's activities.²⁰⁷

As a result of these legal developments, the consent and implied consent theories, adequate in the pre-Civil War days, became increasingly unsatisfactory methods for asserting in personam jurisdiction over foreign corporations. A theory was needed that recognized the interstate nature of many corporate businesses, provided a means for subjecting some of these corporations to suit in states in which they were not incorporated and imposed limitations on state power to affect the corporation's activities through the use of state courts.²⁰⁸ Thus, it is not surprising to find the "presence" theory making its appearance in

Pac. R.R., 118 U.S. 394, 396 (1886) ("[t]he court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does").

205. Ch. 31, 14 Stat. 27 (1866).

206. The state was allowed some regulatory power to protect its interests, but the type of regulation or manner of enforcement could not constitute an unreasonable burden on interstate commerce. Subjecting the foreign corporation to suit in the state where it operates was found not to violate the commerce clause, *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); neither was a statute subjecting cars used in interstate commerce to attachment and garnishment a violation, *Davis v. Cleveland C.C. & St. L. Ry.*, 217 U.S. 157 (1910). The methods of enforcing conditions, however, may create an unreasonable burden. *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), allowed the foreign corporation to sue on a contract in state court, though the corporation had not complied with the statutory prerequisites. Deciding on the same issue in *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), the Court said: "The right to demand and enforce payment for goods sold in interstate commerce . . . is . . . directly connected with it and . . . essential to its existence and continuance." 235 U.S. at 200-01. "[State regulations] must not be enforced by expulsion, or by closing the courts to the corporation on causes of action growing out of interstate commerce, or . . . by declaring its contracts void, but a reasonable method of enforcement, such as a moderate fine, should be upheld." HENDERSON 126.

207. See Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951):

While it is pure speculation, one of Chief Justice Shaw's motives underlying his opinion [in *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850)] appears to have been a desire to make risk-creating enterprise less hazardous to investors and entrepreneurs than it had been previously at common law. Certainly that interpretation is consistent with his having furthered the establishment of the fellow servant doctrine and the expansion of the assumption-of-risk defense in actions arising out of industrial injuries. Judicial subsidies of this sort of youthful enterprise removed pressure from the pocket-books of investors and gave incipient industry a chance to experiment on low-cost operations without the risk of losing its reserve in actions by injured employees. Such a policy no doubt seems ruthless; but in a small way it probably helped to establish industry, which in turn was essential to the good society as Shaw envisaged it.

See also FRIEDMAN 412-14.

208. The critical limitation of the consent and implied consent theories for these purposes was that they were premised on the idea that the state could prohibit foreign corporations from entering into or transacting business within its borders. See text accompanying notes 157-58 *supra*. But the development of commerce clause jurisprudence, see text accompanying notes 202-03 *supra*, led to the recognition that corporations engaged in "interstate commerce" could not be

the late nineteenth century, when the commerce clause had been extended to include many new activities, and interstate activity was more pervasive and complex.²⁰⁹ The "presence" theory filled the jurisdictional hole in the "implied consent" theory created by the expansion of the commerce clause, permitting the assertion of jurisdiction where no significant burden was imposed upon interstate commerce.²¹⁰ Even though a corporation dealing in interstate commerce could not theoretically be prohibited from entering the state, it could still be subjected to personal jurisdiction. Both theories co-existed because they dealt with two distinct corporate groups—corporations that the states could exclude and those that they could not.

2. *Doing Business.* The evolution of the "doing business" theory of personal jurisdiction occurred in the early twentieth century;²¹¹

prohibited from doing business in the state without interference with the flow of interstate commerce.

209. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States.

St. Clair v. Cox, 106 U.S. 350, 355 (1882); see DOUGLASS 47.

210. Although the Supreme Court held that a state court could assert personal jurisdiction over a foreign corporation engaged exclusively in interstate commerce when it was "present" within the state, *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914), this holding did not mean that the Court was less concerned about the adverse impact upon a business caused by an assertion of personal jurisdiction over it than about other assertions of state power that might have an adverse impact upon an out-of-state business enterprise. See generally HENDERSON 112-31. This concern was reflected in the Supreme Court's and lower courts' determination of the amount and type of business activity that was required before a foreign corporation was found to be "present" or "doing business" within the forum state. See, e.g., *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517-18 (1923); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930); *Davega, Inc. v. Lincoln Furniture Mfg. Co.*, 29 F.2d 164 (2d Cir. 1928); cf. *W.S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U.S. 723 (1915) (paying an agent to solicit orders to be filled at home office and sharing services with another corporation held not to constitute "a regular and established place of business" in the district).

One consequence of finding a foreign corporation "present" or "doing business" within a state was that it was subject to in personam jurisdiction in that state on any transitory cause of action regardless of whether it arose within the state or in another location. See generally Kurland 582-83. This fact may have influenced the courts' determination of whether a corporation in a particular case was "present" or "doing business." But see *Rosenberg Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923).

