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HOW DELAWARE’S CORPORATE LAW MONOPOLY WAS NEARLY DESTROYED

Eric A. Chiappinelli*

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INTRODUCTION

Delaware’s position as the nation’s leader in corporate law is well established.¹ Equally well established, although perhaps less well known except among corporate law scholars, is that Delaware’s leadership is the result of its Court of Chancery being the center for stockholder litigation against corporate fiduciaries.² What has been unknown, until recently, is that Delaware’s position as the center for

* Frank McDonald Endowed Professor of Law, Texas Tech University School of Law. I greatly benefitted from Boston University School of Law’s Third Annual Workshop for Corporate & Securities Litigation held on October 2 and 3, 2015; special thanks to Professors Jessica Erickson, David Webber, and Verity Winship who organized the workshop.

1. See ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 133 (3d ed. 2014) [hereinafter CHIAPPINELLI, CASES AND MATERIALS].

2. John Armour et al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345, 1347 (2012); John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 606 (2012); Eric A. Chiappinelli, *The Underappreciated Importance of Personal Jurisdiction in Delaware’s Success*, 63 DEPAUL L. REV. 911, 912 (2014) [hereinafter Chiappinelli, *Underappreciated Importance*]; John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915,

stockholder litigation is the result of Delaware's two unique systems for obtaining personal jurisdiction over corporate fiduciaries.³ Since 1977, Delaware's system has been premised upon implied consent to obtain personal jurisdiction over fiduciaries.⁴ That system is very likely unconstitutional, as I have argued elsewhere.⁵

Until 1977, Delaware used a system of attachment called sequestration to obtain personal jurisdiction. Sequestration was declared unconstitutional by the U.S. Supreme Court in *Shaffer v. Heitner*.⁶ In this Article, I describe the surprising way in which two major changes in American constitutional law led to *Shaffer*. Both of these changes are well known. Yet those changes are neither doctrinally related to each other nor is either one obviously related to corporate law.

The economic background for this story started in the late nineteenth century when the modern form of large business enterprise emerged. Concomitant with that emergence came the innovation of the pseudo-domestic corporation. That is, a corporation deliberately incorporated in a state where the corporation did little or no business and in which it was not headquartered.⁷ I lay out this background in Part II.⁸

By the post-World War I era, stockholder litigation against corporate fiduciaries was an important check on managerial authority. In the mid-1930s, the frequency of that litigation greatly increased.⁹ A continuing and difficult problem in this litigation was finding a state in which personal jurisdiction could be had over both the corporation and the fiduciaries. The rules for personal jurisdiction were clear under *Pennoyer v. Neff*,¹⁰ but their application to stockholder litigation was problematic. Part III details the personal jurisdiction rules as they applied to stockholder litigation in the years after *Pennoyer* and why stockholder litigation presented such intractable jurisdictional hurdles.¹¹

1951–52 (2012); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1054–55 (2013).

3. Chiappinelli, *Underappreciated Importance*, *supra* note 2, at 932–41.

4. *Id.* at 944.

5. Eric A. Chiappinelli, *The Myth of Director Consent: After Shaffer, Beyond Nicastro*, 37 DEL. J. CORP. L. 783, 785 (2013) [hereinafter Chiappinelli, *Myth*].

6. 433 U.S. 186 (1977).

7. Chiappinelli, *Myth*, *supra* note 5, at 788 n.29.

8. See *infra* notes 23–58 and accompanying text.

9. George D. Hornstein, *Rights of Stockholders in the New York Courts*, 56 YALE L.J. 942, 949 (1947).

10. 95 U.S. 714, 735–36 (1877).

11. See *infra* notes 59–113 and accompanying text.

Sequestration was unique to the Delaware Court of Chancery. No other state could have established the same system. In Part IV, I describe in detail how sequestration developed and how it operated. Sequestration was rooted in the concept of quasi in rem jurisdiction that had been approved in *Pennoyer*.¹² In the 1920s, the constitutionality of a parallel procedure for Delaware's Superior Court was upheld in the landmark U.S. Supreme Court case of *Ownbey v. Morgan*.¹³ The Delaware courts upheld sequestration against similar constitutional challenges as well. Despite the availability of sequestration as a solution to the personal jurisdiction problem, it was New York, rather than Delaware, that was the original center for stockholder litigation. But, by the 1960s, Delaware replaced New York as the litigation center, largely because of sequestration's availability, as Part V demonstrates.¹⁴

In the early 1960s, academics realized that the U.S. Supreme Court's 1945 decision in *International Shoe v. Washington*¹⁵ could be expanded to apply to individual defendants as well as corporate ones.¹⁶ Taken on its own terms, and taken in the context of the case itself, the opinion in *International Shoe* was not a sea change in personal jurisdiction. It was the invention of the modern understanding of *International Shoe*, which came nearly two decades after the decision itself, that marked the beginning of the end for sequestration. The invention of *International Shoe* was the first doctrinal shift that affected Delaware's sequestration system.

In 1969, the U.S. Supreme Court began the second doctrinal shift, a revolution between debtors and their creditors.¹⁷ Within a decade, that area of law completely changed. While many of the U.S. Supreme Court's decisions involved consumer debt, the Court's 1972 decision in *Fuentes v. Shevin*¹⁸ made it clear that the Court intended to extend the revolution to property rights more broadly. *Fuentes* was the second doctrinal shift that ensured the demise of sequestration. Part VI illuminates the invention of *International Shoe* and the revolution in debtors' rights.¹⁹

Part VI also makes clear that in the mid-1970s, academics and courts outside of Delaware used the modern interpretation of *Interna-*

12. See *infra* notes 114–87 and accompanying text.

13. 256 U.S. 94 (1921).

14. See *infra* notes 188–99 and accompanying text.

15. 326 U.S. 310 (1945).

16. See *infra* notes 206–09 and accompanying text.

17. See *infra* Part VI.B.

18. 407 U.S. 67 (1972).

19. See *infra* notes 200–51 and accompanying text.

tional Shoe and the debtors' rights cases to question the continued constitutionality of sequestration.²⁰ Those arguments culminated in *Shaffer* in 1977, which is described in Part VII.²¹ The Coda, Part VIII, briefly summarizes Delaware's surprising response to *Shaffer*.²²

II. THE CORPORATE LAW LANDSCAPE

The number of large businesses that came into existence between approximately 1870 and 1900 increased exponentially thanks to the completion of the transportation and information infrastructures throughout the country.²³ In other words, the nationwide railroads, the telegraph, and the telephone permitted large business entities to coordinate their activities, which allowed those entities to conduct business throughout the country. These enterprises were routinely organized as corporations.²⁴ Many smaller business firms, which operated either as sole proprietorships or small partnerships, also incorporated during those decades.²⁵

Obviously, from an early day, corporations chartered in one state would do business in,²⁶ or at least seek to sue on obligations in,²⁷ other states. By the early 1880s, corporate charters frequently included the explicit power to do business outside the state of incorporation,²⁸ and by mid-decade, that power was implied.²⁹ Conversely, other states permitted foreign corporations³⁰ to do business within them under a doctrine of comity.³¹

As is true today, a foreign corporation doing business in a state was subject to that state's laws, just as a nonresident individual within that state was subject to that state's laws.³² However, the corporation's powers and the relations between the corporation, its stockholders, its

20. See *infra* notes 252–319 and accompanying text.

21. See *infra* notes 320–67 and accompanying text.

22. See *infra* notes 368–71 and accompanying text.

23. ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* 285 (1977).

24. See *id.*

25. See VINCENT P. CAROSSO, *INVESTMENT BANKING IN AMERICA: A HISTORY* 29, 157 (1970).

26. *E.g.*, *LaFayette Ins. Co. v. French*, 59 U.S. 404 (1855) (Indiana insurance company sold insurance in Ohio).

27. *E.g.*, *Bank of Augusta v. Earle*, 38 U.S. 519 (1839) (Georgia bank sought to bring suit in Alabama).

28. VICTOR MORAWETZ, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE* § 501 (1882) [hereinafter MORAWETZ, FIRST EDITION].

29. 2 VICTOR MORAWETZ, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* § 958 (2d ed. 1886) [hereinafter MORAWETZ, SECOND EDITION].

30. A foreign corporation does business or has its headquarters in a state other than the one in which it is incorporated. CHIAPPINELLI, *CASES AND MATERIALS*, *supra* note 1, at 129–30.

31. MORAWETZ, FIRST EDITION, *supra* note 28, § 502.

32. *Id.* § 505.

directors, and its officers were circumscribed by the state of incorporation's law, not that of any other state in which the corporation did business. The theory behind this approach was that the state that created a corporation retained complete control over what powers to grant the corporation and its constituents. Again, through a doctrine of comity, other states would not apply their law to determine a foreign corporation's powers³³ or determine the rights and obligations among stockholders, officers, directors, and the corporation. Put more modernly, states declined to apply their local law to what has come to be called the internal affairs of foreign corporations.³⁴

Many courts declined to hear cases involving the internal affairs of foreign corporations on the ground of either lack of competence³⁵ or *forum non conveniens*.³⁶ Clearly, however, subject matter jurisdiction could be had if a statute making the court competent were in effect, and in fact, many courts did entertain these suits.³⁷ When they did, they applied the state of incorporation's corporate law rather than their own.³⁸

These principles were geared to foreign corporations that conducted business in both their state of incorporation and other states as well. However, some foreign corporations were formed to conduct business only in states they were not incorporated in. By 1880 or so, these corporations were sufficiently numerous that courts dealt with them as a separate category of corporation.³⁹ Presumably the promoters of these corporations and their legal advisors saw advantages in the corporate law of foreign states. Or perhaps, if not corporate law advantages, they at least found comparable corporate law provisions but lower taxes in a foreign jurisdiction. Presumably, they also understood that the state of incorporation's corporate law would govern the internal affairs.

These entities came to be called "pseudo-foreign corporations,"⁴⁰ or, regarding them from the point of view of the incorporating state, "pseudo-domestic corporations." In the nineteenth century they were

33. States made exceptions for corporate powers that were, by the 1880s, seen as public rather than private powers. For example, even though a corporation might possess powers under its charter, which would be valid in the state of incorporation, other states would not recognize a foreign corporation's power to condemn property or its right to a monopoly in a certain business. *Id.* § 508.

34. *See id.* § 506.

35. *See, e.g.,* *N. State Copper & Gold Min. Co. v. Field*, 20 A. 1039, 1040–41 (Md. 1885).

36. *E.g.,* *Howell v. Chi. & N.W. Ry. Co.*, 51 Barb. 379, 385 (N.Y. 1868).

37. *See e.g.,* *Cent. Trust Co. v. McGeorge*, 151 U.S. 129, 132 (1894).

38. MORAWETZ, FIRST EDITION, *supra* note 28, § 506.

39. *Id.* at §§ 508, 513–14.

40. Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 *YALE L.J.* 137, 137 (1955).

referred to as “tramp corporations.”⁴¹ A number of courts dealt with the question of whether tramp corporations had to be recognized in other states, and most courts held that they did.⁴² Morawetz, the most important late nineteenth century corporate law treatise writer supported tramp corporations, though other writers were more dubious.⁴³

Small corporations doubtless retained the partnership management structure in which the residual wealth owners were also the business enterprise managers.⁴⁴ That is, the corporation’s stockholders were also its directors and officers. Large corporations developed a different structure, as Alfred D. Chandler documented.⁴⁵ The control of these large businesses, though not the actual ownership, shifted from either the founding families or the bankers who supplied capital to the managers who actually formulated and implemented strategic decisions for the company.⁴⁶ The appearance of large business entities and the separation in those companies of ownership from control created pressure on state corporation law. State corporation statutes in the late nineteenth century were not drafted in anticipation of large multi-state businesses.⁴⁷

When large businesses developed, state statutes were slow to adapt and frequently hostile to those businesses.⁴⁸ However, in a somewhat symbiotic process, as corporate planners recognized that the internal affairs doctrine and judicial approval of tramp corporations effectively allowed them to select the corporate law of any state, some states saw an opportunity to increase their revenues by amending their corpora-

41. *E.g.*, *Kimball v. Davis*, 52 Mo. App. 194, 213 (Mo. Ct. App. 1892). *Kimball* was the first to use the term in print, though the opinion suggests the appellation was well known. The opinion is by the distinguished corporate scholar and law journal editor, Seymour D. Thompson, who also served as a Missouri court of appeals judge.

42. *Troy & N. Car. Gold Min. Co. v. Snow Lumber Co.*, 92 S.E. 494, 495 (N.C. 1917) (recognizing a New York corporation, whose charter granted it the power to do business only in North Carolina, as a valid foreign corporation); *e.g.*, *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343, 352 (Ohio 1875); *Second Nat’l Bank of Cin. v. Lovell*, 13 Ohio Dec. Reprint 972, 973–74 (Sup. Ct. Cincinnati 1873). *But see* *Land Grant Ry & Trust Co. v. Coffey Cty. Com’rs*, 6 Kan. 149, 153–54 (Kan. 1870) (noting that the corporation’s Pennsylvania charter granted it the power to do business in any state except Pennsylvania, which doubtless influenced the Kansas court’s decision).

43. Compare MORAWETZ, FIRST EDITION, *supra* note 28, § 508, with C. B. Ames, *Tramp Corporations*, 48 CENT. L.J. 391, 391 (1899).

44. CHANDLER, *supra* note 23, at 9.

45. *Id.* at 9–10.

46. *See generally id.* at 491–97.

47. William E. Kirk, III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System To Attain Corporate Pre-Eminence*, 10 J. CORP. L. 233, 243–44 (1984).

48. *E.g.*, *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–60 (1933) (Brandeis, J., dissenting). *See generally* Kirk, *supra* note 47, 244–50.

tion statutes or lowering their corporate taxes to attract pseudo-domestic incorporations.

New Jersey is traditionally considered the first state to have attracted significant pseudo-domestic incorporations.⁴⁹ This attempt involved a corporation statute that allowed corporations more freedom to operate, such as permitting a corporation to own stock in another corporation, and allowed managers to increase their control over the corporation by reducing the stockholders' power.⁵⁰ New Jersey's efforts were enormously successful.⁵¹ Maine, Maryland, New York, South Dakota, West Virginia, and possibly other states, attracted the interest of corporate promoters looking to incorporate a tramp corporation, though not all of these states intended to compete for those incorporations.⁵²

Delaware began to compete with New Jersey for foreign incorporations when it ratified a new constitution in 1897 and adopted a new corporation statute two years later, essentially enacting New Jersey's corporations statute wholesale.⁵³ When New Jersey (at the behest of Governor Woodrow Wilson) passed a number of reform acts, Delaware began to overtake New Jersey as the jurisdiction of choice for corporate planners.⁵⁴ By the end of World War I, Delaware dominated the market for pseudo-domestic incorporations, a position it has not yet relinquished.⁵⁵

49. See generally Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. ECON. HIST. 677, 680–81 (1989); Kirk, *supra* note 47, at 247–49; Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573, 583–84 (2009); Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 352–53 (2007).

50. See Kirk, *supra* note 47, at 247–48.

51. *Id.* at 249.

52. Grandy, *supra* note 49, at 685 (Maine, Maryland, New York, and West Virginia); Yablon, *supra* note 49, at 361 n.226, 365 n.251, 366 (Maine, New York, South Dakota, and West Virginia).

53. Kirk, *supra* note 47, at 252–53.

54. In 1915, Delaware enacted a new corporations act that sought to take advantage of New Jersey's retreat from liberalizing corporation law. JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 148 (1970). See generally Kirk, *supra* note 47, at 255–59. But, as Charles Yablon has put it:

Indeed, it is not too great an exaggeration to say that there has only been one dominant state corporate law throughout American history: New Jersey law. It is just that, after 1913, Delaware was perceived by corporate lawyers and promoters as a more reliable custodian of their conception of New Jersey law than New Jersey itself.

Yablon, *supra* note 49, at 330.

55. ADOLF A. BERLE, JR., & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY*, 206 n.18 (1932) (“Of the whole list [of the 573 NYSE actively traded listed companies in 1928], 148 of the 573 corporations hold Delaware charters, most of them relatively recent; New York is second with 121, most of them relatively old; New Jersey third with 87, most of which grow [sic] out of the great merger period from 1898–1910.”); HURST, *supra* note 54, at 148; Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering*

The end of World War I brought another development that bore on the problem of personal jurisdiction in stockholder litigation. From 1919 onward, common stock in large corporations was intentionally marketed to individual investors who lived outside the financial centers of the Northeast.⁵⁶ By the post-war era, these corporations no longer had controlling shareholders. In fact, no minority shareholder owned any significant percentage of stock. Further, the stockholders of these corporations were dispersed throughout the country.

These developments: (1) the validation of foreign incorporation; (2) Delaware's primacy for pseudo-domestic incorporations, especially large, publicly traded corporations; (3) the separation of ownership from control in large corporations; and (4) the dispersion of stock ownership, set the stage for the problem of personal jurisdiction in stockholder litigation.