211. E.g., *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218 (1913); *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U.S. 496 (1912); *Mechanical Appliance Co. v. Castleman*, 215 U.S. 437 (1910); *Green v. Chicago B. & Q. Ry.*, 205 U.S. 530 (1907); *Peterson v. Chicago, R.I. & Pac. Ry.*, 205 U.S. 364 (1907); cf. *Goldey v. Morning News*, 156 U.S. 518 (1895) (state court judgment against a corporation that is neither incorporated nor doing business within the state has no validity in federal courts or courts of another state unless service of process is made in the state upon an agent appointed to act there for the corporation).

during that period, *laissez faire*²¹² continued to be the prevailing economic philosophy. Continuing the approach of the late nineteenth century, the judicial attitude was to protect business activities from those assertions of state or federal power believed to be inconsistent with this *laissez faire* philosophy.²¹³ The fifth and fourteenth amendments' due process clauses provided the courts with the legal tools to accomplish this end. The fifth amendment due process clause was used to restrict federal power over businesses covered by the commerce clause and supposedly subject to federal regulation;²¹⁴ the fourteenth amendment due process clause was used to restrict state power over those businesses not covered by the commerce clause and supposedly subject to state regulation.²¹⁵

In the area of personal jurisdiction, the development of the "doing business" theory tracked developments in "economic due process." It would have been inconsistent with the Supreme Court's "economic due process" approach to have allowed a state to assert personal jurisdiction over a foreign corporation when the economic burden and the potential disruption of business activities associated with conducting a defense in a distant forum were significant. The Court therefore required that before a state court could assert jurisdiction over a foreign corporation that had not expressly consented to the assertion of jurisdiction, the foreign corporation's activities within the state had to be substantial enough that no significant inconvenience or economic burden would be imposed upon the foreign corporation by requiring it to defend a lawsuit filed in that state.²¹⁶ The term "doing business" was

212. *See generally, e.g.*, SWINDLER.

213. *See generally, e.g., id.* To prevent the application of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), to the activities of the numerous trusts that had been formed during the last quarter of the nineteenth century, the Supreme Court adopted a narrow interpretation of the commerce clause. SWINDLER 28-31, 35. When the states attempted to regulate those businesses that were excluded from the protection of the commerce clause, the Court responded by using the due process clause and the concept of economic due process to declare unconstitutional state statutes inconsistent with the Court's *laissez faire* philosophy. *Id.* 36.

214. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Adair v. United States*, 208 U.S. 161 (1908).

215. *E.g., Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Chicago, M. & S.P. Ry. v. Minnesota*, 134 U.S. 418 (1890).

216. *See* authorities cited at note 211 *supra*. Interestingly, the Supreme Court held that a foreign corporation was not "doing business" more often in cases involving personal injuries and other personal torts than in cases involving contracts and commercial torts. *Compare Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907) *and Peterson v. Chicago, R.I. & Pac. Ry.*, 205 U.S. 364 (1907) *with St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218 (1913) *and Mechanical Appliance Co. v. Castleman*, 215 U.S. 437 (1910). *See also Goldey v. Morning News*, 156 U.S. 518 (1895).

A factor that complicates analysis of the development of jurisdictional principles at this time was that assertion of personal jurisdiction over a foreign corporation may have been less of an interference with the business activities than pre-existing practice. At that time, most foreign

used to describe the threshold of activity sufficient for the assertion of personal jurisdiction over foreign corporations.²¹⁷

"Doing business" was a natural outgrowth of earlier jurisdictional theories. Under both the "implied consent" and "presence" theories, courts had to examine the business activities of a foreign corporation to determine whether its activities within a state were substantial enough to permit the state to assert personal jurisdiction over the corporation. If the corporation's business activities were sufficient, then the corporation's "implied consent" or "presence" would be found.²¹⁸ The phrase "doing business" was often used to describe those activities sufficient to find implied consent or presence.²¹⁹ Thus, it was easy to substitute that already familiar term for both these theories. This substitution may have been simply the product of a judicial realization of the similarities between the two theories,²²⁰ but it may have been more than that because it allowed the Court to use the same protective umbrella in supervising the assertion by state courts of personal jurisdiction over all foreign corporations regardless of whether they were engaged in activities covered by the commerce clause.

III. THE SOCIAL WELFARE SOCIETY AND "MINIMUM CONTACTS"

The next major stage of jurisdictional development followed the Great Depression and was part of a major shift in social philosophy. The Depression and post-Depression years witnessed the decline of the laissez faire philosophy and of the concept of individualism.²²¹ The great crash of 1929, the Depression, the loss of faith in business,²²² the demand on the government for relief and the desire to create safeguards to prevent a similar occurrence in the future²²³ were the driving forces behind the social welfare philosophy²²⁴ and many legislative

corporations "doing business" within a state had assets within the state that could be seized pursuant to an assertion of quasi in rem jurisdiction. Deprivation, even temporarily, of business assets would have been a more significant interference with business than the assertion of personal jurisdiction. Thus, the Court may have encouraged the assertion of personal jurisdiction in such circumstances. *Cf.* *International Harvester Co. v. Kentucky*, 234 U.S. 579, 588 (1913) (fact that foreign corporation engages only in interstate commerce does not alone immunize its property from seizure under state garnishment and attachment laws).

217. See authorities cited at note 211 *supra*.

218. See, e.g., *Kurland* 584.

219. See, e.g., *id.*

220. See e.g., *id.* 584-85.

221. See *FRIEDMAN* 568-70.

222. See, e.g., *id.* 575.

223. See, e.g., *id.* 590.

224. E.g., Emergency Farm Mortgage Act of 1933, ch. 25, tit. II, 48 Stat. 41; Public Works Administration Act, ch. 90, tit. II, 48 Stat. 195 (1933); Social Security Act, ch. 531, 49 Stat. 620

limitations on corporate power.²²⁵ Protection of the individual from economic forces beyond his or her control became a part of the thinking of the times.

International Shoe Co. v. Washington,²²⁶ which gave birth to the "minimum contacts" theory, was a child of its times. Not surprisingly, it involved a social welfare scheme and a foreign corporation. In 1937, Washington passed an Unemployment Compensation Act.²²⁷ In 1941, the state sought to collect unemployment compensation taxes from the International Shoe Company.²²⁸ The taxes were based upon the compensation paid to the company's Washington salesmen as commissions. International Shoe contested the jurisdiction of the state to assess the tax and challenged the in personam jurisdiction of the state court. In the Washington state courts the company asserted that the commerce clause and the due process clause prevented the state from collecting the unemployment compensation taxes,²²⁹ but the Supreme Court informed counsel it did not wish to hear these arguments.²³⁰ Thus, the argument was limited to the company's contention that the due process clause prevented the assertion of in personam jurisdiction by Washington over International Shoe.²³¹ The end result of the case was the announcement of the "minimum contacts" test:

[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 the suit does not offend "traditional notions of fair play and substantial justice."²³²

As Mr. Justice Black pointed out, *International Shoe* could have been decided under the existing jurisdictional theories.²³³ The words

(1935); Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58; National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

225. *E.g.*, National Labor Relations Act, ch. 372, 49 Stat. 449 (1935); Reconstruction Finance Corporation Act, ch. 8, 47 Stat. 5 (1932); Securities Act of 1933, ch. 38, tit. I, 48 Stat. 74; Securities Exchange Act of 1934, ch. 404, 48 Stat. 881; Banking Act of 1933, ch. 89, 48 Stat. 162.

226. 326 U.S. 310 (1945).

227. 1937 Wash. Laws 574 (codified at WASH. REV. CODE § 50 (1976)).

228. International Shoe Company was a Delaware corporation with its principal place of business in St. Louis, Missouri. It did not have an office or any property, except for shoe samples, in the state of Washington. It did not enter into any contracts in that state, nor did it deliver any goods in that state. All orders were shipped FOB from outside the state. It did, however, employ Washington residents as salesmen to solicit orders within the state. These employees rented display rooms, for which they were reimbursed by International Shoe Company, and received commissions on all orders they sent to the company.

229. *International Shoe Co. v. State*, 22 Wash. 2d 146, 154 P.2d 801, *aff'd*, 326 U.S. 310 (1945).

230. 65 S. Ct. 1579 (1945) (not officially reported); Kurland 587-88.

231. 326 U.S. at 311; Kurland 588.

232. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

233. 326 U.S. at 322 (advocating dismissal of the appeal as "insubstantial"); Kurland 586.

"minimum contacts" are neither more precise nor more definite than "implied consent," "presence" or "doing business"; all are vessels of unknown size. The "minimum contacts" test, however, was the beginning of a new way of looking at jurisdictional questions with a substantial difference in emphasis.²³⁴

The "implied consent," "presence" and "doing business" theories looked for a more substantial amount of corporate conduct within the forum state than the minimum contacts test. The lesser degree of corporate activity necessary for the assertion of jurisdiction under the minimum contacts test was part of the underlying political and philosophical shift. Businesses were being asked to bear more of the economic burdens of their conduct, and, as part of that movement, the burden of litigating in an inconvenient forum, which had previously fallen upon the plaintiff, was being shifted to the corporate defendant.²³⁵ The additional cost of defending the suit would be passed on to society as a whole through the pricing mechanism.

The full impact of this development awaited its merger with another growing legal doctrine that had its origins in *MacPherson v. Buick Motor Co.*²³⁶ *MacPherson* was the first case to give the ultimate consumer a cause of action against a manufacturer, with which he had never dealt, for injuries caused by a defective product. The post-World War II acceptance of this concept was a social welfare society's

Compare this approach with the Court's decision in *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

234. Although there is substantial evidence that the *International Shoe* Court did not view the decision as a break with precedent, Kurland 589-91, but as a promulgation of "an appropriate rationale to demonstrate . . . [the] consistency [of precedent]," *id.* 589, the subsequent focusing upon the phrase "minimum contacts," *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952), *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950), in fact rejected precedent and adopted a new way of looking at jurisdiction. That the Supreme Court was cautious in developing the new approach and was unwilling to cut off precedent directly in *International Shoe* is not surprising. The history of jurisdiction has been one of gradual evolution, of new ideas growing out of old, until the new completely supplants the old.

The shift of thinking incidental to adoption of the minimum contacts test for determining the propriety of state jurisdiction over a nonresident defendant is not unlike the shift of thinking associated with the promulgation of the Federal Rules of Civil Procedure. In the Federal Rules the terms "claim for relief" and "12(b)(6) motion" were adopted in place of the traditional terms "cause of action" and "demurrer." The use of these terms was specifically intended to point the direction to a new way of thinking about pleading and to discard precedent. Whether the Supreme Court intended to do the same with the minimum contacts test is not as important as the fact that it did happen.