The confluence of these developments helped create two new problems in corporate law. First, the rise of corporations doing business nationally, the validation of tramp corporations, and the dispersion of stock ownership meant that litigation involving corporate law issues might be brought in a state other than the state of incorporation. Second, the separation of ownership from control meant that stockholder derivative litigation became the primary check on director power.⁵⁷ When large corporations were controlled by either the founding families or the corporations' investment bankers, those constituencies could exert effective constraints on the board. With the wide dispersion of share ownership, no stockholder, or even any feasibly assembled group of stockholders, could restrain director action.⁵⁸

III. PERSONAL JURISDICTION ISSUES IN STOCKHOLDER LITIGATION AFTER *PENNOYER*

Two kinds of litigation involving corporations need to be distinguished. First is the ordinary suit by or against the corporation and involving a party opponent independent of the corporation. Second is what has come to be called derivative litigation, in which a stock-

the Competition over Corporate Charters, 112 *YALE L.J.* 553, 578 (2002) (claiming that 85% of publicly traded, nonfinancial, pseudo-domestic corporations are incorporated in Delaware); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 *N.Y.U. L. REV.* 1559, 1605 *tbl.A1*, 1608 *tbl.A4* (2002) (showing that well over 80% of public pseudo-domestic corporations and over 95% of corporations going public incorporate in Delaware).

56. JONATHAN BARRON BASKIN & PAUL J. MIRANTI, JR., *A HISTORY OF CORPORATE FINANCE* 177 (1997); CAROSSO, *supra* note 25, at 249-54.

57. See BERLE & MEANS, *supra* note 55, at 277.

58. *Id.* at 94. In 1930, 130 of the 200 largest corporations were controlled by management. *Id.* These 130 corporations owned 80% of the 200 corporations' total assets. *Id.*

holder brings suit to enforce a right belonging to the corporation. Through the nineteenth century, derivative litigation was undertaken to enforce corporate rights against third parties.

Frequently, derivative litigation was used to challenge taxes imposed on the corporation. The stockholder alleged that the tax was illegal, that the corporation had a right not to pay the tax, and that the stockholder was suing to vindicate that right.⁵⁹ More germane to our inquiry, however, were derivative suits in which the party opponent was in fact an officer, a director, or, in many instances, the entire board of directors. In these cases, the theory was that the defendant had caused harm to the corporation, the corporation would not bring suit because the defendant controlled it, and the stockholder was suing to vindicate the corporation's right to be made whole by the wrong-doing director or officer.⁶⁰

One procedural issue that arose in both kinds of litigation was personal jurisdiction over the corporation. From the beginning it was clear that a state could exercise personal jurisdiction over its domestic corporations.⁶¹ Personal jurisdiction over foreign corporations proved more complicated. The theory on which personal jurisdiction over a foreign corporation could be asserted was clear from 1877 onward.⁶² However, the application of that theory quickly led to a large body of case law that culminated in *International Shoe* in 1945.⁶³ Simply put, a state could assert personal jurisdiction over a foreign corporation if the corporation either consented to jurisdiction or was present within the forum state.⁶⁴

Consent was typically obtained in advance by conditioning permission to do business within a state on registering with the state. States had at least some power to prevent foreign corporations from doing business within their borders and so could condition permission to do business on reasonable terms. The registration process required either explicit consent to personal jurisdiction or the appointment of an agent within the state on whom service of process could be made.⁶⁵

Presence was conceptually more attenuated. Because a corporation is a separate entity from its stockholders or directors, the presence of

59. *E.g.*, *Dodge v. Woolsey*, 59 U.S. 331 (1855).

60. *See, e.g.*, *Taylor v. Miami Exporting Co.*, 5 Ohio 162 (Ohio 1831).

61. *See* Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 878 (1919).

62. *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Ex parte Schollenberger*, 96 U.S. 369, 375–76 (1877).

63. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

64. *Pennoyer*, 95 U.S. at 722; *Schollenberger*, 96 U.S. at 377–78.

65. Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 2, 12 (1990).

officers or directors was irrelevant to whether the corporation was present. Thus, service of process within the jurisdiction on an officer or director was ineffective to confer jurisdiction over the corporation if the corporation were not present.⁶⁶

When was a foreign corporation present so that a state could assert personal jurisdiction? When a corporation failed to comply with a registration statute but did business within a state, the corporation might be found to be present but might also be found to have impliedly consented. In either event, personal jurisdiction, while not completely predictable in advance, was not particularly problematic.

As derivative litigation became more frequent, other procedural issues appeared. One form of indirect proof that derivative litigation had become commonplace was the U.S. Supreme Court's adoption of Equity Rule 94 in 1882.⁶⁷ That rule contained two requirements meant to address perceived abuses in derivative suits. The first was substantive and required the plaintiff to detail any efforts to obtain relief from the corporation. In other words, Rule 94 embodied the modern demand requirement.

The second principal requirement was purely procedural. It required the bill⁶⁸ to state compliance with what has come to be called the contemporaneous ownership rule.⁶⁹ That is, the plaintiff must have been a stockholder at the time of the action complained of.⁷⁰ Although the contemporaneous ownership rule later embodied both a shift in philosophical thought on the nature of the derivative suit and was used to restrict such lawsuits, the purpose of Rule 94 was different.⁷¹ Just as in a situation involving an aggrieved individual, a corporation desiring to pursue a claim for relief (typically against a government for imposing a tax the corporation believed was illegal but also sometimes against an independent third party) might wish to litigate in federal rather than state court. Throughout most of the nineteenth century, the majority of federal lawsuits were based on di-

66. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194–95 (1915); *Conley v. Mathieson Alkali Works*, 190 U.S. 406 (1903); *Goldey v. Morning News of New Haven*, 156 U.S. 518 (1895).

67. SUP. CT. R. EQ. 94, 104 U.S. ix (1882) (now FED. R. CIV. P. 23.1(b)).

68. The bill was the first pleading in a suit in equity, which is equivalent to the complaint in modern rules pleading. BENJAMIN J. SHIPMAN, *HANDBOOK OF THE LAW OF EQUITY PLEADING* § 26 (1897).

69. SUP. CT. R. EQ. 94, 104 U.S. ix, ix–x.

70. Or, the bill must state that the plaintiff acquired the shares by operation of law.

71. Philosophically, the injury to the corporation was thought of as inhering in the shares themselves, such that a subsequent purchaser could nevertheless maintain a derivative suit. Later, the injury to the corporation was thought of as belonging derivatively to the stockholders at the time of the injury. MORAWETZ, *SECOND EDITION*, *supra* note 29, §§ 265–66.

versity jurisdiction.⁷² When, as frequently happened, the corporation-plaintiff had a claim against a nondiverse defendant, such as the government of the state of incorporation, diversity was absent. Corporations created artificial diversity by arranging for a friendly stockholder of diverse citizenship from the defendant to file a derivative suit.

In *Hawes v. Oakland*,⁷³ the U.S. Supreme Court held that this behavior was collusive and that the federal courts did not have subject matter jurisdiction in these cases.⁷⁴ More importantly for our purposes, the U.S. Supreme Court evidently thought that these cases were sufficiently frequent and that its holding in *Hawes* was inadequate to solve the problem, whereupon it amended the Equity Rules to add Rule 94.⁷⁵

In all stockholder litigation, personal jurisdiction over the corporation was required. Analytically, one might think that in stockholder litigation against corporate fiduciaries the corporation itself need not be made a party. Even in derivative actions, the stockholder-plaintiff is suing because the corporation will not do so; thus, the stockholder is not suing the corporation, but those whose actions are alleged to have harmed the corporation. However, it was held early on in state courts,⁷⁶ and authoritatively by the U.S. Supreme Court in 1873, that the corporation is an indispensable party in derivative litigation.⁷⁷

This rule existed for two reasons. First, any recovery flowed not to the plaintiff or other stockholders but to the corporation.⁷⁸ Having the corporation as a party facilitated effecting a remedy. Second, under the principles of preclusion at the time, if the corporation were not a party to the stockholder litigation, it would not be precluded from filing a second action against the same defendants who would thus be in danger of two judgments on the same claim.⁷⁹

Are the directors or officers indispensable parties? In a case in which a stockholder sues to enjoin the corporation from engaging in an illegal act, such as paying an illegal tax or entering into or performing an ultra vires contract, the U.S. Supreme Court held that the corporation's fiduciaries were not indispensable parties. This was based

72. Federal question jurisdiction was not granted generally until 1875. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 64–65 (1927).

73. 104 U.S. 450 (1881).

74. *Id.* at 452–53, 459–61.

75. *Quincy v. Steel*, 120 U.S. 241, 248 (1887).

76. The leading state case is *Robinson v. Smith*, 3 Paige Ch. 222, 233 (N.Y. Ch. 1832).

77. *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 523 n.2 (1947); *City of Davenport v. Dows*, 85 U.S. 626, 627 (1873).

78. *Dows*, 85 U.S. at 627.

79. *Id.*

on the theory that if the corporation were enjoined, all who have power to make the corporation act would thereby be bound in their official capacity as well.⁸⁰

But, in the much more typical case in which a stockholder seeks recompense for the corporation from the corporate fiduciaries who have harmed the corporation, those fiduciaries are indispensable.⁸¹ However, because the liability is joint and several, a plaintiff need not join every wrong-doing fiduciary, though of course, recovery may only be had against those properly joined and served.⁸² This rule alleviated one potential issue in stockholder litigation: the inability to obtain personal jurisdiction over all the potential individual defendants in one forum. The plaintiff could choose, for reasons of strategy, practicality (such as suing the defendants with the deepest pockets), or procedure, to sue some but not all possible fiduciary defendants.

For nearly seventy years, from *Pennoyer* to *International Shoe*, the rules for personal jurisdiction over individuals were clear and could usually be applied without difficulty. A state could assert personal jurisdiction over: (1) any person physically present in the state when served with process; (2) any domiciliary, even when absent from the state;⁸³ and (3) anyone who consented either in advance or by appearance in a lawsuit.⁸⁴

But during this period, many businesses were being incorporated, corporations with nationwide business were ascendant, and a truly national economy was created. The rules for personal jurisdiction over foreign corporations were not always clear and their application was frequently unpredictable.⁸⁵ A corporation was domiciled only in the state of incorporation and thus jurisdiction based on domicile could not be used by other states.⁸⁶ A foreign corporation could consent to personal jurisdiction much like an individual could.⁸⁷ Because in many circumstances a state had the power to exclude foreign corporations, states often conditioned doing business on the foreign corpora-

80. *Geer v. Mathieson Alkali Works*, 190 U.S. 428, 433–36 (1903).

81. *Id.* at 436–37.

82. Chester Rohrllich, *Suits in Equity by Minority Stockholders as a Means of Corporate Control*, 81 U. PA. L. REV. 692, 722 (1933); e.g., *Harden v. E. States Pub. Serv. Co.*, 122 A. 705, 707 (Del. Ch. 1923).

83. Personal service was not necessarily required for domiciliaries. Rather, they could be validly served through process left at their residence in the forum state. See *McDonald v. Mabee*, 243 U.S. 90, 92 (1917); Scott, *supra* note 61, at 875.

84. See Scott, *supra* note 61, at 873–74.

85. Personal jurisdiction over domestic corporations was simple; the corporation was only domiciled in the state of incorporation. *St. Clair v. Cox*, 106 U.S. 350, 355 (1882).

86. *Id.*

87. Scott, *supra* note 61, at 879.

tion's registering with the state and designating an in-state agent for service of process.⁸⁸

But, it would frequently happen that a corporation would have dealings in a state where it was not registered or incorporated.⁸⁹ The corporation might not have registered for several reasons. For example, the corporation's failure to register might have been an oversight. Alternatively, it might have believed it was engaged entirely in interstate commerce. The states were without power to exclude foreign corporations in these instances.⁹⁰ The corporation might have also believed that its actions with the other state were insufficient to trigger the state's registration statute. Finally, the corporation might have strategically failed to register simply to complicate or stave off any subsequent litigation.

When a foreign corporation did not register in a state, personal jurisdiction over that corporation was predicated on four other theories. First, the foreign corporation's consent to jurisdiction could be implied from its actions within the forum state.⁹¹ Academics advanced a second theory, predicating personal jurisdiction over foreign corporations simply on the fairness of subjecting corporations to jurisdiction in a state for acts performed in that state.⁹² This theory was occasionally found in legal opinions; for example, Learned Hand and Cardozo both espoused it. But, until it was essentially adopted in *International Shoe*,⁹³ the theory was not widely regarded as viable.

The third and fourth theories were closely related. In one approach intellectually consonant with *Pennoyer's* territoriality focus, jurisdiction was said to attach when the foreign corporation was "present" in

88. *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855); William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 689–90 (1916).

89. William F. Cahill, *supra* note 88, at 600–94.

90. *Paul v. Virginia*, 75 U.S. 168, 181–82 (1868). But, note that even in those instances, states could require a foreign corporation to appoint an in-state agent for service of process. *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 587–88 (1914).

91. *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 22–23 (1907); *Lafayette Ins.*, 59 U.S. 404; Scott, *supra* note 61, at 880–81.

92. *E.g.*, Calvert Magruder, *Jurisdiction over Partnerships*, 32 HARV. L. REV. 794, 826 (1924); Scott, *supra* note 61, at 878; Note, *What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction*, 29 COLUM. L. REV. 187, 195 (1929).

93. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 140–41 (2d Cir. 1930) (L. Hand, J.); *Smolik v. Phil. & Reading Coal & Iron Co.*, 222 F. 148, 149 (S.D.N.Y. 1915) (L. Hand, J.); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917–18 (N.Y. 1917) (Cardozo, J.); *Bagdon v. Phil. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1077 (N.Y. 1916) (Cardozo, J.).

the jurisdiction.⁹⁴ Some cases took an attenuated view, holding that a corporation was present within a state whenever a corporate officer or director was within the jurisdiction for corporate purposes.⁹⁵ Frequently though, presence was made to turn on whether the corporation was doing business within the forum state.⁹⁶

The related theory (doing business) was often based on either a truncated logic that doing business was the proper test for presence.⁹⁷ Another justification for that test was the belief that doing business within the forum state was required to meet due process.⁹⁸ In other instances, the doing business test was simply based on the language of the state's amenability statute without regard to any constitutional requirements.⁹⁹

Although the implied consent theory had some arguable vibrancy until *International Shoe*,¹⁰⁰ generally speaking, the key to personal jurisdiction over a foreign corporation was doing business.¹⁰¹ As early as 1916, courts believed that clarifying the theory of personal jurisdiction over foreign corporations was a chronic and important issue.¹⁰² By the end of the 1920s, this was perceived as a major issue and was the subject of much academic analysis.¹⁰³

Three kinds of tramp corporations should be distinguished. It is clear that many, perhaps most, tramp corporations were always intended by their promoters to have their business operations in a single state. These corporations were really local businesses that their promoters simply chose to incorporate elsewhere.¹⁰⁴ Stockholder suits against those corporations could typically have been brought easily in the state where the corporation's operations existed. Because the corporation was always intended to do business in the forum state, it probably registered to do business there and appointed an agent on

94. See, e.g., *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 106–08 (1898); Cahill, *supra* note 88, at 678; Note, *supra* note 92, at 188.

95. Cahill, *supra* note 88, at 695–96.

96. Scott, *supra* note 61, at 882–83.

97. *Id.* at 881–82.

98. Note, *supra* note 92, at 187 (“[I]t is a fundamental requisite under the Constitution that the corporation shall be ‘doing business’ in the state or district where the service is made to sustain [service of process’s] validity.”).

99. See Cahill, *supra* note 88, at 695.

100. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

101. Note, *supra* note 92, at 187.

102. Cahill, *supra* note 88, at 676.

103. Elcanon Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018 (1925); Note, *supra* note 92, at 187; Note, *What Constitutes “Doing Business” in a State?*, 36 HARV. L. REV. 327 (1923); Note, *When Is a Foreign Corporation “Doing Business” Within the State?*, 21 COLUM. L. REV. 362 (1921).

104. See, e.g., *Troy & N. Car. Gold Min. Co. v. Snow Lumber Co.*, 92 S.E. 494 (N.C. 1917).

whom service of process could be made. If it had not registered, personal jurisdiction over the corporation could nonetheless be invoked under the theories of implied consent, fairness, or, more likely, presence through doing business. The directors and officers of such a corporation were very likely to be domiciled in the forum state, or, at the very least, to be frequently present in the forum state to attend to the corporation's business. Service of process over those individuals could, in the normal case, be effected without problem.

Note that the state of incorporation was not likely to be a viable or even preferable venue for stockholder litigation over these local tramp corporations. Personal jurisdiction over the corporation was of course assured but was not substantially more certain or easier to effect than in the forum state. But, the state of incorporation was likely to have no personal jurisdiction over the individual defendants. These defendants were neither domiciled there nor was there any reason connected to the business for them to be in the state. This was especially true for tramp corporations incorporated in smaller or less populous states, such as Delaware, Maine, Maryland, South Dakota, or West Virginia, all of which had sizeable numbers of pseudo-domestic corporations.¹⁰⁵ For these corporations, stockholder litigation was practically confined to the state in which the corporation actually operated.

A second kind of tramp corporation was incorporated in one state, its business operations were in another state, and its promoters, who were likely to be the directors and senior officers, were in yet a third state. This scenario could come about benignly when, for example, eastern entrepreneurs saw a business opportunity in another area of the country, often with an emerging economy. In one example, New York businessmen incorporated a business in Delaware to pursue a business opportunity in Colorado, which was an expanding market.¹⁰⁶ In this setting a stockholder might have considerable difficulty obtaining personal jurisdiction over both the corporation and the fiduciaries in the same state. The corporation would be amenable to jurisdiction only where it did business or in its state of incorporation. The promoters, however, were likely to be amenable to process only where they lived. Thus, unless the aggrieved stockholder could state an individual claim, which could be brought directly against the wrong-doing fiduciaries where they lived, rather than a derivative

105. See, e.g., *Grandy*, *supra* note 49, at 685 (Maryland); *Yablon*, *supra* note 49, at 333, 361 n.226, 365 n.251, 366 (Maine, New York, South Dakota, and West Virginia).

106. *Wootton Land & Fuel Co. v. Ownbey*, 265 F. 91 (8th Cir. 1920).

claim in which the corporation was an indispensable party, there might be no forum in which the case could be brought.

A slightly different dynamic affected tramp corporations that did business on a national or international scale. In these cases, the corporation might be amenable to jurisdiction in many states. The directors would, of course, be amenable to personal jurisdiction only in their state of domicile and wherever they could be served. If they routinely worked in a state other than that in which they lived (e.g. directors might work in New York City but live in Connecticut or New Jersey) then they might be liable to service in New York as well as their state of residence. Otherwise, service was possible only if the plaintiff knew the fiduciaries were traveling to a state in which the plaintiff wished to bring suit and the plaintiff could arrange for personal service within that state.

Because directors and officers naturally tended to keep their state of residence and the state in which they routinely worked (in the case of commuters), the feasibility of stockholder litigation turned on whether the corporation could be made a party in the state or states where the directors lived or worked.

Two major changes in American life between 1900 and *International Shoe* in 1945 complicated the principles of personal jurisdiction. The American economy became national in scope and American culture became increasingly mobile.¹⁰⁷ As a consequence, questions of personal jurisdiction over nonresidents, both individuals and corporations, became increasingly common. Further, plaintiffs became increasingly stymied because they could not obtain personal jurisdiction over defendants in an increasing number of instances. In the non-commercial sphere, the most salient and chronic issue was the automobile accident.¹⁰⁸ Increasingly, an out-of-state motorist would be involved in an accident with a resident of the state where the accident occurred. Under the classical theory of personal jurisdiction, the resident would typically have to bring suit in the out-of-state motorist's state of residence. Between 1908, when New Jersey adopted the first out-of-state motorist act, and *International Shoe*, every state adopted similar acts, which held out-of-state motorists amenable to

107. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927); *Kane v. New Jersey*, 242 U.S. 160, 161-63 (1916); *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915); see also, CHANDLER, *supra* note 23, at 285.

108. *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977).

personal jurisdiction in the state in which the accident occurred.¹⁰⁹ These statutes were upheld by the U.S. Supreme Court in 1916.¹¹⁰

During this period, a very few states also adopted amenability statutes covering foreign corporations in lawsuits arising out of their actions within the state.¹¹¹ These statutes were, in part, declaratory of the judicial holdings that based personal jurisdiction on either implied consent or presence via doing business, but at least one statute arguably went further by covering in-state torts even if the corporation were not doing business within the state.¹¹² Apparently, none of these statutes' validity was litigated before *International Shoe*, and it is difficult to know whether they had any effect.¹¹³

IV. DELAWARE'S SOLUTION: SEQUESTRATION

Delaware law provided that domestic corporations could hold board and stockholder meetings outside the state.¹¹⁴ By 1915, Delaware corporations were no longer required to have at least one director who was a resident of Delaware.¹¹⁵

Stockholder-plaintiffs and the Delaware Court of Chancery faced a problem that existed before but had become increasingly more important. How could Delaware exercise personal jurisdiction over nonresident directors of pseudo-domestic corporations in stockholder suits?

This problem came to the forefront in 1925.¹¹⁶ Earle W. Hammons, the motion picture pioneer, was sued by one of his business partners, George A. Skinner.¹¹⁷ The lawsuit charged Hammons with defrauding a Delaware corporation, Educational Pictures Securities Corporation, of which Hammons was an officer and the general manager.¹¹⁸ Delaware recognized the general rule that derivative

109. *Knoop v. Anderson*, 71 F. Supp. 832, 836 (D. Iowa 1947).

110. *Kane v. New Jersey*, 242 U.S. 160, 167 (1916); *see also Hess v. Pawloski*, 274 U.S. 352, 352–53 (1927) (affirming *Kane*).

111. Edward W. Cleary & Arthur R. Seder, Jr., *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. REV. 599, 604 (1955). Note that these statutes are distinct from the nearly universal statutes requiring a foreign corporation doing business within the state to register and consent to jurisdiction. *See Kipp, supra* note 65, at 32.

112. Cleary & Seder, *supra* note 111, at 604.

113. *Id.*

114. Act of Mar. 10, 1899, ch. 273, §§ 20, 136, 21 Del. Laws 445, 451, 502; *Lippman v. Kehoe Stenograph Co.*, 98 A. 943, 948 (Del. Ch. 1916).

115. Act of Mar. 8, 1915, ch. 102, § 3, 28 Del. Laws 285, 285–86 (revising requirements for directors); *See Act of Mar. 10, 1899, ch. 273, § 20, 21 Del. Laws 445, 451* (requiring at least one director to be a Delaware resident); *Lippman*, 98 A. at 949.

116. *Skinner v. Educ. Pictures Sec. Corp.*, 129 A. 857, 858 (Del. Ch. 1925).

117. Obituary, *Earle Hammons, Film Pioneer*, 75, N.Y. TIMES, Aug. 2, 1962, at 25.

118. *Skinner*, 129 A. at 858.

suits were equitable in nature.¹¹⁹ For this reason, Skinner filed a bill in the Delaware Court of Chancery. Hammons was a nonresident of Delaware and was not personally served with process within Delaware. Hammons was given notice of the suit via a subpoena sent to him in another state by registered mail,¹²⁰ which at that time would not confer personal jurisdiction over Hammons.¹²¹

At the same time the bill was filed, Skinner obtained a temporary restraining order (TRO) against Hammons and the corporation preventing any transfer of Hammons's stock in the corporation.¹²² Hammons entered a special appearance to challenge the assertion of personal jurisdiction and seeking to vacate the restraining order.¹²³

Chancellor Josiah Wolcott held that no personal jurisdiction existed over Hammons because Hammons had not been personally served with process while in Delaware.¹²⁴ Because no personal jurisdiction existed over Hammons, the TRO was discharged.¹²⁵ Chancellor Wolcott evidently understood that Skinner's plight was becoming more common and needed to be addressed.¹²⁶ The Chancellor noted that *Pennoyer* would allow Delaware to effect quasi in rem jurisdiction by seizure and publication, but Skinner's suit was an action in personam not quasi in rem.¹²⁷ Even if Skinner's bill was predicated on quasi in rem jurisdiction, no Delaware statute made the Court of Chancery

119. *Ross v. Bernhard*, 396 U.S. 531, 534 (1970); *id.*, at 544, 546 (Stewart, J., dissenting); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 264 (1917); *Hawes v. Oakland* 104 U.S. 450, 452–53 (1881); *Dodge v. Woolsey*, 59 U.S. 331, 341–42 (1855); *see* *Sohland v. Baker*, 141 A. 277, 281–82 (recognizing that the equitable nature of a stockholder derivative action was a long-standing rule in Delaware).

120. *Skinner*, 129 A. at 857.

121. *See generally Pennoyer v. Neff*, 95 U.S. 714, 726–29 (1878) (holding that personal jurisdiction can be obtained if a defendant is served while present in the state and the property within the state is attached before litigation).

122. *Skinner*, 129 A. at 858 (noting that Hammons owned 2,313 shares of the corporation's common stock).

123. *Id.* at 858.

124. *Id.* at 861 (“The only way the complainant can bring the nonresidents into court in a cause of this type is to procure personal service of the subpoena.”).

125. *Id.* at 859.

126. A similar situation had arisen three years earlier and Chancellor Wolcott dismissed the bill with a brief opinion. *Cities Serv. Co. v. McDowell*, 116 A. 4, 9 (Del. Ch. 1922).

127. *Skinner*, 129 A. at 860 (“[Skinner's bill] does not seek to reach and dispose of Hammons' stock, or of any interest therein; it seeks to impose no lien or charge upon it, nor to impress upon it any equity by way of trust or otherwise It seeks a purely personal decree for the payment of such money as is alleged to be due”). Skinner apparently recognized the ineffectiveness of out of state service on Hammons because after the hearing on Hammons's motion to vacate service, Skinner applied for a variety of equitable processes to keep Hammons's stock under court control until Hammons entered a general appearance. *Id.* at 861. The Chancellor denied Skinner's application on the ground that none of them could be used as initial process but only as mesne process. *Id.*

competent to hear these cases. Oddly, the Delaware General Assembly made a superior court, but not the Delaware Court of Chancery, competent to assert personal jurisdiction in quasi in rem cases.

From 1829 onward, shares of stock in Delaware corporations could be attached to confer quasi in rem jurisdiction over nonresident stockholders in actions at law.¹²⁸ This form of process was known as foreign attachment. Delaware made clear in 1899 that it considered all shares of stock in Delaware corporations to be personal property located in Delaware regardless of where any certificate or stockholder was located.¹²⁹ Thus from 1899, an out-of-state plaintiff could invoke quasi in rem jurisdiction in Delaware over an out-of-state defendant if the defendant owned any shares of a Delaware corporation. But, the plaintiff was limited to proceeding in a Delaware superior court, not the Delaware Court of Chancery.

Foreign attachment of stock was principally used to assert quasi in rem jurisdiction in cases in which the actual ownership of the stock was not a part of the dispute, a situation sometimes called unrelated quasi in rem. The well-known litigation of *Morgan v. Ownbey*¹³⁰ is both a vivid example of the use of foreign attachment and an important intellectual component relating to personal jurisdiction in stockholder litigation.¹³¹

In 1906, James A. Ownbey entered into a business venture with his friend, J. Pierpont Morgan, and two others.¹³² The venture was a mining company in Colorado and took the legal form of the Wootton Land & Fuel Co., a Delaware corporation.¹³³ By 1909, the company needed an infusion of \$200,000.00 and Morgan apparently agreed to put up half and to loan Ownbey the other half, the loan to be repaid

128. See *Greene v. Johnston*, 99 A.2d 627, 631 (Del. 1953) (now codified at DEL. CODE ANN. tit. 8, § 324 (2011)).

129. Act of Mar. 10, 1899, ch. 273, § 128, 21 Del. Laws 445, 499 (codified at DEL. CODE ANN. tit. 8, § 169 (2011)); see *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142, 149 (3d Cir. 1976).

130. 100 A. 411 (Del. Super. Ct. 1916) (en banc).

131. See Obituary, *Col. J.A. Ownbey, Mine Developer, Dies*, N.Y. TIMES, Aug. 16, 1927, at 25 [hereinafter Obituary, *Ownbey*] and Special to New York Times, *Mystery in Morgan Suit*, N.Y. TIMES, Dec. 24, 1915, at 25, for background on litigation. See also *Morgan Estate Must Pay: \$53,000 Allowed to Col. Ownbey in Suit for Accounting*, N.Y. TIMES, Jan. 30, 1918, at 13; *Sued by Morgan Estate*, N.Y. TIMES, Apr. 9, 1915, at 8; and *Suit by Morgan Executors: Accounting of Land and Fuel Company Asked in Denver*, N.Y. TIMES, Feb. 26, 1916, at 10 [hereinafter *Suit by Morgan Executors*], for a description of related litigation in Denver.

132. *Wootton Land & Fuel Co. v. Ownbey*, 265 F. 91, 92 (8th Cir. 1920).

133. *Id.* Note that the corporation's first word is frequently spelled "Wootten," "Wooten," "Woonton," or "Woornton" in contemporary reports and litigation; however, the name derives from the prominent Colorado entrepreneur Richens Lacy Wootton, and thus "Wootton" is the correct spelling.

from the company's profits.¹³⁴ The company was not successful.¹³⁵ Morgan died in 1913, and in late 1915, Morgan's executors filed suit against Ownbey in a Delaware superior court.¹³⁶ The apparent basis of the action was to recover the loan made to Ownbey.¹³⁷

The suit was commenced by foreign attachment. Plaintiffs' counsel filed an affidavit stating that defendant was a nonresident and was indebted to plaintiffs in an amount exceeding \$50.00. Plaintiffs' counsel then obtained a writ, as a matter of course, from the court clerk¹³⁸ directing the sheriff to seize shares of stock in the Wootton Land and Fuel Company standing in the defendant's name up to the value of \$200,000.00.¹³⁹ The sheriff did so. Plaintiffs thereupon filed their declaration that contained only boilerplate assertions that Ownbey owed the plaintiffs \$200,000.00. Ownbey's Delaware attorneys entered an appearance and filed an answer to the complaint.¹⁴⁰

Throughout the litigation, Ownbey asserted that his shares of stock in the corporation constituted the bulk of his wealth, that litigation both in Delaware and Colorado reduced the value of the stock so that he was unable to obtain a loan against the shares, and that therefore, he was unable to post special bail.¹⁴¹ These assertions were unavailing and a judgment of \$200,168.57 was entered against him.¹⁴² This equates to an approximate value of slightly over \$4 million in today's dollars.¹⁴³

134. *Suit by Morgan Executors*, *supra* note 131, at 10.

135. Obituary, *Ownbey*, *supra* note 131, at 26.

136. *Mystery in Morgan Suit: Estate Files a \$200,000 Action Against James A. Ownbey*, N.Y. TIMES, Dec. 24, 1915, at 5 [hereinafter *Mystery in Morgan Suit*].

137. *Wootton Land & Fuel Co.*, 265 F. at 103–04. I say “apparently” because the Delaware litigation was started with a writ of attachment, which only needed to state, in conclusory fashion, that the defendant owed the plaintiff more than \$50.00; the complaint, filed in early 1916, contained boilerplate allegations supporting a cause of action for debt. See *Mystery in Morgan Suit*, *supra* note 136, at 5 (“[D]etails of the litigation are lacking [The] attorney for the executors refuses to talk It is evident that details of the suit are being closely guarded.”); see also *Morgan v. Ownbey*, 100 A. 411, 419 (Del. Super. Ct. 1916) (en banc), *aff'd*, 105 A. 838 (Del. 1919), *aff'd*, 256 U.S. 94 (1921) (“The declaration contained the common counts. There was no bill of particulars filed, but simply the date and amount of indebtedness.”).

138. If the procedure in these cases is a tad Dickensian, know that the writ was obtained from one “Prothonotary Wigglesworth.” *Mystery in Morgan Suit*, *supra* note 136, at 5. Prothonotary is the official title of the superior court clerk. DEL. CODE ANN. tit. 10, § 521 (2013).

139. *Mystery in Morgan Suit*, *supra* note 136, at 5.

140. *Morgan*, 100 A. at 420.

141. *Id.*

142. *Id.* at 427, 434; Obituary, *Ownbey*, *supra* note 131, at 25.