235. See, e.g., *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Hoagland v. Springer*, 75 N.J. Super. 560, 183 A.2d 678 (App. Div.), *aff'd*, 39 N.J. 32, 186 A.2d 679 (1962). See also *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

236. 217 N.Y. 382, 111 N.E. 1050 (1916).

response to the numerous, complex and often dangerous products of the technological age.²³⁷ Since that time, products liability litigation has mushroomed.²³⁸ In order that individual consumers might actually receive the benefits of the newly protective tort law, it was essential that they be able to assert personal jurisdiction over distant manufacturers. The minimum contacts test helped open the courts to products liability plaintiffs. Corporations passed on the cost of litigation in a distant forum and the additional recoveries resulting from the ability of plaintiffs to sue conveniently in the forum of their choosing to the rest of society by raising the price of their products.²³⁹

The classic explanation of the minimum contacts test has emphasized the improvements in communication and technology that have occurred in the twentieth century. For example, in *Hanson v. Denckla*,²⁴⁰ Chief Justice Warren stated:

As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, to the flexible standard of *International Shoe Co. v. Washington*.²⁴¹

The ultimate question, however, is why should the defendant rather than the plaintiff have to take advantage of these improvements and come to the forum of the plaintiff's choice? Why do we need expanded jurisdiction over nonresidents? The answer does not lie in the making of a rational choice among various possible forums depending upon which appears to be the best forum in which to litigate the partic-

237. See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1976).

The acceptance of the social welfare philosophy in the twentieth century was hastened by the substantial change in economic conditions between the nineteenth and twentieth centuries. By the mid-twentieth century, America had substantially completed its process of industrialization. The forces of industrialization had been firmly established, and the country's economic condition was relatively secure. The dangers to a fledgling enterprise or to business growth presented by the burdens of liability for injuries and of litigation in a forum distant from the places where the corporation was "doing business" were no longer as serious as they were once perceived to be. See, e.g., Gregory, *supra* note 207, at 382-85.

238. See, e.g., FRIEDMAN 589.

239. The availability of insurance, a risk-spreading device, has, of course, been a substantial factor in hastening the wider application of the minimum contacts test to new classes of cases and in reducing the extent of the "contact" necessary to satisfy the test. Cf. *Schneider v. Linkfield*, 389 Mich. 608, 209 N.W.2d 225 (1973) (jurisdiction predicated on Michigan long-arm statute over cause of action arising in Indiana when defendant was a former Michigan resident with a Michigan drivers license and vehicle involved was licensed and titled in Michigan).

240. 357 U.S. 235 (1958).

241. *Id.* at 250-51 (citations omitted).

ular controversy. It is true that often the plaintiff's forum will also be where the cause of action arose; the witnesses, the evidence and the applicable law will be found there.²⁴² That, however, is not the ratio decidendi of the minimum contacts test. Numerous cases can be posited where only the injury and damages, which may not even be seriously contested, occurred in the plaintiff's choice of forum. The critical witnesses, evidence and applicable law may be located elsewhere. The answer lies in the social welfare philosophy that permeates the minimum contacts test.²⁴³

The social welfare philosophy demands a bias in favor of the plaintiff, who more often than not will be an individual who has suffered some form of physical or economic injury. The minimum contacts test imposes upon the defendant the costs of going to one forum or another, thus making it economically more feasible for a plaintiff to initiate litigation. This shift of costs furthers a general social policy of providing an individual with a small claim or inadequate resources with the opportunity to receive the full benefit of the substantive law²⁴⁴ by allowing the claim to be asserted in the plaintiff's forum.²⁴⁵

*Travelers Health Association v. Virginia*²⁴⁶ is a good example of this policy in action. In *Travelers Health*, Justice Black emphasized the fact that if the Virginia policyholders were not permitted to assert their health benefit claims against the Nebraska insurance company in Virginia, "the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit."²⁴⁷ Thus, when the defendant, as in *Travelers Health*, has derived some economic benefit from its association with the state, the argument that it should also bear the economic burdens connected with responding in that state to claims arising out of its associations is compelling, especially when residents of the state might otherwise be foreclosed

242. See, e.g., *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950).

243. The general thesis that jurisdictional principles evolve in response to the needs and pressures exerted by dominant political groups is illustrated by the enactment of long-arm statutes. A colleague has suggested that one impetus for long arm legislation probably was the personal injury bar, which, prior to the enactment of such statutes, saw substantial personal injury cases flowing out of their state to out-of-state attorneys. The loss of potential income associated with such cases, as well as a concern for the injured resident who had to litigate in the defendant's forum, may have had a substantial impact upon the adoption of long-arm statutes by the states.

244. Examples of this general public policy are the Consumer Credit Protection Act's civil liability provisions, 15 U.S.C. § 1640 (1976), and of course the small claims court.

245. See generally von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167-73 (1966).

246. 339 U.S. 643 (1950).

247. *Id.* at 648-49.

from presenting such claims.

A majority of plaintiffs, however, probably have substantial enough claims that, if necessary, they could finance a lawsuit in a forum in which the defendant has a place of business.²⁴⁸ Only a narrow band of plaintiffs, those with small claims or inadequate resources, is directly benefited by this rationale. But the bias in favor of the plaintiff extends beyond the question of who should bear the cost of going to one forum or another.