143. *CPI Inflation Calculator*, BUREAU OF LAB. STATS., <http://data.bls.gov/cgi-bin/opicalc.pl?cost1=200%2C168.57&year1=1916&year2=2014> (last visited Feb. 15, 2015) [hereinafter *CPI Inflation Calculator*]. While the litigation was in progress, and probably in reaction to it, Delaware repealed the requirement that appearance and defense of an action begun by foreign attachment be predicated upon posting special bail equal to the amount of property seized, but

The Delaware foreign attachment statute required a nonresident defendant to post security, so-called special bail, “to the value of the property . . . attached”¹⁴⁴ If the defendant did not post special bail, she could not appear and defend the action, and judgment was entered in favor of the plaintiff.¹⁴⁵ Plaintiffs moved to strike defendant’s appearance and pleadings under these statutes and the superior court agreed.¹⁴⁶ The court entered judgment for the plaintiffs, the amount of which would be ascertained at a special hearing and satisfaction for which would be limited to the shares of stock seized.¹⁴⁷ The Delaware Supreme Court affirmed¹⁴⁸ as did the U.S. Supreme Court.¹⁴⁹

Morgan provided the baseline for some of the subsequent constitutional arguments. The Delaware Supreme Court’s decision was appealed to the U.S. Supreme Court principally on Fourteenth Amendment due process grounds.¹⁵⁰ Ownbey asserted that due process was violated because the statute did not permit him to appear and be heard unless he posted special bail.¹⁵¹

Justice Pitney, speaking for the Court,¹⁵² upheld the foreign attachment scheme. He first held that Delaware’s foreign attachment scheme was grounded in colonial and London practice, and thus, comported with due process.¹⁵³ Citing *Pennoyer v. Neff*,¹⁵⁴ he also upheld the scheme as a valid exercise of power by a state over property within it and upheld seizure as adequate notice to Ownbey.¹⁵⁵ The Court

rather, the property would simply remain seized. Act of Mar. 23, 1917, ch. 258, 29 Del. Laws 844. Although the statute applied retroactively to cover the suit against Ownbey, he did not avail himself of the provision, presumably because by the time the statute was enacted, the sale of his shares had already occurred. See *Morgan*, 100 A. at 417–18. On November 27, 1916, the superior court ordered sale of the seized shares to satisfy the judgment of \$200,168.57. *Ownbey v. Morgan*, 105 A. 838 (Del. 1919), *aff’d*, 256 U.S. 94 (1921). The final judgment of the Delaware Supreme Court was rendered on March 21, 1919, after the statutorily provided window in which defendants, such as Ownbey, could avail themselves of the new statute. No evidence in the reported opinions suggested that the superior court’s order for sale was stayed pending appeal.

144. DEL. REV. C. § 4123 (1915) (repealed 1917).

145. *Id.* § 4137.

146. *Morgan*, 100 A. at 423.

147. *Id.*

148. *Ownbey*, 105 A. at 849.

149. *Ownbey v. Morgan*, 256 U.S. 94 (1921).

150. *Id.* at 102.

151. *Id.* at 102–03.

152. Five other Justices concurred with Justice Pitney’s opinion and Justice McReynolds concurred in the result only. Chief Justice Taft and Justice Clarke dissented without opinion. *Id.* at 113.

153. *Id.* at 108–09.

154. 95 U.S. 714 (1878).

155. *Ownbey*, 256 U.S. at 109–10.

disposed of the Equal Protection Clause and Privileges and Immunities Clause arguments in brief paragraphs.¹⁵⁶

The Delaware courts then upheld the sequestration process against constitutional challenges based in part on *Ownbey* and in part on other grounds. In *Skinner*, Chancellor Wolcott simply assumed a sequestration statute would be constitutional under *Pennoyer*.¹⁵⁷ Three years later, in *Wightman v. San Francisco Bay Toll-Bridge Co.*,¹⁵⁸ he sidestepped the constitutional issue and quashed the writ of sequestration on the ground that the statute did not apply in actions that did not seek money damages.¹⁵⁹

Chancellor Wolcott faced the constitutional question head-on in *Cantor v. Sachs*¹⁶⁰ in 1932.¹⁶¹ The plaintiffs obtained an order of sequestration over the nonresident director-defendants' stock in various Delaware corporations.¹⁶² The defendants appeared specially and moved to vacate the sequestration.¹⁶³ They challenged the statute on three federal due process grounds, all going to the question of notice to the defendant. None of the arguments was availing.¹⁶⁴

As Chancellor Wolcott noted in *Skinner*, a foreign attachment procedure was unavailable in the Delaware Court of Chancery.¹⁶⁵ Within a year, however, the General Assembly responded by establishing a

156. *Id.* at 112–13 (rejecting an equal protection argument because treating nonresident individuals and foreign corporations differently was reasonable; rejecting a privileges and immunities argument because “not pressed, and plainly is untenable”). Justice Pitney also remarked that the peculiar hardship *Ownbey* faced might be worthy of leniency by a court, but leniency was not required by due process. *Id.* at 110.

157. *Pennoyer*, 95 U.S. at 723–24 (holding that substituted service is sufficient even where the object of the action is to reach property in the state); *Skinner v. Educ. Pictures Sec. Corp.*, 129 A. 857, 860 (Del. Ch. 1925) (“There would seem to be no doubt that it would be competent for the legislative power of the state to confer upon this court a power to proceed against nonresidents after the manner of foreign attachment at law. But it has not as yet done so.”).

158. 142 A. 783 (Del. Ch. 1928).

159. *Id.* at 785 (“In view of the foregoing, it is unnecessary to consider the question of whether or not the new procedure provided for by the 1927 amendment to section 3850 offends against the due process clause of the Federal Constitution or its equivalent in the State Constitution.”). Note that the 1955 amendment to the statute effectively broadened the statute to cover actions in the Court of Chancery seeking any kind of relief. Act of July 1, 1955, ch. 379, 50 Del. Laws c. 379 (codified at DEL. CODE ANN. tit. 10, § 366) (2013)).

160. 162 A. 73 (Del. Ch. 1932).

161. *Id.* at 79–80. *Cantor* also definitively established that the sequestration statute could be used by stockholder-plaintiffs in derivative actions. *Id.* at 76–78. See *Cantor is Plaintiff in \$100,000,000 Suit*, N.Y. TIMES, Feb. 12, 1932, at 44, for the litigation’s genesis.

162. *Cantor*, 162 A. at 74.

163. *Id.*

164. *Id.* at 78–82.

165. *Skinner v. Educ. Pictures Sec. Corp.*, 129 A. 857, 860 (Del. Ch. 1925).

comparable procedure for suits in equity.¹⁶⁶ Although the equitable procedure was usually called “sequestration” rather than “foreign attachment,” it permitted the claimant to seize shares in a Delaware corporation belonging to a nonresident defendant.¹⁶⁷

The statute read,

If it shall appear in the bill . . . that the defendant . . . is a non-resident . . . , the Chancellor shall have power to compel the appearance of the defendant by the seizure of . . . his property, which property may be sold under the order of the Chancellor to pay the demand of the complainant, if the defendant shall not appear, or shall otherwise default. Such property shall remain subject to said seizure . . . unless security sufficient to the Chancellor shall be given to secure the release thereof.¹⁶⁸

The only substantial change in the statute was in 1955, when a provision to release the property from seizure if the defendant entered a general appearance in the action was added.¹⁶⁹ Prior to that change, the property remained sequestered throughout the proceeding. The mechanics of obtaining an order of sequestration were set out in the Delaware Court of Chancery’s rules.

166. Act of Apr. 12, 1927, ch. 217, 35 Del. Laws c. 217 (codified with amendments at DEL. CODE ANN. tit. 10, § 366 (2013)). See generally *Wightman v. S.F. Bay Toll-Bridge Co.*, 142 A. 783, 784 (Del. Ch. 1928) (“The new provisions were enacted in order to obviate the effect of . . . *Skinner*.” (citation omitted)).

167. *Loft, Inc. v. Guth*, 19 A.2d 721, 722–23 (Del. 1941).

There is no mention of the word, ‘sequestrator’ in the statute, nor is the word defined in any rule of court. It was not the purpose of the Legislature to establish and define an office; rather it was to confer on the Chancellor wide authority for the compulsion of appearance and the satisfaction of decrees, leaving to him to devise, in the particular case, the method best suited to accomplish the purpose. There seems to be no compelling reason for the appointment of any person as a sequestrator, or to give that name to the person appointed to make the seizure. The Sheriff, who ordinarily executes the writs of the Court of Chancery, could as well have been designated to seize and hold the shares of stock . . . ; or the shares . . . could have been held in the name of the court. The word, ‘sequestrator’, is merely a convenient designation for the person selected to carry out the court’s order; and whatever the appellation given, a sequestrator is merely the court’s auxiliary, its executive agent to hold possession of the property seized under the direction of the court for the purpose of accomplishing the statutory purposes.”)

Id.

168. Act of Apr. 12, 1927, ch. 217, 35 Del. Laws c. 217 (codified with amendments at tit. 10, § 366).

169. Act of July 1, 1955, ch. 379, 50 Del. Laws c. 379 (codified at tit. 10, § 366). The amendment replaced the last sentence of the statute quoted above with:

Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause, may . . . petition the Court for an order releasing such property The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured.

Id.

A plaintiff-stockholder of a Delaware corporation seeking to assert a claim (whether derivative or direct) against the nonresident directors made, by court rule, an ex parte application to the Register in Chancery (the clerk of the court) that contained: (1) the complaint to be filed, which had to allege that the defendant was a nonresident; (2) an affidavit stating the nonresident's last known address, a reasonable description of the in-state property, the property's estimated value, and the defendant's ownership interest;¹⁷⁰ and (3) a motion for an order of sequestration of defendant's stock and appointing a sequestrator under the sequestration statute.¹⁷¹ Plaintiff also submitted a form of order of sequestration to be signed by the court.

If the papers were complete on their face, the Register in Chancery was required to file the complaint and grant the order for sequestration subject to the plaintiff and sequestrator posting the appropriate bonds, which they typically did immediately. The Register had no discretion to refuse the order or challenge the merits of the action and sequestration.¹⁷²

The court papers in *Shaffer* provide concrete examples of the ease with which a plaintiff could obtain sequestration of a nonresident director's stock.¹⁷³ The affidavit of the plaintiff's lawyer was seven pages, primarily naming the nonresident defendants, giving the corporation's headquarters as each defendant's last known address, setting out each defendant's shareholdings, and noting the closing price of the corporation's stock at the most recent date. The attorney obtained this information (described in parentheses) from the Delaware Secretary of State (names of directors), the corporation's last proxy statement (addresses and shareholdings of the directors), and the *Wall Street Journal* (closing stock price).¹⁷⁴

The motion for an order of sequestration was one page¹⁷⁵ and the order granting the motion was six pages of boilerplate language.¹⁷⁶

170. DEL. CT. CH. R. 4(db). Note that this Rule is still current although the use of sequestration is greatly curtailed.

171. tit. 10, § 366.

172. *Breech v. Hughes Tool Co.*, 189 A.2d 428, 431–32 (Del. 1963).

173. "The facts underlying *Shaffer v. Heitner* were not atypical of other Court of Chancery sequestration cases." DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 3.03[b] (2014).

174. Handelman Affidavit at A29–31, *Shaffer v. Heitner*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

175. Motion for Sequestration at A18, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

176. Order of Sequestration at A19, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

The sequestrator's bond was two pages¹⁷⁷ and the plaintiff's bond was three pages.¹⁷⁸ In sum, there were five documents totalling nineteen pages (much of it formulaic language); however none of these documents was challenged. The fourteen-page complaint was a typical notice pleading document asserting a derivative action by a stockholder against the directors.¹⁷⁹

By this method, over \$1.5 million dollars in stock was instantly brought under the control of a private individual, the sequestrator, to abide the general appearance of the defendants.¹⁸⁰ The sequestrator and plaintiff were each required to post a bond of only \$1,000.00¹⁸¹ equivalent to about \$4,800.00 today.¹⁸² Assuming the procedural niceties were followed and that the defendants actually did own the property sequestered, the defendants could choose to appear generally, submitting themselves to unlimited liability, or to default and forfeit up to all of the property sequestered to satisfy plaintiff's claim.

It was clear from the beginning, and became even more clear with the 1955 amendment, that the statute's purpose was not really to adjudicate the right to ownership of the defendant's shares of stock.¹⁸³ The sequestration statute, as with foreign attachment, was a method for securing both related and unrelated quasi in rem jurisdiction. The whole point of the statute was to provide a method for bringing non-resident directors (and other nonresident defendants) before the Delaware Court of Chancery.¹⁸⁴

177. Sequestrator's Bond at A32, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

178. Plaintiff's Bond at A34, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

179. Complaint at A4, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

180. The affidavit asserted that the defendants owned 101,753 shares of Greyhound stock and that the closing price was \$15.25 per share for a total of \$1,551,733.00 *Handelman Affidavit*, *supra* note 174, at A29–A30.

181. Order of Sequestration, *supra* note 174, at A24.

182. *CPI Inflation Calculator*, *supra* note 143.

183. *Wightman v. S.F. Bay Toll-Bridge Co.*, 142 A. 783, 784 (Del. Ch. 1928) (“The seizure of property of a non-resident . . . is for the purpose of compelling an appearance in the first instance.”). *Wightman* limited the statute's applicability to suits in equity looking toward a money judgment. Chancellor Wolcott stated that when the bill sought only nonmonetary relief, the statute was inapplicable because otherwise the provision for seizing shares of stock would result in releasing the very thing seized in order to bring the defendant into court. *Id.* at 784–85. Ironically, the 1955 amendment effectively overruled that interpretation, thus allowing sequestration to be used even when no monetary relief was sought. Act of July 1, 1955, ch. 379, 50 Del. Laws c. 379 (codified at DEL. CODE. ANN. tit. 10, § 366) (2013).

184. See *Cantor v. Sachs*, 162 A. 73, 76 (Del. Ch. 1932) (explaining that the statute permitted sequestration in derivative actions and direct actions); *Wightman*, 142 A. at 784 (“The new provisions were enacted in order to obviate the effect of . . . *Skinner*.” (citation omitted)).

The 1955 amendment, however, made salient an important issue: Could a defendant enter a limited appearance rather than a general appearance? It had long been held that a defendant brought into a Delaware court could enter a special appearance to challenge personal jurisdiction. In quasi in rem cases (whether related or unrelated), the question then became: Did a defendant have the option of litigating the case but limiting any damage award to the amount of the property seized? Three months after the amendment's adoption, the Delaware Supreme Court resolved that issue. In *Sands v. Lefcourt Realty Corp.*,¹⁸⁵ the court held that limited appearances were unavailable to nonresident defendants in sequestration actions.¹⁸⁶

For fifty years the Delaware sequestration statute provided the principal means for bringing nonresident directors of Delaware corporations before the Delaware Court of Chancery.¹⁸⁷ It did so, even though several constitutional challenges were raised against the procedure.

V. STOCKHOLDER LITIGATION SHIFTS TO DELAWARE

A. *Centers of Stockholder Litigation Before Delaware*

Although by 1927 Delaware had the sequestration process in place and upheld it against constitutional challenges, stockholder litigation in Delaware was undesirable because there would likely be no personal jurisdiction over the directors. The directors did not live in Delaware, work there, or travel there to transact any corporate business. This situation was as true of the other small states that rivaled Delaware for pseudo-domestic incorporations.

Bringing suit in the state where the corporation was headquartered was more certain because personal jurisdiction over the corporation was assured. Most likely, the corporation had registered to do business in the state. If not, the corporation surely would be found either to be "present" or to be "doing business." Personal jurisdiction could

185. 117 A.2d 365 (Del. 1955).

186. *Id.* at 368.

187. See *Gordon v. Michel*, 297 A.2d 420, 421, 421 n.1 (Del. Ch. 1972); WOLFE & PITTENGER, *supra* note 173, § 3.03[a][2] ("Sequestration under Section 366 formerly served as the primary mechanism by which the Court of Chancery obtained jurisdiction over corporate directors, officers, and stockholders in corporate litigation, in particular, stockholder class and derivative actions alleging director or officer malfeasance. This process was aided materially by the existence of a statute treating Delaware as the situs of capital stock in a Delaware corporation, a provision that Delaware, unlike the vast majority of jurisdictions, has opted to retain. Because most corporate directors and officers own stock in the Delaware corporation for which they serve, that ownership interest provided a ready basis for jurisdiction over such officers and directors." (footnote omitted)).

also reliably be asserted over the directors in the corporation's state of incorporation. Most directors visited the headquarters at least periodically and board meetings were likely held there as well. Thus, if the plaintiff could retain nimble process servers, the directors could likely be personally served in the state where the corporation was headquartered.

However, a plentiful supply of directors, given that many directors were the nominees of large financial institutions and many directors served on numerous boards, could be most readily found in the five financial centers of the United States. That is, Connecticut, Illinois, Massachusetts, New Jersey, and New York. Of those states, New York was the easiest state in which to find directors. Not only did many directors reside in New York City, but those who did not were typically physically present there with some regularity.

Thus, from a combination of jurisdictional theory, practicality, and, no doubt, path dependence, New York became the original center of stockholder litigation by the mid-1930s.¹⁸⁸ Centrally, New York became the center largely because it was the state in which problems of personal jurisdiction were minimized.

As noted above, stockholder litigation exploded from the mid-1930s onward.¹⁸⁹ After World War II, however, New York's public policy changed significantly and the New York legislature took a handful of actions designed to curb this sort of litigation. These actions included a security-for-expenses statute, a shortened statute of limitations, and the adoption of a contemporaneous ownership rule. The combined effect of these actions was to reduce stockholder litigation in New York by 96%.¹⁹⁰

From the mid-1960s until the mid-1970s, much stockholder litigation migrated to the federal courts. The reason for this migration was that the U.S. Supreme Court expanded the securities acts, particularly actions under Rule 10b-5,¹⁹¹ to include claims for relief that traditionally had to be brought under state law. However, in a series of cases decided in the mid-1970s, the Court retrenched its view of the proper

188. FRANKLIN S. WOOD, CHAMBER OF COMMERCE OF THE STATE OF N.Y., SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS 32 (1944); Chiappinelli, *Underappreciated Importance*, *supra* note 2, at 925-27.

189. Hornstein, *supra* note 9, at 949.

190. George D. Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1, 12-13, 12 tbl.1 (1947).

191. 15 U.S.C. § 78j (2010).

scope of the securities laws.¹⁹² By 1977, the federal courts were effectively finished as a center for stockholder litigation.¹⁹³ In any event, the federal courts never had as strong a lock on stockholder litigation as New York.

B. How Delaware Became the Center for Stockholder Litigation

Delaware had all of the institutional requisites to become the center for stockholder litigation. It had, of course, the Court of Chancery specializing in stockholder litigation. By 1970, there were three judges on that court, so jurisprudence was less ad hominem than previously.¹⁹⁴ Since 1899, Delaware had the most modern corporations statute.¹⁹⁵ Further, Delaware had a relatively large body of case law. In 1900, the Delaware Court of Chancery held that when Delaware adopted New Jersey's corporations statute it also intended to adopt New Jersey's case law interpreting that statute.¹⁹⁶ Finally, by the mid-1960s, Delaware had an active, specialized corporate bar that included plaintiffs' and defendants' litigators as well as active corporate transactional practitioners.¹⁹⁷

The substance of Delaware corporate law was cutting edge but provided no advantages to stockholder plaintiffs that other states could not, and did not, adopt as well. Procedurally, Delaware was perhaps a bit more welcoming to stockholder litigation than some other states. For example, Delaware did not have a security-for-expenses statute. Also, in the 1967 revision of the Delaware General Corporate Law (DGCL), Delaware adopted an expanded stockholder inspection right.¹⁹⁸ However, neither of these advantages was unique to Delaware.

192. *Burks v. Lasker*, 441 U.S. 471 (1979); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Cort v. Ash*, 422 U.S. 66 (1975).

193. Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 143-44 (2015) (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971) and *Santa Fe Indus.*, 430 U.S. 462).

194. William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 846-48 (1993).

195. A WestlawNext search for cases decided by the Delaware Court of Chancery before 1971 results in over 2,000 cases.

196. *Wilmington City Ry. Co. v. People's Ry. Co.*, 47 A. 245, 254 (Del. Ch. 1900).

197. Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 863-64 (1969); see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 692 (1974).

198. Comment, *supra* note 197, at 887-88 (citing DEL. CODE ANN. tit. 8, § 220 (2010)); see also Memorandum from Irving Morris to Members of the Delaware Corporation Law Revision Committee (Oct. 1, 1964), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf>.

By 1960, thanks to the invention of the *International Shoe* doctrine, the more difficult conceptual jurisdictional problem in stockholder litigation had shifted from jurisdiction over the corporation to jurisdiction over the directors. It was in this area that Delaware's sequestration provisions allowed Delaware to become the center for stockholder litigation with an advantage other states could not duplicate. The combination of DGCL Section 169 (locating all stock in Delaware), the 1927 amenability statute (providing for quasi in rem jurisdiction by seizing stock), and, most importantly, the notice rule for seizure, ensured that Delaware was the center for stockholder litigation.¹⁹⁹

VI. THE THREATS TO DELAWARE'S DOMINANCE

A. *The Invention of International Shoe*

As detailed above, the primary test for determining whether a state could exercise personal jurisdiction over a foreign corporation was whether the corporation was doing business within the forum state. Although the courts sometimes relied on the theories of implied consent and presence, the dominant formulation was whether the corporation was doing business. By the end of World War I, a pair of U.S. Supreme Court cases had reformulated the doing business test to turn on whether the corporation was engaged in "mere solicitation" of business or whether it was engaged in "solicitation plus."²⁰⁰ The former was not sufficient to subject the corporation to personal jurisdiction while the latter was.

As it reached the U.S. Supreme Court from Washington State, *International Shoe*²⁰¹ was simply another in a long line of cases deciding whether a foreign corporation's actions in the forum state were enough for personal jurisdiction. Both sides in the litigation treated the case as one solely involving the application of settled legal principles. That is, the question was whether *International Shoe's* activities in Washington were solicitation plus, and therefore, doing business.²⁰²

199. Chiappinelli, *Underappreciated Importance*, *supra* note 2, at 940.

200. See *Int'l Harvester Co. v. Kentucky*, 234 U.S. 579, 585–87 (1914); *Green v. Chi., Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533–34 (1907).

201. See Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 786–804 (1995), for arguably the best description of facts in *International Shoe*.

202. Brief of Appellees at 22–24, *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (No. 107) (presenting two questions: (1) whether the company's actions in Washington constituted "doing business"; and (2) whether Washington's unemployment tax unduly burdened interstate commerce); see also *Int'l Shoe Co. v. Washington*, 65 S. Ct. 1579 (1945) (mem.) ("The Court does not

Chief Justice Stone's opinion for the Court focused almost entirely on this question, and nothing in *International Shoe* indicates that the Court intended to overrule the system of territoriality established in *Pennoyer*. Rather, *International Shoe* seemingly intended to reformulate the solicitation plus test for doing business to acknowledge that the quality as well as the quantity of a foreign corporation's actions in the forum state might be sufficient to subject it to personal jurisdiction.²⁰³ That standard has come to be known as the "minimum contacts" test. Justice Black, writing separately but neither concurring nor dissenting, remarked that the case was so insubstantial that the Court should have dismissed it rather than decide it on the merits.²⁰⁴ He further criticized the Court for "[announcing] vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution."²⁰⁵ Ironically then, Justice Black feared that *International Shoe* would limit, rather than expand, the power of states to exert personal jurisdiction over a foreign corporation.

The initial reaction to *International Shoe* by the Court and academics suggests that contemporaneous observers saw the case as incremental rather than revolutionary. The U.S. Supreme Court reiterated that *International Shoe* stood for the proposition that regular and continuous solicitation of business was doing business for personal jurisdiction purposes without any intimation that the case had broader implications.²⁰⁶ Academics in both law review articles and casebooks considered *International Shoe* to be simply a case that modified the standard for analyzing when a foreign corporation's activities within the forum state were sufficient to confer personal jurisdiction.²⁰⁷

Nevertheless, one paragraph in *International Shoe* spoke about jurisdiction over "defendants" and used "he" rather than "corporation," which might be read as suggesting that the minimum contacts test could or should be applicable to individuals as well as to foreign corporations:

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's

care to hear argument on the question whether the statutes attacked placed an undue burden on interstate commerce.").

203. *Int'l Shoe*, 326 U.S. at 319.

204. *Id.* at 322 (opinion of Black, J.).

205. *Id.* at 323 (opinion of Black, J.).

206. *Nippert v. City of Richmond*, 327 U.S. 416, 426 (1946).

207. See, e.g., George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 351, 358-59, 359 nn.62-63.

person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."²⁰⁸

On the other hand, the Court was clearly talking about the historical origins of the state's power over defendants, which would naturally be individuals rather than entities.²⁰⁹

The U.S. Supreme Court did not speak—even indirectly—to the question of whether the minimum contacts test applies to individuals as well as foreign corporations for a dozen years after *International Shoe*. In *McGee v. International Life Insurance Co.*,²¹⁰ Justice Black, who had been dubitant about the wisdom of *International Shoe*, wrote: "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations *and other nonresidents*."²¹¹ During the next Term, in *Hanson v. Denkla*,²¹² the Court applied the minimum contacts test to personal jurisdiction over trusts and trustees.²¹³ The lower courts treated the issue as an open one until at least the early 1960s.²¹⁴

Around the same time, several enormously influential academics suggested, with varying degrees of depth, that *International Shoe* could or should apply to all assertions of in personam jurisdiction or even to all assertions of personal jurisdiction. Among these academics were Paul Carrington,²¹⁵ Philip Kurland,²¹⁶ David Currie,²¹⁷ Geoffrey

208. *Int'l Shoe*, 326 U.S. at 316 (citation omitted) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

209. Further, that paragraph cited six prior U.S. Supreme Court cases that all involved in personam jurisdiction over individuals rather than corporations. *Id.* (citing *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316, 319 (1943); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *Young v. Masci*, 289 U.S. 253, 254 (1933); *Blackmer v. United States*, 284 U.S. 421, 426 (1932); *Hess v. Pawloski*, 274 U.S. 352, 353, 356 (1927); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917)).

210. 355 U.S. 220 (1957).

211. *Id.* at 223 (emphasis added).

212. 357 U.S. 235 (1958).

213. *Id.* at 247–56.

214. *See, e.g.*, *Calagaz v. Calhoon*, 309 F.2d 248, 255 (5th Cir. 1962). The U.S. Supreme Court definitively held that the minimum contacts test applied to individuals as well as foreign corporations in *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977).

215. Paul D. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 306–07 (1962).

Hazard,²¹⁸ and Arthur von Mehren & Donald Troutman.²¹⁹ By the mid-1960s, the modern conception of the reach of *International Shoe* was widely acknowledged, if not universally accepted. The invention of *International Shoe* was accomplished.

The minimum contacts test had two potential effects on Delaware's advantage over other states. First, to the extent that the test both clarified and lowered the criterion for personal jurisdiction over foreign corporations, some states that might not have had jurisdiction over foreign corporations before now did. More importantly though, if *International Shoe* applied to individuals as well as corporations, states might assert personal jurisdiction over nonresident directors who could not be served within the state. This could end Delaware's sequestration advantage and allow stockholder litigation to flow out of Delaware if plaintiffs thought other jurisdictions were preferable.

Delaware was unable to effect this challenge due to at least three remaining obstacles. First, although *International Shoe* had been invented, not everyone was convinced. The question of minimum contacts' application beyond the foreign corporation setting was an open one in the lower courts as late as 1962.²²⁰ Thus, states and the plaintiffs' bar could not be sure that states other than Delaware would have personal jurisdiction over nonresident directors under minimum contacts until an authoritative case was decided.

Second, even if minimum contacts applied to individuals, states needed to enact amenability statutes broad enough to grant power to their courts to exercise that jurisdiction under minimum contacts. In the corporate director context, this could come about in two ways. First, a specific long-arm statute could be enacted covering nonresident directors. Second, a general long-arm statute might be construed to cover nonresident directors of either domestic or foreign corporations.

216. Philip B. Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 592-93, 598, 610 (1958) (suggesting that *International Shoe* was not intended to apply to individuals and suggesting that not until *McGee* and *Hanson* were decided, in 1957 and 1958 respectively, did the Court truly provide useful guidance as to the content of minimum contacts).

217. David P. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 536-41 (suggesting that *McGee* and *Hanson* were the keys to informing the minimum contacts test).

218. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281-83.

219. Arthur T. von Mehren & Donald T. Troutman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1142-44 (1966).

220. See, e.g., *Calagaz v. Calhoon*, 309 F.2d 248, 255 (5th Cir. 1962).

By the time *Shaffer* was decided in 1977, at least eleven states had director-specific amenability statutes or rules.²²¹ However, only two or three could be considered commercially important states and therefore possible threats to Delaware's hegemony.²²² At least some of the director amenability statutes pre-dated *International Shoe*, though it is unclear how frequently these statutes were used in any of the states. Only South Carolina and Connecticut had reported cases interpreting their director-amenability statutes.²²³

More pertinently, at least eight states had statutes purporting to extend personal jurisdiction over nonresident individuals who transacted business within the forum state.²²⁴ However, these statutes (other than the nonresident motorist statutes) were not used with any great regularity prior to *International Shoe*.²²⁵

It was more than a decade after *International Shoe* before any state asserted a general, expansive power over nonresidents doing business or committing torts within the state.²²⁶ In part, this lag was due to uncertainty over the scope and content of the minimum contacts test itself.²²⁷ In 1956, Illinois became the first state to enact a modern long-arm statute.²²⁸ But, twenty years after *International Shoe*, only eleven states had comprehensive long-arm statutes, including: Illinois, Michigan, and New York (but not Delaware).²²⁹ Before the end of the decade, though, nearly one-half of the states had adopted a broad

221. Rodman Ward, Jr., *A Delaware Phoenix: The Fall of Sequestration and the Enactment of a Director Service Statute*, 3 DEL. J. CORP. L. 1, 13 (1977).

222. See *id.*, at 13–14 (collecting states).

223. Ernest L. Folk, III & Peter F. Moyer, *Sequestration in Delaware*, 73 COLUM. L. REV. 749, 789–95 (1973) citing only cases from Connecticut and South Carolina).

224. F. Arnold Daum, *The Transaction of Business Within a State by a Non-Resident as a Foundation for Jurisdiction*, 19 IOWA L. REV. 421, 422–23 n.5 (1934).

225. Cleary & Seder, *supra* note 111, at 604 (“These statutes apparently were not employed sufficiently to bring them before the courts until the resurgence of interest which resulted from the decision in the *International Shoe* case.” (footnote omitted)).

226. John M. O'Connor, Jr. & James M. Goff, *Expanded Concepts of State Jurisdiction over Non-Residents: The Illinois Revised Practice Act*, 31 NOTRE DAME L. 223, 223 (1956).

227. Kurland, *supra* note 216, at 592–93, 598, 610 (suggesting that *International Shoe* was not intended to apply to individuals and suggesting that not until *McGee* and *Hanson* were decided, in 1957 and 1958 respectively, did the Court truly provide useful guidance as to the content of minimum contacts); see Currie, *supra* note 217, at 536 (suggesting that *McGee* and *Hanson* were the keys to informing the minimum contacts test).

228. ILL. REV. STAT. c. 110, §§ 1-101.72 (1955).

229. AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 376 n.2, 376–77 n.3 (1969) (listing as of May 1965: Arkansas, Idaho, Illinois, Maine, Michigan, New Mexico, New York, Oklahoma, Rhode Island, Washington, and Wisconsin).

long-arm statute, although of the commercially important states, only Ohio joined Illinois, Michigan, and New York in doing so.²³⁰

Third, even with a sufficiently expansive long-arm statute, or one specifically directed to nonresident directors of foreign corporations, the vexing question remained whether those directors did, in fact, have sufficient contacts with the forum state such that jurisdiction would comport with traditional notions of fair play and substantial justice.

B. *The Revolution in Debtors' Rights*

From the late 1960s to the mid-1970s, the U.S. Supreme Court revolutionized the long-standing legal relations between debtors and their creditors.²³¹ The implications of this revolution undermined the continued validity of Delaware's sequestration system. However, as with the invention of *International Shoe*, commentators who were not versed in Delaware corporate law did not focus on the implications of the revolution to Delaware, and those who were familiar with Delaware's sequestration were mostly quick to argue that the revolution bypassed Delaware.

Eight days before Thanksgiving in 1966, the Family Finance Corporation of Bay View, Wisconsin filed a garnishment action in Wisconsin state court against Christine Sniadach on a promissory note she and her then-husband had signed two years earlier.²³² The following Monday, Mrs. Sniadach and her employer were served with process in the suit and the employer withheld \$31.59 of her \$63.18 net wages for the week in accordance with Wisconsin garnishment law.²³³ The Legal Defense Fund made a test case of the lawsuit and challenged the Wisconsin garnishment law.²³⁴

The U.S. Supreme Court granted certiorari.²³⁵ In June 1969, Justice Douglas held that the prejudgment seizure of wages, without providing the employee with notice and opportunity to be heard, violated

230. *Id.* (noting that of the commercially important states, only Ohio had joined Illinois, Michigan, and New York in doing so).

231. See *infra* note 239 and accompany text.

232. Oral Argument at 00:50–04:20, *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (No. 130), http://www.oyez.org/cases/1960-1969/1968/1968_130.

233. *Family Fin. Corp. v. Sniadach*, 154 N.W.2d 259, 260, 260 n.1 (Wis. 1967), *rev'd*, 395 U.S. 337 (1969).

234. Oral Argument at 3:50–4:20, *Sniadach*, 395 U.S. 337 (No. 130), http://www.oyez.org/cases/1960-1969/1968/1968_130; Special to New York Times, *Court to Review Garnisheeing of Pay Without Proof of Debt*, N.Y. TIMES, Feb. 25, 1969, at 24 [hereinafter *Court to Review Garnisheeing*].

235. *Sniadach v. Family Fin. Corp.*, 393 U.S. 1078 (1969) (mem.) (granting certiorari).

due process.²³⁶ “Where the taking of one’s property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process.”²³⁷ Although prior to the U.S. Supreme Court’s opinion the case had garnered no attention in the academic literature and little attention in the nonlegal world, the reaction to the Court’s decision was huge.²³⁸

A revolution had begun. In seven years the Court decided eight cases expanding the rights of debtors, especially consumer debtors, and broadened the idea of property rights.²³⁹ The most important of these cases were *Sniadach* and *Fuentes* (decided three years later).²⁴⁰ Although in retrospect *Sniadach* contained the kernel on which the debtors’ rights attack on Delaware sequestration would spring, at the time, thoughtful observers saw legitimate facets of *Sniadach* that could have confined the revolution to consumer settings. For example, *Sniadach* emphasized the fact that wage garnishment systemically affected low-income people.²⁴¹ The *Sniadach* Court also described wages as “a specialized type of property presenting distinct problems in our economic system”²⁴² and the next two cases in the revolution

236. 395 U.S. 337, 342 (1969).