Prior to the adoption of the minimum contacts rule, litigation normally proceeded in a forum in which the defendant had some substantial business operations, perhaps employed significant numbers of people and was an integral part of the economy of the community.²⁴⁹ To the extent that a local bias in favor of or against one party is reflected in a jury verdict, the nonresident plaintiff would be at a disadvantage.²⁵⁰ Picture litigating a claim that a product is defective in the community in which the defendant is a major employer. Even those who are not directly employed by the defendant may be indirectly dependent upon the financial well-being of the defendant and therefore biased in its favor. Under the minimum contacts test, the plaintiff can often force litigation in an alternate forum. The defendant is then the outsider, the impersonal distant business entity, whose activities have little direct economic impact upon the community. If the plaintiff is also a resident he will be further advantaged. In this setting the idea of distributing the plaintiff's loss among society as a whole can be viewed in a more abstract manner than in the defendant's community. This is the essence of the social welfare society; this is also the essence of the

248. Most lawsuits involve people who are residents of the same state or community. Jurisdictional rules have little impact upon decisions by these plaintiffs to sue or not to sue for economic reasons. It is only the class of plaintiffs consisting of persons who are suing nonresident defendants that may experience some adverse economic impact from a jurisdictional rule that requires them to sue where the defendant is doing business rather than where the claim arose.

249. For example, mail order businesses would be doing business where their warehouses and corporate offices were located; manufacturers would be doing business where their plants and corporate offices were located even though their products flowed through interstate commerce; and railroads would be doing business where they operated trains and where their corporate offices were located. *See, e.g., Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907) (selling passenger tickets and freight passes in Pennsylvania for ultimate use on defendant's trains in the Midwest held not to be "doing business" in Pennsylvania). Venue rules would require actions to be brought in the county where the businesses were located. *See, e.g., N.C. GEN. STAT. §§ 1-79, 1-80* (1975).

250. *Cf. Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3d Cir. 1965) (voir dire inquiry concerning prospective jurors' connections with insurance companies proper since jurors favor party with whom they identify economically, socially or emotionally).

minimum contacts test.

The development and expansion of this jurisdictional principle was, of course, made easier by the improvements in transportation and technology that made the defense of a lawsuit in distant forums less inconvenient.²⁵¹ The social welfare philosophy and the idea of protecting the individual from the adverse effects of the operations of a large scale industrial society, however, gave content to the interpretations and applications of the minimum contacts doctrine. In short, the doctrine developed out of the social, economic and, most importantly, the political forces of its times.

IV. THE FURTHER EVOLUTION OF JURISDICTIONAL PRINCIPLES

The evolution of the minimum contacts principle has for the most part proceeded independently of the cases involving the assertion of quasi in rem jurisdiction. Beginning with *Sniadach v. Family Finance Corp.*,²⁵² however, the social welfare philosophy of the minimum contacts principle has been evident in cases involving the assertion of quasi in rem jurisdiction. In justifying its decision that a resident's wages could not be seized and used as a basis for jurisdiction absent notice and a prior hearing, the *Sniadach* Court said:

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by his attorneys in the garnishment proceedings:

"The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'payment schedule' which incorporates these additional charges."

. . . .

The result is that a prejudgment garnishment of [this] type may as a practical matter drive a wage-earning family to the wall.²⁵³

The limitations on the use of prejudgment garnishment and attachment were further refined in *Fuentes v. Shevin*,²⁵⁴ *Mitchell v. W.T. Grant Co.*²⁵⁵ and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,²⁵⁶ however, neither *Sniadach* nor its progeny questioned the power of the

251. See *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958).

252. 395 U.S. 337 (1969).

253. *Id.* at 341-42 (quoting Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 753 (1968)) (footnotes omitted).

254. 407 U.S. 67 (1972).

255. 416 U.S. 600 (1974).

256. 419 U.S. 601 (1975).

state to adjudicate any claim against a nonresident so long as the nonresident had property within the state, the property was seized at the commencement of the action and execution of the judgment was limited to the property seized.²⁵⁷

The next step in the evolution of jurisdictional principles occurred in *Shaffer v. Heitner*.²⁵⁸ In connection with a stockholder's derivative suit, the plaintiff in *Shaffer* filed a motion for sequestration with the Delaware Chancery Court, requesting that the court sequester the common stock and other security interests of twenty-one nonresident defendant corporate officers and directors. Although the share certificates were not physically present in the state, Delaware law deemed all shares of Delaware corporations to be situated in the state for purposes of sequestration. Other than being officers or directors and stockholders of a Delaware corporation, which had its principal place of business in Phoenix, Arizona, the nonresident defendants had no connection with the state. In addition, the claim upon which the action was founded arose out of activities in Oregon. Nonetheless, the Delaware Supreme Court affirmed the issuance of the sequestration order, holding that the Delaware procedure was a valid exercise of quasi in rem jurisdiction not requiring any minimum contact between the defendants and the state beyond the presence of the property attached.²⁵⁹

The United States Supreme Court reversed, holding that the minimum contacts test applied to all assertions of judicial jurisdiction regardless of the label attached and that the mere presence of a defendant's property will not support the assertion of state court jurisdiction.²⁶⁰ Although the existence of property within a state might suggest other ties between the defendant, the state and the litigation sufficient to permit the assertion of jurisdiction, in *Shaffer* no such other ties were present and therefore jurisdiction did not exist.²⁶¹ By holding that the *International Shoe* minimum contacts test applied to all assertions of state court jurisdiction, the Supreme Court overruled *Harris v. Balk*²⁶² as well as other jurisdictional cases predicated upon

257. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972); *Ownbey v. Morgan*, 256 U.S. 94 (1921). Even *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977), left open the possibility of quasi in rem jurisdiction based upon the mere presence of property when no other forum is available to the plaintiff.