237. *Id.* (citation omitted).

238. The New York Times devoted two small articles to the case before the U.S. Supreme Court’s opinion. *Court to Review Garnisheeing*, *supra* note 234, at 24; Robert J. Cole, *Personal Finance: Wage Garnishment*, N.Y. TIMES, Apr. 28, 1969, at 55. The case was cited by courts over 100 times in the first two years following its decision. A WestlawNext search shows 104 citations to *Sniadach* in the two years following its decision. Both the *New York Times* and the *Los Angeles Times* reported the Court’s decision on their front pages, and the *Los Angeles Times* had a banner headline. Ronald J. Ostrow, *Court Voids Garnishment Laws in California, 16 Other States*, L.A. TIMES, June 10, 1969, at 1; Special to New York Times, *Court Voids Law on Garnishment*, N.Y. TIMES, June 10, 1969, at 1.

239. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (pre-termination hearing of Social Security disability benefits); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (prehearing garnishment of commercial goods); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (extraordinary situation justifying a prehearing seizure of property); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (prehearing sequestration of consumer goods); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prehearing replevin of consumer goods); *Bell v. Burson*, 402 U.S. 535 (1971) (prehearing suspension of driver’s license and automobile registration); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (prehearing cessation of AFCD benefits); *Sniadach*, 395 U.S. 337 (prehearing garnishment of wages); *see also Connecticut v. Doehr*, 501 U.S. 1 (1991) (prehearing seizure of real property).

240. *Fuentes*, 407 U.S. 67.

241. *Sniadach*, 395 U.S. at 340–41.

242. *Id.* at 340.

also involved specific property rights that could be characterized as necessities, especially for those with low incomes.²⁴³

Fuentes signaled that the Court was not limiting its due process protection to either economically disadvantaged people or to particularly essential property rights, although the case itself involved both of those elements.²⁴⁴ *Fuentes* was a consolidated case involving the pre-judgment replevin of household goods purchased under conditional sales contracts.²⁴⁵ The Court, in quite sweeping language, made clear that “a temporary, nonfinal deprivation of property is nonetheless a ‘deprivation’ in the terms of the Fourteenth Amendment.”²⁴⁶ Justice Stewart, speaking for the Court, asserted, without any real support, that *Sniadach* and *Goldberg* (the second case in the revolution) “were in the mainstream of past cases, having little or nothing to do with the absolute ‘necessities’ of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.”²⁴⁷ He thus demolished the suggestion that the revolution would protect only certain property, saying that the Court had never held that the Due Process Clause “is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.”²⁴⁸

Fuentes also elaborated, even if it did not clarify, a possible exception to the scope of the debtors’ rights revolution. *Sniadach* held that ex parte prejudgment attachment may be compatible with due process “in extraordinary situations” involving “special protection to a state or creditor interest”²⁴⁹ *Fuentes* found three factors present in all the cases in which ex parte prejudgment seizure was allowed.

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for

243. *Burson*, 402 U.S. 535 (prehearing suspension of driver’s license and automobile registration); *Goldberg*, 397 U.S. 254 (prehearing cessation of Aid to Families with Dependent Children (AFCD) benefits).

244. *Fuentes*, 407 U.S. 67.

245. *Id.* at 70–72.

246. *Id.* at 85 (citing *Sniadach*, 395 U.S. 337).

247. *Id.* at 88 (footnote omitted).

248. *Id.* at 89 (footnote omitted).

249. *Sniadach*, 295 U.S. at 339 (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598–600 (1950); *Fahey v. Mallonee*, 332 U.S. 245, 253–54 (1947); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31 (1928); *Ownbey v. Morgan*, 256 U.S. 94, 110–12 (1921)).

determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.²⁵⁰

The synthesis of the debtors' rights cases, speaking rather generally, is that in private litigation, a prejudgment deprivation of a property interest must be accompanied by either pre seizure or post seizure safeguards or must be an "extraordinary situation" justifying the deprivation.²⁵¹

C. Attacks on Delaware Sequestration

While the debtors' rights revolution was in full swing, academics and the courts began questioning the constitutional validity of Delaware's sequestration process. Some of the arguments they used predated the first debtors' rights case in 1969, but the attacks grew louder and stronger after *Fuentes* in 1972. These attacks came within a larger movement challenging the nearly universal state provisions for prejudgment seizure of property²⁵² but became more Delaware focused in the work of the great corporate law scholar Ernest L. Folk, III, who had been²⁵³ the reporter for the revision of the Delaware corporation statute in the mid-1960s.²⁵⁴

250. *Fuentes*, 407 U.S. at 91. In a footnote, the Court distinguished seizure from attachment and characterized *Ownbey's* result as "attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest." *Id.* at 91 n.23.

251.

For this type of case [i.e., private litigation], therefore, the relevant inquiry requires . . . first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (relying in particular on *Snidach*, *Fuentes*, *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), and *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)).

[Due Process requires that] an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (footnotes omitted).

252. See, e.g., Joseph P. Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975); Comment, *Foreign Attachment After Snidach and Fuentes*, 73 COLUM. L. REV. 342 (1973); Comment, *Laprease and Fuentes: Revlevin Reconsidered*, 71 COLUM. L. REV. 886 (1971); Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973); see also, e.g., *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 85, 88–92 (1972).

253. Thomas H. Jackson et al., *Tributes to Ernest L. Folk, III*, 76 VA. L. REV. 1 (1990).

254. Ernest L. Folk, III, *Some Reflections of a Corporation Law Draftsman*, 42 CONN. B.J. 409 (1968).

In fact, prescient criticisms of quasi in rem jurisdiction itself, although not attacks on foreign attachment or Delaware in particular, were put forth even before the invention of *International Shoe* by several proceduralists,²⁵⁵ including one of the most prominent, Paul Carrington. In this line of attack, the expansion of the states' power to exert personal jurisdiction beyond the traditional territorial limits of *Pennoyer* meant that quasi in rem jurisdiction, of which foreign attachment (and therefore Delaware's sequestration) was a part, was no longer necessary to obtain personal jurisdiction over defendants except those who "ought not to be asked to defend in the forum chosen by the plaintiff."²⁵⁶ Thus, according to this reasoning, quasi in rem jurisdiction should be eliminated.

Professor Folk seemed to have perceived no effect of *International Shoe* or the proceduralists' attack on quasi in rem jurisdiction for Delaware's sequestration system when he worked on the revision of the Delaware corporation statute in the mid-1960s. His extensive report in connection with the revision of the DGCL listed five objections to sequestration, but none was rooted in a possible constitutional objection.²⁵⁷ However, he was keenly aware of *Sniadach's* implications on Delaware, and in 1971, he raised four possible constitutional questions for Delaware, two of which were based on the invention of *International Shoe* and the debtors' rights revolution.²⁵⁸

255. Even the great Brainerd Currie weighed in, calling Delaware's foreign attachment procedure under *Ownbey* "one of the more egregious injustices of modern times." Brainerd Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337, 379 (1961) (footnote omitted).

256. Carrington, *supra* note 215, at 306. See Albert A. Ehernzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Hazard, *supra* note 218, at 282-83; Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 657-58 (1959); Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 948 (1960); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 550-51 (1967); Note, *Garnishment of Wages Prior to Judgment is a Denial of Due Process: The Sniadach case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 1003-04 (1970); Comment, *Podolasky v. Devinney and the Garnishment of Intangibles: A Chip off the Old Balk*, 54 VA. L. REV. 1426 (1968), for other expressions of the same argument.

257. ERNEST L. FOLK, III, REVIEW OF THE DELAWARE CORPORATION LAW 267-71 (1968). The report was published in 1968, but Professor Folk prepared the section on sequestration by April 1966. See Minutes of Thirty-Third Meeting of Delaware Corporation Law Study Committee, (Apr. 25, 1966), <http://delawarelaw.widener.edu/files/resources/committeeminutes.pdf>.

258. ERNEST L. FOLK, III, *An Essay on Sequestration and Foreign Attachment*, in THE DELAWARE GENERAL CORPORATION LAW 565, 603-10 (1972). The essay was completed in 1971. See *id.*, at 607 n.274. The two constitutional arguments he raised, which did not prove to be significant, included: (1) a question of the requisite notice of with sequestration; and (2) whether Delaware's refusal to permit a limited appearance violated due process. *Id.* at 603-04, 606. Folk reiterated and elaborated on his concern with the limited appearance problem in Ernest L. Folk, III & Moyer, *supra* note 223, at 789-95.

It is clear that even in 1971 Professor Folk did not see the *International Shoe* argument against sequestration as a strong one. Rather, he expressed annoyance that the Delaware Supreme Court gave the argument short shrift rather than facing it head-on and holding that, in effect, quasi in rem jurisdiction did not require the minimum contacts showing of *International Shoe*.²⁵⁹ After *Fuentes*, however, he understood the power of the *International Shoe* argument. In his enormously influential 1973 article published in the *Columbia Law Review*, Folk and his student co-author, Moyer, devoted seventeen pages to an examination of the invention of *International Shoe*'s consequences for Delaware's system of sequestration.²⁶⁰

Folk and Moyer focused primarily on whether *International Shoe*'s expansion of in personam jurisdiction also worked a contraction of other forms of personal jurisdiction such as quasi in rem. They acknowledged the argument that quasi in rem jurisdiction was no longer necessary since the development of the modern minimum contacts tests.²⁶¹ They admitted that the function of sequestration—to coerce in personam jurisdiction over nonresident corporate fiduciaries—made it difficult to categorize sequestration as a true quasi in rem proceeding rather than an in personam one.²⁶² They also argued that even though Section 169 placed all stock in Delaware, the state in which the certificates were located, any state in which the corporation was subject to in personam jurisdiction could also plausibly claim to have the stock located within it as well, thus exposing the stockholder to quasi in rem jurisdiction in a multiplicity of states.²⁶³ They also confessed that if *International Shoe* were applied to sequestration, the U.S. Supreme Court might decide that fairness requires that a single site for stock be determined and might find that the state of incorporation was not the most fair location. In that event, Delaware's sequestration system would crumble even though the procedure itself would be upheld.²⁶⁴

Finally, the authors addressed one of the arguments in favor of upholding sequestration after *International Shoe*, an analogy to a line of state and federal cases upholding a New York statute permitting suit in New York by the state's residents against insurance companies doing business there, even where neither the insured nor the tort giving

259. See FOLK, *supra* note 258, at 604–06. Folk was criticizing the Delaware Supreme Court's opinion in *Breech v. Hughes Tool Co.*, 189 A.2d 428 (Del. 1963).

260. Folk & Moyer, *supra* note 223, at 778–95.

261. *Id.* at 780–81.

262. See *id.* at 784.

263. *Id.* at 786.

264. *Id.* at 788–89.

rise to the claim had any connection to New York.²⁶⁵ Although two years earlier Folk favored that argument,²⁶⁶ by 1973 he had changed his mind and found a distinction between the New York statute and Delaware's sequestration in the fact that the Delaware corporation, analogous to the insurance company doing business in New York, was only a nominal party in corporate litigation not the real party in interest.

Turning to other arguments in support of sequestration, Folk and Moyer noted that sequestration had been likened to garnishment of a debt, which had been sustained under *Harris v. Balk*.²⁶⁷ Harris owed money to Balk; both were North Carolina residents and the debt was presumably contracted there. Balk also owed money to Epstein, a Maryland resident. While Harris was in Maryland, Epstein garnished Harris's debt owed to Balk in partial satisfaction of Balk's debt to Epstein.²⁶⁸ Harris paid money to Epstein and that payment was found to be a valid defense to a later suit by Balk to recover from Harris in North Carolina.²⁶⁹ However, Folk and Moyer noted that Epstein, the plaintiff-creditor-garnishor in *Harris*, was a resident of the forum state, and that in garnishment, the plaintiff takes the place of the original creditor (Balk in this case).²⁷⁰ In sequestration, by contrast, the plaintiff is seldom (if ever) a Delaware resident and need not seek to collect for herself an obligation owed to the corporation. These differences were enough for Folk and Moyer to conclude that the *Harris* reasoning would not support sequestration against a challenge under *International Shoe*.²⁷¹

Despite the careful critique of sequestration in light of *International Shoe*, Professor Folk saw the debtors' rights revolution as the stronger attack on sequestration.²⁷² In 1971, he thought that a broad reading of *Sniadach* could "inevitably condemn[] the Delaware sequestration statute" if the case applied to all property and not just property of those of modest means.²⁷³ But, in 1973 after *Fuentes* authoritatively applied due process to all property, Folk and Moyer thought sequestration might still meet due process even though the debtors' rights

265. "The controversy was initiated by *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). Much of the ensuing case law was discussed in *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), which upheld the constitutionality of the New York procedures." *Id.* at 786 n.216.

266. FOLK, *supra* note 258, at 605.

267. 198 U.S. 215 (1908).

268. *Id.* at 216.

269. *Id.* at 216-17.

270. Folk & Moyer, *supra* note 223, at 786-87.

271. *Id.* at 786-88.

272. *See id.* at 795-800 (discussing sequestration after *Fuentes*).

273. FOLK, *supra* note 258, at 608

cases applied to the seizure of stock.²⁷⁴ Further, they argued that the 1955 amendment to the sequestration statute, which ordinarily required the release of the property upon the defendant's general appearance, might be seen as a less serious taking than in *Sniadach*, and therefore, a possible ground for distinction.²⁷⁵

Folk did not argue that Delaware's sequestration system constituted an extraordinary situation justifying an exception to even a broad reading of *Sniadach*.²⁷⁶ After *Fuentes*, he admitted that sequestration would not survive as an extraordinary situation in cases where it was needed most. That is, where the defendants did not have minimum contacts and thus where personal jurisdiction must be based on quasi in rem principles.²⁷⁷

Folk and Moyer also argued in favor of Delaware jurisdiction, though perhaps not via sequestration, in cases in which the defendant was a nonresident and therefore arguably not subject to jurisdiction under minimum contacts. In that setting, they argued that the necessity of providing a forum in Delaware for the resolution of cases involving Delaware corporate law, obviously of high importance to Delaware, could be justified under *Fuentes* although not via sequestration.²⁷⁸ Rather, they saw the solution as either a system based on quasi in rem jurisdiction, but invoked by service of process rather than seizure, or a targeted long-arm statute.²⁷⁹

Folk was enough of a realist to understand that Delaware could not save sequestration by hiding behind *Ownbey*. The Delaware sequestration scheme had virtually no preseizure safeguards though it contained some postseizure safeguards. For example, defendants were allowed to appear specially to contest jurisdiction.²⁸⁰ Also, the norm was release of the sequestered property upon entry of a general appearance by defendant. Finally, the defendant could obtain a hearing on the value of the property subject to seizure.²⁸¹

274. See Folk & Moyer, *supra* note 223, at 798 (proposing to enact either a system of sequestration initiated by service of process on the defendant rather than seizure of the defendant's stock or a long-arm statute aimed specifically at corporate fiduciaries).

275. FOLK, *supra* note 258, at 608. He conceded, however, that this difference might not be sufficient to save sequestration. Folk & Moyer, *supra* note 223, at 792–95.

276. FOLK, *supra* note 258, at 608.

277. Folk & Moyer, *supra* note 223, at 767.

278. *Id.* at 764–65.

279. *Id.* at 798.

280. Leftcourt Realty Corp. v. Sands, 113 A.2d 428, 429 (Del. Ch. 1955), *aff'd*, 117 A.2d 365 (Del. 1955).

281. DEL. CODE ANN. tit. 10, § 366(a) (2013).

Perhaps the strongest argument in favor of upholding the Delaware sequestration scheme was that *Ownbey*²⁸² had approved the similar scheme of foreign attachment under Delaware law. More pertinently, the U.S. Supreme Court cited *Ownbey* favorably in at least five of its debtors' rights cases.²⁸³

Rather amusingly, however, five Justices invoked *Ownbey* for four different propositions. For Justice Douglas, *Ownbey* represented an "extraordinary situation" justifying prehearing seizure.²⁸⁴ For Justice Black, in his dissent in the same case, *Ownbey* illustrated the fact that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."²⁸⁵ Justice Stewart and Justice Brennan thought that *Ownbey* stood for the proposition that "attachment necessary to secure jurisdiction in state court [is] clearly a most basic and important public interest."²⁸⁶ Finally, Justice White read *Ownbey* as holding that process issued "in the first instance by an agent of the State but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method . . . open to no objection."²⁸⁷

In the midst of the debtors' rights revolution, especially after *Fuentes* in 1972, litigants and the courts²⁸⁸ began questioning the continued vitality of *Ownbey* and the Delaware sequestration procedure. Academic commentators began seriously questioning Delaware's sequestration procedure as well.²⁸⁹

The first court challenges framed the question as whether sequestration either met *Fuentes*'s requirements for due process or was an exception to the requirements. The U.S. District Court for the District of Delaware upheld sequestration against the *Fuentes* challenge, find-

282. 256 U.S. 94 (1921).

283. See *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 (1975) (Powell, J., concurring); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 n.13 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 613-14 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969); *id.*, at 349 (Black, J., dissenting). *But cf.*, *Bell v. Burson*, 402 U.S. 535, 542 n.5 (1971) (citing two examples of "emergency situations" but did not include *Ownbey*).

284. *Sniadach*, 395 U.S. at 339.

285. *Id.* at 349 (Black, J., dissenting).

286. See *Fuentes*, 407 U.S. at 91 n.23 (Stewart, J.); see also *Calero-Toledo*, 416 U.S. at 679 n.13 (Brennan, J.).

287. *Mitchell*, 416 U.S. at 613 (citation omitted) (quoting *Coffin Bros. v. Bennett*, 277 U.S. 29, 31 (1928)); see also *N. Ga. Finishing*, 419 U.S. at 610 (Powell, J. concurring) (agreeing with his own characterization of *Ownbey* in *Mitchell*).

288. *U.S. Indus., Inc. v. Gregg*, 348 F. Supp. 1004, 1020-21 (D. Del. 1972), *rev'd*, 540 F.2d 142 (3d Cir. 1976).

289. The most influential academic pieces were *Folk & Moyer*, *supra* note 223, at 796 and Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 *YALE L.J.* 1023, 1039 (1973).

ing that Delaware's sequestration scheme was an extraordinary situation because its purpose was to confer jurisdiction on the court.²⁹⁰ The district court also based its decision on the argument that sequestration was of long-standing practice and validity in Delaware.²⁹¹ The court also regarded *Ownbey* as good law for at least some purposes.²⁹²

Other cases involving Delaware sequestration were resolved similarly.²⁹³ One additional argument against the sequestration system was that the statute²⁹⁴ deeming Delaware the situs for the stock of all Delaware corporations was impermissible, and therefore, no minimum contacts existed in the typical stockholder derivative case in which none of the defendant-directors had any contact with Delaware (and typically the plaintiff was a nonresident with no contacts as well). A further argument was that even if the Delaware situs statute were given effect, the presence of a defendant's stock in Delaware, *vel non*, was insufficient to give Delaware personal jurisdiction over the defendant under *International Shoe* and its progeny, particularly *Hanson v. Denkla*.²⁹⁵

In *Jonnet v. Dollar Savings Bank*,²⁹⁶ the Third Circuit overturned Pennsylvania's foreign attachment statute, which was quite similar to the Delaware foreign attachment system in *Ownbey*.²⁹⁷ While admitting that the U.S. Supreme Court's debtors' rights revolution cases frequently cited *Ownbey* with approval, Judge Rosenn, speaking for the court, limited *Ownbey* to the proposition that due process does not require preattachment notice and hearing in foreign attachment settings.²⁹⁸ Judge Gibbons concurred in an opinion more than twice

290. *Gregg*, 348 F. Supp. at 1020–21. The defendant also argued for a minimum contacts analysis. The court in *Gregg* held that the minimum contacts test was inapplicable to a situation where a state asserted power over property located within its borders. *Id.* at 1020.

291. *Id.* (citing *McDonald v. Mabee*, 243 U.S. 90 (1915)).

292. *Id.* at 1021.

293. *See, e.g.*, *Wiley v. Copeland*, 349 A.2d 211 (Del. 1975); *Emersons Ltd. v. Radnay & Levi*, No. CIV.A.5028, 1977 WL 176194 (Del. Ch. June 22, 1977); *Heitner v. Greyhound Corp.* 1975 WL 417 (Del. Ch. May 12, 1975), *aff'd*, 361 A.2d 225 (Del. 1976), *rev'd, sub nom.* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

294. DEL. CODE ANN. tit. 8, § 169 (2011) (“For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.”).

295. 357 U.S. 235, 253 (1958) (holding that a trust agreement was insubstantial to establish personal jurisdiction over a nonresident defendant); *see Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Gregg*, 348 F. Supp. at 1020; *Wiley v. Copeland*, 349 A.2d 211 (Del. 1975).

296. 530 F.2d 1123, 1142–43 (3d Cir. 1976).

297. The Pennsylvania statute in *Jonnet*, however, did not include the provision for special bail that was at the heart of *Ownbey* in the U.S. Supreme Court. *Jonnet*, 530 F.2d at 1136 (Gibbons, J., concurring).

298. *Id.* at 1128.

as long as Judge Rosenn's opinion for the court.²⁹⁹ He emphasized his deeply researched and nuanced view that *International Shoe* and its progeny were applicable to states' power over property as well as over individuals and corporations.³⁰⁰ Presumably Judge Seitz, the third member of the panel, preferred not to reach that issue because he signed onto Judge Rosenn's opinion rather than Judge Gibbons'. Perhaps Judge Seitz, who for twenty years sat on the Delaware Court of Chancery, was not prepared to highlight the potential infirmities of a Delaware system with which he was deeply implicated.

A few months later, a completely different panel of the Third Circuit embraced Judge Gibbons' *International Shoe* approach³⁰¹ and reversed the district court's opinion in *Gregg*.³⁰² Judge Aldisert's blunt opening states: "The major question presented in this appeal . . . is whether the Delaware situs statute . . . comports with the constitutional requirement that jurisdiction be predicated on minimum contacts with the forum In our view, it does not so comport."³⁰³ This, of course, was not the way the district court had analyzed the case.

Judge Aldisert sarcastically attacked the Delaware judiciary's upholding of the sequestration procedure.³⁰⁴ He analyzed *Ownbey* separately and noted that it had recently and frequently been cited by the U.S. Supreme Court. But, he wrote: "Ownbey has been cited by the Supreme Court from 1972 to 1975 to illustrate the few limited situations in which the Court historically has permitted seizure of property without opportunity for a prior hearing."³⁰⁵ He then observed that "[t]he brute fact is that *Ownbey* adjudicated the constitutionality of a statutory procedure since abandoned. While the case, incidentally, did involve the seizure of stock, it did not adjudicate the question of

299. *Id.* at 1130-43 (Gibbons, J., concurring).

300. *Id.* at 1131 (Gibbons, J., concurring). Judge Gibbons expressed similar views three years previously in a dissenting opinion in a case in which rehearing en banc was granted. In *Baker v. Gotz*, a panel of the Third Circuit was split on the constitutionality of Delaware's sequestration. No. 71-2150, 1973 U.S. App. LEXIS 8074 (3d Cir. Aug. 31, 1973) (rehearing granted, which vacated the panel's opinions). The majority, per Justice Adams, upheld the procedure largely on the basis of *Ownbey*. Judge Gibbons dissented primarily on the ground that minimum contacts should be applied and were insufficient to sustain jurisdiction. *Id.* at *61-*71 (Gibbons, J., dissenting).

301. *Jonnet*, 530 F.2d at 1130-43 (Gibbons, J., concurring).

302. *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976), *rev'g* 348 F. Supp. 1004 (D. Del. 1972). Although this case raised issues similar to those in *Shaffer*, the U.S. Supreme Court denied certiorari. *U.S. Indus. Inc. v. Gregg*, 433 U.S. 908 (1977) (mem.).

303. *Gregg*, 540 F.2d at 144 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

304. *Id.* at 151 ("We cannot accept the notion that the mere proliferation of unwarranted reliances on old cases suffices to settle a contemporary issue in a dynamic field of law.").

305. *Id.* at 152.

situs; and certainly it did not anticipate the minimum contacts doctrine of *International Shoe*.³⁰⁶

The court then held that the minimum contacts test was applicable to all personal jurisdiction questions, partly reversing the district court on that issue, giving a bench slap to the Delaware courts, and affirming the reasoning of Judge Gibbons' concurrence in *Jonnet*.³⁰⁷ Applying the analysis to the Delaware sequestration procedure, Judge Aldisert concluded that the Delaware situs statute, which provided the only contact with Delaware for any defendant (or plaintiff for that matter), was insufficient to confer personal jurisdiction on the Delaware courts.³⁰⁸

The Delaware courts, as might be expected, were less easily convinced that *International Shoe* or *Fuentes* had eviscerated the support for sequestration. They continued to believe, or at least hope, that *Ownbey* and *Cantor* remained good law and supported the constitutionality of sequestration.

The Delaware courts did not consider the possible effects of *International Shoe* until 1962. Vice Chancellor Marvel quickly dismissed the argument that *International Shoe* should govern sequestration procedure by saying:

I fail to perceive the pertinency of cases such as [*International Shoe*] which have to do with the question of whether or not the contacts of a foreign corporation with a sister state in which it is sued are such that traditional notions of fair play and substantial justice are offended in permitting a suit against it to proceed. Here, we are concerned with this Court's power over property whose situs has been declared by the Legislature to be for present purposes in Delaware, *Cantor v. Sachs*, *Ownbey v. Morgan*³⁰⁹

Delaware had, in addition to its foreign attachment and sequestration statutes, a typical garnishment statute. A Delaware superior court held that the garnishment statute did not survive *Sniadach* even

306. *Id.* at 152–53 (footnote omitted).

307. *Id.* at 153. “Our conclusion that *International Shoe* applies to quasi in rem actions is contrary to the district court's” *Id.* at 154. “Our conclusion also severely erodes the foundation of the Delaware Supreme Court's truncated analysis in *Greyhound Corp.* that *International Shoe* did not apply. . . .” *Id.* “Judge Gibbons' analysis, a scholarly, carefully documented history of quasi in rem foreign attachment in the federal courts, develops a thesis to which we perceive no effective rebuttal.” *Id.* (citing *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1130 (3d Cir. 1976) (Gibbons, J., concurring)).

308. *Gregg*, 540 F.2d at 155. Note that the district court followed *Gregg* in *Barber-Greene Co. v. WALCO Nat'l Corp.*, 428 F. Supp. 567 (D. Del. 1977).

309. *Trans World Airlines, Inc. v. Hughes*, 185 A.2d 762, 765 (Del. Ch.), *aff'd*, 185 A.2d 886 (Del. 1962) (citations omitted).

though the defendant was a nonresident.³¹⁰ The Delaware Supreme Court reversed on the ground that the garnishee who challenged the statute lacked standing, and the court did not reach the constitutional issue (although it was reported that on remand the superior court reaffirmed its prior holding after the defendant made a special appearance).³¹¹

Similarly, Chancellor Duffy upheld a Delaware statute providing for suspension of a driver's license without a hearing on the ground that the suspension in that particular case was an "emergency situation" and therefore comported with due process.³¹²

However, in at least one post-*Sniadach* case the Delaware Supreme Court recognized that the revolution arrived. Delaware's landlord distress law allowed a landlord to seize a tenant's personal property in certain instances. In a post-*Sniadach* case challenging that law, the Delaware Supreme Court sidestepped actually ruling on the question, but said:

In passing, however, we invite the attention of the General Assembly to the possible effect . . . of . . . *Sniadach*

Sooner or later, if the Delaware Landlord Distress Law remains unchanged, we may expect a case to be presented requiring our courts to determine the validity of the provisions of the Law which permit seizure by the landlord of the tenant's household goods and furniture for unpaid rent without prior notice and hearing. In the light of the current development of the law of procedural due process, the seizure provisions of the Law may well be brought to the attention of the General Assembly for such action as it deems proper.³¹³

Even after *Fuentes*, the Delaware courts did their best to deny that *International Shoe* or the debtors' rights cases had any implications for sequestration. Chancellor Duffy, in *Gordon v. Michel*,³¹⁴ simply noted that sequestration had long been upheld and refused to entertain the argument that the debtors' rights cases required a rethinking of the Delaware approach.³¹⁵ Relying on *Ownbey*, he upheld sequestration.³¹⁶

310. *Mills v. Bartlett*, 265 A.2d 39, 41 (Del. Super. Ct.), *rev'd*, *Mills v. Trans. Caribbean Airways, Inc.*, 272 A.2d 702 (Del. 1970).

311. *Mills*, 272 A.2d at 703-04.

312. *Broughton v. Warren*, 281 A.2d 625, 628-29 (Del. Ch. 1971) (citing *Bell v. Burson*, 402 U.S. 535 (1971)).

313. *Downs v. Jacobs*, 272 A.2d 706, 708-09 (Del. 1970) (footnote omitted) (citations omitted).

314. 297 A. 2d 420 (Del. Ch. 1972).

315. *Id.* at 421-22.

316. *Id.* at 423 ("The result [in *Fuentes*], then, admits of no doubt, in my judgment: *Ownbey* is still very much alive and [the sequestration statute] was and is constitutional."). Two years later,

The Delaware Supreme Court delicately approached the problem of the constitutionality of sequestration with a per curiam affirmance in 1975. The court quoted Chancellor Quillen's letter-opinion denying a *Fuentes*-based challenge on the basis of other recent Delaware cases.³¹⁷

As Chancellor Marvel noted in 1977: "While it may be that [the Delaware Supreme Court's decision in *Shaffer*] will at some time in the near future no longer be the law of Delaware, until such ruling is set aside, it controls the decision in this case."³¹⁸ Two days later, Chancellor Marvel's premonition came true in the form of the U.S. Supreme Court's decision in *Shaffer*.³¹⁹

VII. SHAFER PUTS AN END TO SEQUESTRATION³²⁰

Shaffer arose when the Delaware Court of Chancery asserted personal jurisdiction over twenty-eight nonresident directors and officers of the Greyhound Corporation, a Delaware corporation, and its California subsidiary, requiring them to respond to a stockholder-derivative action. The complaint asserted that the defendants were liable to the corporation because they caused the corporation to violate anti-trust laws. Those violations resulted in a civil judgment of over \$13 million and fines of \$600,000.00 for violating an Interstate Commerce Commission (ICC) order.³²¹ The plaintiff filed suit in the Delaware Court of Chancery and obtained an order of sequestration against the defendants, seizing over \$1.5 million worth of stock.³²² Apparently, seven defendants did not own Greyhound shares and so were not

a Delaware superior court upheld the system of foreign attachment against an attack based on *Sniadach* and *Fuentes* on the ground that *Ownbey* remained good law. The court also rejected a challenge under *International Shoe* on the ground that *International Shoe* did not apply to quasi in rem cases. *Hibou, Inc. v. Ramsing*, 324 A.2d 777, 780 (Del. Super. Ct. 1974).

317. *Wiley v. Copeland*, 349 A.2d 211, 212 n.1 (Del. 1975) (per curiam). The Chancellor cited *Gordon* and *Gregg* as authority. *Wiley*, 349 A.2d at 212. Chancellor Quillen's letter-ruling stated that there was no reason to think there would be an extension of *Fuentes* or *Sniadach*, especially after *Mitchell*. *Id.* at 212 n.1. The Chancellor cited *Hibou* favorably as well. *Id.*

318. *Emersons Ltd. v. Radnay & Levi*, No. CIV.A 5028, 1977 WL 176194, at *1 (Del. Ch. June 22, 1977).

319. 433 U.S. 186, 216–17 (1977).

320. A good description of the events leading up to *Shaffer* is found in Wendy Collins Perdue, *The Story of Shaffer: Allocating Jurisdiction Among the States*, in *CIVIL PROCEDURE STORIES* 135–40, (Kevin M. Clermont ed., 2d ed. 2008). As Professor David L. Ratner noted: "Although the Supreme Court had quite a bit to say on the subject in its *Shaffer* opinion, what it said is not very clear." David L. Ratner & Donald E. Schwartz, *The Impact of Shaffer v. Heitner on the Substantive Law of Corporations*, 45 *BROOKLYN L. REV.* 641, 645 (1979).