258. 433 U.S. 186 (1977). There is a great deal of scholarly discussion concerning this case. See, e.g., *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 152-62 (1977).

259. *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976); see 433 U.S. at 194-95.

260. 433 U.S. at 212.

261. *Id.* at 216-17.

262. 198 U.S. 215 (1905).

the same outmoded jurisdictional philosophy.²⁶³

In looking back upon jurisdictional developments, it would be improper to criticize any particular principle as being inconsistent with due process at the time it was developed. Each principle in its time afforded due process of law in the sense that it represented a reasonable balancing of the needs of society and individuals in an attempt to provide justice within a workable system of adjudication. For example, at the turn of the century when *Harris* was decided, transportation and communication had improved markedly during the preceding hundred years; nonetheless, pursuit of an absconding or out-of-state debtor was still difficult and expensive. The maintenance and securing of credit arrangements, a fundamental element in our economic growth, still required that a creditor have the right to seize, as a basis for adjudicating and collecting a debt, property of the debtor that might be located in the creditor's home state or wherever the creditor might chance to locate it. However, improvements in transportation and communication since the decision in *Harris*, coupled with the extension of personal jurisdiction associated with the minimum contacts principle, have made the broad quasi in rem jurisdiction of *Harris* both unnecessary and the occasion for abuse and unfairness.²⁶⁴ The *Harris* decision may have afforded due process of law at one time, but it no longer does. Its necessity has been outlived, and the potential for abuse and unfairness generated by its continued use as a precedent demanded that the deci-

263. 433 U.S. at 212 n.39. This was a decision long advocated by legal commentators. *E.g.*, A. EHRENZWEIG, CONFLICT OF LAWS § 29 (1962); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1119-1123 (1969); Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337 (1961); Comment, *Jurisdiction In Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725.

264. 3 F. JAMES, CIVIL PROCEDURE § 12.7, at 631-32 (1965):

The availability of quasi in rem jurisdiction obtained by attachment of tangible property imposes some hardship on a defendant who may be called upon to contest a claim far away from home and from where the transaction took place in order to defend property in a distant state having no other connection with the parties or subject matter This opens up wide possibilities of abuse and oppression. [e.g., garnish wages of employee of great trans-state concern.] A plaintiff with however tenuous and ill-founded a claim is given all the opportunities afforded by the transient rule, compounded at least twice, to pick a forum in which defendant will find it inconvenient and expensive to defend on the merits.

See, e.g., *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934) (garnishment of the proceeds due an insured in the hands of an insurer would not be defeated by interpleader); *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (New York garnishment by the New York insurance company's contractual obligation to defend and indemnify). *See also* *Rosenthal v. Warren*, 342 F. Supp. 246 (S.D.N.Y. 1972) (wrongful death action by New York resident against Massachusetts doctor for operation performed in Massachusetts with attachment of the Massachusetts doctor's liability carrier in New York); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

sion be overruled.

Shaffer is not the end of this evolutionary process. Although a significant decision, it is just another milestone, which a hundred years from now may seem as archaic as *Harris* or *Pennoyer v. Neff*.²⁶⁵ The next jurisdictional principle to fall probably will be the last vestige of *Pennoyer*—the idea that the mere presence of the defendant within the state is a sufficient basis for the assertion of personal jurisdiction regardless of where the claim arose.²⁶⁶ If, as the Court said in *Shaffer*, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"²⁶⁷ the fortuitous presence of a person within a state cannot be sufficient contact, tie or relation any more than the fortuitous presence of a piece of property can be. The principle that service of process upon a nonresident individual while he is within the state confers personal jurisdiction upon the state court presents a potential for abuse and unfairness similar to that presented by the continued application of the *Harris* principle. Today the extensive availability of long-arm jurisdiction makes it possible to place litigation in a forum having significant ties to the litigation. Since the possibility of having no forum is remote and since there is an inherent potential for abuse in the *Pennoyer* principle, its continued vitality cannot be justified.

Other changes will probably occur. The substantial public dissatisfaction that exists today with the cost and delay²⁶⁸ associated with traditional civil litigation provides an example of one factor that could well influence future jurisdictional development. Societal impatience will most likely increase the speed and extent to which modern communication technology is assimilated into the courtroom. Full videotape trials,²⁶⁹ perhaps based upon videotape depositions, may be common-

265. 95 U.S. 714 (1877).

266. *Id.* at 724.

267. *Shaffer*, 433 U.S. at 212. Relying upon this language in *Shaffer*, the court in *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F.Supp. 483 (D. Kan. 1978) held that the Supreme Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), that the doing of business in a state by a subsidiary was not sufficient to permit the assertion of personal jurisdiction over the parent, was no longer to be followed. Instead, the court stated, the validity of assertion of personal jurisdiction in such a situation must be measured by the standards of *International Shoe*.

268. See H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* (1959); Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956). See also *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964).

269. See generally G. Coleman, *Video Technology in the Courts* (1976) (distributed by Mitre Corp., McClean, Va.); N. Kingbury, D. Corrigan, S. Fribush, S. Halpin & J. Schleter, *Potential Uses of Court Related Video Recording* (1972) (distributed by National Technical Information Service, U.S. Dep't of Commerce); Doret, *Trial by Video Tape—Can Justice Be Seen to be Done*,

place in the future.²⁷⁰ It is also foreseeable that the videotaping of depositions and trial testimony may be done by using some form of nationwide closed circuit television system, with the lawyers and witnesses in separate locations.²⁷¹ Such a development would eliminate one of the major concerns about litigating in distant forums because all the necessary testimony, prepackaged and ready to play before a jury, could be shipped at essentially the same cost anywhere in the country.

It is easy to see that the development of videotape trials could have an impact upon the evolution of jurisdictional principles. The elimination of the expense and inconvenience associated with litigation in distant forums would present the opportunity for jurisdiction to develop in one of at least three directions.

First, the pro-plaintiff orientation of the social-welfare philosophy and the minimum contacts test might continue with "minimum contacts" evolving into "minimal contacts."²⁷² The most minimal contact that might be required would be simply that the plaintiff be a resident of the state in which the lawsuit is filed. This of course would push to the outer limits the philosophy of *Seider v. Roth*²⁷³ and its progeny.²⁷⁴

47 TEMP. L.Q. 228 (1974); Kennelly, *The Practical Uses of Trialvision and Depovision*, 16 TRIAL LAWYER'S GUIDE 183 (1972); Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9 (1972).

270. See, e.g., Brennan, *Videotape: The Michigan Experience*, 24 HASTINGS L.J. 1 (1972); McCrystal & Young, *Pre-Recorded Videotape Trials—An Ohio Innovation*, 39 BROOKLYN L. REV. 560 (1973); Morrill, *Enter—The Video Tape Trial*, 3 J. MAR. J. PRAC. & PROC. 236 (1970); Roth, *Videotape in the Courts; Its Uses and Potential*, 3 RUTGERS J. COMPUTERS & L. 279 (1974). Ohio and Tennessee recently discontinued experimental videotape programs on the basis of costliness and time consumption. *Man Preferred Over Machines, Courtroom Videotape Experiments Discontinued*, 31 BAR BRIEFS 8 (1976) (Columbus, Ohio Bar Association).

271. See, e.g., *Court Hears Via D.C.-N.Y. Television Link*, Washington Post, Oct. 17, 1975, § A, at 9, col. 3; *TV Phone to Link Lawyers in City to Judges in Capital*, N.Y. Times, Oct. 8, 1975, at 1, col. 7.

272. See, e.g., *Schneider v. Linkfield*, 389 Mich. 608, 209 N.W.2d 225 (1973); *Cooke v. Yarrington*, 62 N.J. 123, 299 A.2d 400 (1973).

273. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, the plaintiffs, residents of New York, brought suit against defendants, residents of Quebec, on the basis of an automobile accident that occurred in Vermont. The New York Court of Appeals held that the plaintiff could attach the contractual obligation of the defendant's insurer (who was doing business in New York) to defend and to indemnify the defendant.

274. E.g., *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd on rehearing*, 410 F.2d 117 (2d Cir.) (en banc), *cert. denied*, 396 U.S. 844 (1969); *Rintala v. Shoemaker*, 362 F. Supp. 1044 (D. Minn. 1973); *Rosenthal v. Warren*, 342 F. Supp. 246 (S.D.N.Y. 1972), *cert. denied*, 414 U.S. 856 (1973); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

Following the Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the question arose whether the assertion of quasi in rem jurisdiction authorized by *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), was constitutional. See, e.g., Williams, *The Validity of Assuming Jurisdiction by the Attachment of Automobile Liability Insurance Obligations: The Impact of Shaffer v. Heitner Upon Seider v. Roth*, 9 RUTGERS-CAMDEN L.J. 241 (1978). Recently, the Second Circuit upheld the assertion of jurisdiction based upon an attachment of the obligation of an insurance company doing business in New York to defend and indemnify the

The overriding interest justifying the assertion of jurisdiction would be that of providing an injured resident plaintiff with a favorable home forum, regardless of where his cause of action arose, because he might become a ward of the state or be unfairly disadvantaged if he had to litigate in either the defendant's home state or where the claim arose.²⁷⁵ Neither *Seider* nor any of the later cases applying the *Seider* principle has gone this far and there is no evidence at this time that the mere presence of a plaintiff would be a sufficient contact by itself to permit a court to assert jurisdiction over a nonresident defendant. As a general rule, more is required.²⁷⁶

Another possibility is that concern over the filing of frivolous

named defendant. *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), *cert. denied*, 99 S. Ct. 639 (1978). In that case the court stated that *Shaffer* did not affect the *Seider* principle. Quoting the district court opinion, 437 F. Supp. 994, 1002 (E.D.N.Y. 1977), the *O'Connor* court said:

Seider v. Roth and Simpson [v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967)] are *sui generis* in the field of jurisdiction. They cannot be pigeonholed as *in rem* or *in personam*. They are in real terms *in personam* so far as the insurer is concerned. For the named defendant the suit is only an occasion of cooperation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant; his role as a party is hardly more real than that of the casual ejector Richard Roe in common law ejectment actions. What is at stake in the suit is the plaintiff's claim for the payment of his alleged damages by the insurer.

. . . Here the sufficient basis is furnished by the insurer's maintaining an office and regularly transacting business in New York—not to speak of the convenience to the plaintiff in having a trial where witnesses on damages will be more readily available and the fact that in the large proportion of these actions that are settled the insurer usually has no particular interest in requiring the action to be brought at the site of the accident or the residence of the insured.

Id. at 200-01 (footnote omitted).

The New York Court of Appeals has reaffirmed the *Seider* principle in a recent decision. *Baden v. Staples*, 45 N.Y. 2d 889, 383 N.E.2d 110 (1978) (per curiam).

275. See *Minichiello v. Rosenberg*, 410 F.2d 106, 117 (2d Cir. 1968) (Anderson, J., dissenting).

276. The mere presence of the plaintiff as a permissible basis for assertion of jurisdiction is two steps removed from what has been found to be constitutional. Jurisdiction predicated on the defendant's insurance company doing business within the state in which the suit is filed has been upheld. See, e.g., *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), *cert. denied*, 99 S. Ct. 639 (1978). In that situation the attachment of the insurance policy was regarded as sufficient to permit the state court to assert a limited form of quasi *in rem* jurisdiction. At the same time, however, the Supreme Court has made it clear that the mere presence of property within a state is an insufficient basis for the assertion of jurisdiction in most cases. *Shaffer v. Heitner*, 433 U.S. 186 (1977). In addition, the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235 (1958), stated that in order for personal jurisdiction over a nonresident to exist "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. Therefore, at the present time a necessary ingredient of "minimum contacts" would appear to be some purposeful conduct on the part of the defendant which makes it fair to require him to respond to a lawsuit in a place other than where he resides. The mere presence of property, although it belongs to the defendant and was purposefully acquired, does not alone constitute a sufficient contact. The attempt to predicate jurisdiction solely upon the residence of the plaintiff, a fact completely unrelated to any activity of the defendant, is still further removed from the current standard. Consequently, the extreme pro-plaintiff jurisdictional principle does not appear to be a likely development.

claims, mounting litigation expenses, rising insurance premiums and increased costs of marketing products could be factors in a future shift to a greater concern for business interests. If there were such a philosophical shift, jurisdiction principles might require litigation to be conducted in a forum with which the defendant has greater affiliations than is presently the case. In other words, the subtle advantages of the home forum might be given back to the defendant.

Yet another possibility would be the development, for the first time in American legal history, of a party-neutral philosophy of jurisdiction because litigation costs and party convenience would no longer be important considerations for jurisdictional purposes. Thus, it could be argued there is no longer a need to favor one party or the other. Instead, the focus should be on which forum is best qualified to adjudicate the parties' claims. Arguably, that forum is where the claim or a substantial part of the claim arose, exclusive of any other factors.

A jurisdictional principle that would funnel litigation into the forum located where the claim, or a substantial portion of it, arose has some additional advantages. First, the fact that a claim has arisen elsewhere and foreign law is to be applied does not prevent a court from resolving the dispute, although the existence of such power neither compels nor justifies its exercise. Whenever possible, questions of local law should be decided locally,²⁷⁷ where judges are more familiar with its complexities, and judges and juries are more accountable to local citizens. Generally, the law to be applied in adjudicating a claim will be the law of the place where the claim arose.²⁷⁸ Given the greater expertise of a judiciary familiar with the relevant law, courts in the forum where the claim arose and whose law is to be applied can best apply that law.²⁷⁹

Second, the fact that a claim arose within a community may also mean that the conduct or transaction upon which the claim is based has resulted in some disruption of the life of the community, use of community resources, or other local consequences, regardless of the residency of the litigants. Thus, the community in which the claim arose will have a peculiar interest both in observing the course of the litigation and in being assured that local law is correctly applied. Further, the mores and values of the community are often an integral part of the governing law²⁸⁰ and are more likely to be expressed when the litigation is tried before a local judge and jury.

277. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-10 (1947).

278. See, e.g., *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 6 (1971).

279. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

280. *Id.* at 508-10.

A party-neutral jurisdiction principle may result in a shift of litigation to certain communities that is not counterbalanced by a shift of litigation out of those communities. Some of these additional actions may be based upon claims that the community does not have any special interest in resolving. As to such claims, an objection might be made that the community should not be forced to provide locally subsidized institutions to resolve these disputes. However, most claims arise out of some activity or class of activities from which the community derives substantial economic benefit. Having derived the benefit, it is fair that the community should have the burden of deciding the dispute.

It is of course impossible to forecast accurately in which direction jurisdictional principles will move or to predict precisely the factors that will play a primary role in the future evolution of jurisdictional principles. Jurisdictional development in the past has been the result of the interaction of social, economic, political and philosophical conditions as well as technological improvement. What these conditions will be in the future is unknown—they may be conditions of which we are presently unaware or presently existing conditions the significance of which we do not see. Thus, it cannot be predicted whether the combination of increased use and continued improvement of communication technology and public dissatisfaction with the present system will have these suggested jurisdictional ramifications. The important point is that the evolution of jurisdictional principles is part of a broader historical process that can be traced through over 300 years of American history and that it is only by understanding the process that one is able fully to understand the principles.