321. Complaint, *supra* note 179, at A7–A10.

322. *Heitner v. Greyhound Corp.*, 1975 WL 417 (Del. Ch. May 12, 1975), *aff'd*, 361 A.2d 225 (Del. 1976), *rev'd, sub nom. Shaffer*, 433 U.S. 186. The affidavit in connection with the sequestration asserted that the defendants owned 101,753 shares of Greyhound stock and that the clos-

amenable to the sequestration statute.³²³ The plaintiff, Arnold Heitner, a New York resident, owned one share of Greyhound stock.³²⁴

The individual defendants made a special appearance and moved to quash and vacate the sequestration.³²⁵ The defendants' argument was rather broad-based. They asserted that Section 169 of DGCL, the situs statute, was ineffective to locate the Greyhound stock in Delaware and that, therefore, there was no property within Delaware to be seized. Only seizure of the certificates would be effective.³²⁶ Second, they argued that the sequestration process violated the debtors' rights cases, especially *Fuentes* and *Mitchell*.³²⁷ Finally, the defendants reasoned that because the sequestration procedure provided for release of the property once the defendants entered a general appearance, and because the avowed purpose of sequestration was to compel a general appearance rather than to resolve a true, unrelated quasi in rem action, the sequestration procedure was really an action in personam and must meet *International Shoe's* minimum contacts test.³²⁸

As would be expected, Vice Chancellor Brown rejected all of these arguments.³²⁹ He held that the situs statute was not unreasonable and that a stock certificate was only an indication of property, not the property itself.³³⁰ He then held that the defendant's power to seek immediate release of the property upon a general appearance met the requirements of *Fuentes* and *Mitchell*.³³¹ Finally, he simply asserted that sequestration was a proceeding quasi in rem and not in personam.³³²

ing price was \$15.25 per share, for a total of \$1,551,733.00. See Handelman Affidavit, *supra* note 174, at A25.

323. See *Shaffer*, 433 U.S. at 192 n.8.

324. There is quite a strong indication that plaintiff's counsel rather than plaintiff himself was the driving force behind the suit. Justice Powell, the Court's resident corporate lawyer, hinted as much with some rhetorical questions to Heitner's counsel, and Dean Perdue also suggested this possibility. Oral Argument at 33:23–34:00, *Shaffer*, 433 U.S. 186 (1977) (No. 75-1812), http://www.oyez.org/cases/1970-1979/?1976/1976_75_1812/argument; see Perdue, *supra* note 320, at 141 nn.23–24 (citing Telephone Interview with Arnold Heitner (Aug. 1, 2003) and Telephone Interview with Michael Machio (Oct. 13, 2003)).

325. *Heitner*, 1975 WL 417, at *1.

326. *Id.* at *2.

327. *Id.* at *1.

328. *Id.* at *7.

329. He showed his disdain with the debtors' rights cases by alluding to "the recent wealth of judicial decision that has emerged from the swirling and infectious dust of *Sniadach* and *Fuentes*. . . ." *Id.* at *1.

330. *Id.* at *3–4 ("Under this theory, . . . I presume, a stockholder who lost his certificate could not have his stock interest attached by any court, any where in the event he chose not to seek a new one.").

331. *Heitner*, 1975 WL 417, at *4–7.

332. *Id.* at *8.

The Delaware Supreme Court, also predictably, upheld the sequestration process. However, the case apparently gave the court considerable difficulty. The Delaware courts pride themselves on rendering decisions rapidly in corporate litigation, recognizing that certainty on important legal questions in the corporate law realm is a prized virtue because prospective business actions depend upon the settled nature of the law. For reasons that are opaque, it took the Delaware Supreme Court a full six months after the oral argument to render its written decision.³³³

Justice Duffy, who four years earlier as Chancellor rather cursorily upheld the sequestration scheme,³³⁴ wrote the opinion for the three-justice panel. The tenor of the opinion can be gleaned from Justice Duffy's remark that "[t]here are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them."³³⁵ He then rather tautologically held that *International Shoe* was inapplicable because this action was quasi in rem not in personam.³³⁶ The court dismissed the situs argument saying "we have already determined that the shares have a situs here, . . . and, for present purposes that is conclusive on this contention."³³⁷

Justice Duffy analyzed the debtors' rights cases strictly in terms of their effect on *Ownbey*.³³⁸ The upshot of that discussion was the holding that preseizure notice and opportunity to be heard were not constitutionally required because the sequestration procedure was necessary to secure jurisdiction, and therefore, an "extraordinary situation."³³⁹ Then, just in case the court was wrong about the extraordinary situation exception,³⁴⁰ the court began the litany of safeguards that made the sequestration process consonant with the new due process requirements.

In sum, the sequestration procedure is at all times under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally; if the Court determines that there has been a valid seizure a defendant

333. *Greyhound Corp. v. Heitner*, 361 A.2d 225, 225 (Del. 1976), *rev'd, sub nom. Shaffer v. Heitner*, 433 U.S. 186 (1977) (argued Oct. 15, 1976 and decided Apr. 15, 1977).

334. *Gordon v. Michel*, 297 A.2d 420, 424 (Del. Ch. 1972).

335. *Greyhound*, 361 A.2d at 229.

336. *Id.* at 229.

337. *Id.* at 236 (citations omitted).

338. *Id.* at 228–31. *See generally Ownbey v. Morgan*, 256 U.S. 94 (1921).

339. *Greyhound*, 361 A.2d at 231–32.

340. *Id.* at 232. "All of those cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction which is what this appeal is all about. While that difference may be determinative in distinguishing this case from creditor type cases, we do not base our conclusion on it." *Id.* (footnote omitted).

may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim.³⁴¹

Finally, Justice Duffy addressed an argument made apparently for the first time in the case: Delaware's failure to permit a limited appearance violated due process. He rejected that argument on the ground that requiring a general appearance served the legitimate state interest of judicial economy by allowing, indeed requiring, the entire value of a dispute to be litigated in one lawsuit.³⁴² The defendants took an appeal to the U.S. Supreme Court, which noted probable jurisdiction.³⁴³

The Court's analysis of the case had little to do with the Delaware sequestration system at issue. Justice Marshall, speaking for the Court, observed that the concept of implied consent to jurisdiction, the development of various tests to determine the "presence" within the forum jurisdiction of intangibles (such as corporations or debts), and the historical acceptance of personal jurisdiction in niche situations involving some status issues, such as marriage, all undercut *Pennoyer's* emphasis on territoriality as the touchstone of personal jurisdiction.³⁴⁴ *International Shoe* was central to shifting the in personam inquiry away from territorial presence to whether the defendant had sufficient contacts with the forum state such that asserting personal jurisdiction would comport with traditional notions of fair play and substantial justice.³⁴⁵

But, wrote Justice Marshall, no analogous idea invalidated *Pennoyer's* territoriality principle where the dispute involved in rem or quasi in rem jurisdiction rather than in personam jurisdiction.³⁴⁶

341. *Id.* at 234. See generally *id.* at 232–35 (setting out the court's assessment of constitutional safeguards).

342. *Id.* at 235.

343. Prior to 1988, the U.S. Supreme Court had appellate jurisdiction in certain instances in addition to its power to grant writs of certiorari. In theory, the Court was required to hear and decide procedurally valid appeals. 28 U.S.C. § 1257 (2012). In function, however, by the time of *Shaffer*, the Court treated these appeals as discretionary, just as it did with certiorari writs.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1257 (2012).

344. *Shaffer v. Heitner*, 433 U.S. 186, 201–03 (1977).

345. *Id.* at 203–04.

346. *Id.* at 205.

Some academicians and a handful of recent cases, though, had remarked metaphysically that in rem and quasi in rem actions were really like in personam actions in that “[t]he phrase, ‘judicial jurisdiction over a thing’, is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.”³⁴⁷ In something of a non sequitur, Justice Marshall then concluded: “We think that the time is ripe to consider whether the standard of . . . *International Shoe* should be held to govern actions in rem as well as in personam.”³⁴⁸

The main reason for extending *International Shoe* to actions in rem and quasi in rem, wrote Justice Marshall, is that those actions really involved the rights of persons just as in personam actions do.³⁴⁹ The presence of property may itself be a contact with the state going to whether sufficient contact exists to meet the *International Shoe* test, and in true in rem and related quasi in rem cases may well be sufficient, but property *vel non* is not sufficient.³⁵⁰ In unrelated quasi in rem cases where the purpose of seizing property is to compel the defendant to submit to personal jurisdiction, apparently Justice Marshall’s unarticulated premise was that intellectual symmetry required applying the *International Shoe* test. He wrote, “if a direct assertion of personal jurisdiction over the defendant would violate the Constitution [under *International Shoe*], it would seem that an indirect assertion of that jurisdiction [via unrelated quasi in rem] should be equally impermissible.”³⁵¹

Here, a small difficulty for the Court arose. Because neither the defendants’ theory nor the Delaware courts’ analysis was grounded in an *International Shoe* analysis, the Court did not have much information upon which to decide whether the *Shaffer* defendants had sufficient contacts with Delaware to validate in personam jurisdiction under *International Shoe*. Further, the Delaware courts made it clear that they were not applying *International Shoe* and made no factual findings as to any contacts with Delaware.

In the U.S. Supreme Court, defendants noted that none of the plaintiffs resided in Delaware and observed that the plaintiffs could not point to any act by any defendant that occurred in Delaware.³⁵²

347. *Id.* at 207 (alteration in original) (quoting 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS introductory note to § 56 (AM. LAW INST. 1971)).

348. *Id.* at 206.

349. *Id.* at 207.

350. *Shaffer*, 433 U.S. at 207–08.

351. *Id.* at 209.

352. Appellants’ Brief on the Merits at 20–21, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>; Appellants’ Reply Brief on the Merits at 11–12, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

The plaintiff described what it believed to be Delaware's interest in resolving disputes involving the internal affairs of its corporations but did argue that the Delaware corporation statute provided for indemnification and interest-free loans to directors, and thus, by accepting directorships, the defendants enjoyed benefits of Delaware law.³⁵³

The oral argument did not shed much additional light on the question of the defendants' contacts with Delaware. With twelve minutes to go in the hour-long argument, Justice White asked plaintiff's counsel a series of questions going to whether the defendants had any ties with Delaware other than stock ownership.³⁵⁴ It seemed likely that the thrust of the questions was not to establish whether minimum contacts existed, but rather to determine whether sustaining the sequestration procedure was necessary to give Delaware personal jurisdiction in any circumstance. That is, to determine whether this case required affirmance to effect jurisdiction as an extraordinary circumstance. Plaintiff's counsel did not detail any connections to Delaware other than stock ownership.³⁵⁵

So, an unrelated quasi in rem case begun by ex-party sequestration and challenged principally on the grounds that: (1) no property that could be seized was located within the forum state; and (2) any seizure was, in light of the debtors' rights cases, constitutionally infirm because of the lack of safeguards to protect the property rights of the nonresident owners, was to be decided on the ground that the defendants had insufficient contacts with the forum state to permit that state to exercise personal jurisdiction over them without offending traditional notions of fair play and substantial justice.

Some Justices would have preferred to remand the case either to dismiss or for further proceedings if Heitner could show minimum contacts.³⁵⁶ However, a majority of the Justices addressed the minimum contacts question.³⁵⁷

353. Appellee's Answering Brief at 13-15, *Shaffer*, 433 U.S. 186 (No. 75-1812), <http://civprostories.law.cornell.edu/chap03/shaffer01.pdf>.

354. Oral Argument, *supra* note 324, at 12:00-14:15.

355. *Id.* at 52:20-56:10.

356. *See, e.g.*, Letter from Justice William J. Brennan, Jr. to Justice Thurgood A. Marshall (May 18, 1977), <http://civprostories.law.cornell.edu/chap03/shaffer03.pdf>; Letter from Justice Potter Stewart to Justice Thurgood A. Marshall (May 18, 1977), <http://civprostories.law.cornell.edu/chap03/shaffer03.pdf>.

357. *See, e.g.*, Letter from Justice Harry A. Blackmun to Justice Thurgood A. Marshall (May 31, 1977), <http://civprostories.law.cornell.edu/chap03/shaffer04.pdf>; Letter from Justice Lewis F. Powell, Jr. to Justice Thurgood A. Marshall (May 31, 1977), <http://civprostories.law.cornell.edu/chap03/shaffer04.pdf>; Letter from Justice Byron R. White, to Justice Thurgood A. Marshall (May 18, 1977), <http://civprostories.law.cornell.edu/chap03/shaffer03.pdf>.

Apparently believing that the best defense is a good offense, Justice Marshall began his opinion by pretending that the main issue was *International Shoe* and minimum contacts.

Appellants contend that the sequestration statute as applied in this case violates . . . Due Process . . . both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.³⁵⁸

Justice Marshall assumed that if minimum contacts existed, Delaware's sequestration statute and rule would be sufficient to make defendants amenable to the case although no such amenability was stated or intended by the statute.³⁵⁹ The oral argument made clear Delaware's view: without sequestration the defendants were not amenable to personal jurisdiction,³⁶⁰ a point Justice Brennan noted.³⁶¹ The Court rejected Heitner's suggestion that Delaware's interest in overseeing domestic corporations was a sufficient contact. Justice Marshall correctly held that a state's interest for choice of law purposes is not the same as personal jurisdiction.³⁶²

Likewise and presciently, Justice Marshall dismissed plaintiff's argument that serving as a director, *vel non*, is a sufficient contact even with the benefits plaintiff noted in his brief (i.e. the possibility of indemnification and interest-free loans). Rather, that interest is sufficient for choice of law purposes but not personal jurisdiction purposes. Again, presciently, Justice Marshall held that serving, *vel non*, was not "purposefully availing" oneself of the privilege of conducting activities within Delaware. Nor did simply owning securities of Delaware corporations constitute a sufficient contact.³⁶³

Justice Powell concurred but wrote to suggest that some kinds of property may be so permanently situated in a state that, *vel non*, minimum contacts exist. He explicitly agreed with Justice Marshall that "appellants' . . . positions as directors and officers of a Delaware corporation can[not] provide sufficient contacts to support the Delaware courts' assertion of jurisdiction in this case."³⁶⁴

358. *Shaffer*, 433 U.S. at 189.

359. *Id.* at 213 n.40 (1977).

360. Oral Argument, *supra* note 324, at 52:20–56:10.

361. *Shaffer*, 433 U.S. at 219–21 (Brennan, J., concurring in part and dissenting in part).

362. *Id.* at 213–15.

363. *Id.* at 215–17.

364. *Id.* at 217 (Powell, J., concurring).

Justice Brennan, alone among the Justices, would have upheld minimum contacts in this case if Delaware were to enact an amenability statute coterminous with the Due Process Clause. He would conflate the choice of law and personal jurisdiction analyses, and thus, give significant weight to Delaware's interest in overseeing its own corporations as a factor going to whether personal jurisdiction over nonresident directors would offend traditional notions of fair play and substantial justice. Somewhat paradoxically, given his expansive notion of personal jurisdiction, Justice Brennan was seriously dubitant about a state asserting jurisdiction by consent.

Nor would I view as controlling or even especially meaningful Delaware's failure to exact from appellants their consent to be sued. Once we have rejected the jurisdictional framework created in *Pennoyer v. Neff*, I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, expressed or implied.³⁶⁵

Justice Brennan looked even further into the future in the footnote to that statement and spoke to the question of whether service as a director should, *eo ipso*, make one expect to be haled into court in the corporation's state of incorporation.

Admittedly, when one consents to suit in a forum, his expectation is enhanced that he may be haled into that State's courts. . . . But whatever is the degree of personal expectation that is necessary to warrant jurisdiction should not depend on the formality of establishing a consent law. Indeed, if one's expectations are to carry such weight, then appellants here might be fairly charged with the understanding that Delaware would decide to protect its substantial interests through its own courts, for they certainly realized that in the past the sequestration law has been employed primarily as a means of securing the appearance of corporate officials in the State's courts. Even in the absence of such a statute, however, the close and special association between a state corporation and its managers should apprise the latter that the State may seek to offer a convenient forum for addressing claims of fiduciary breach of trust.³⁶⁶

But no sooner did Justice Brennan suggest that consent and defendant's expectations were insufficient to assert personal jurisdiction over nonresident directors, than he wrote:

Crucial to me is the fact that appellants voluntarily associated themselves with the State of Delaware, "invoking the benefits and protections of its laws," by entering into a long-term and fragile relationship with one of its domestic corporations. They thereby elected to assume powers and to undertake responsibilities wholly

365. *Id.* at 227 (Brennan, J., concurring in part and dissenting in part) (citation omitted).

366. *Id.* at 227 n.6 (Brennan, J., concurring in part and dissenting in part)

derived from that State's rules and regulations, and to become eligible for those benefits that Delaware law makes available to its corporations' officials. [again, citing only the possibility of indemnification and interest-free loans] . . . I thus do not believe that it is unfair to insist that appellants make themselves available to suit in a competent forum that Delaware might create for vindication of its important public policies directly pertaining to appellants' fiduciary associations with the State.³⁶⁷

So for Justice Brennan, service as directors was an insufficient contact as was the fact that they might well anticipate being sued in Delaware, but service as directors where they might be indemnified or receive interest-free loans was a sufficient contact.

VIII. CODA: DELAWARE AFTER *SHAFFER*

The Delaware General Assembly in fact responded within two weeks to the U.S. Supreme Court's decision in *Shaffer*. Delaware adopted the current method of obtaining personal jurisdiction over directors: a director amenability statute (Section 3114) ostensibly predicated on implied consent.³⁶⁸ Perhaps the easiest solution for Delaware would have been either a broad long-arm statute or a specific amenability statute for directors based on the director's minimum contacts rather than her fictitious implied consent.³⁶⁹

The General Assembly enacted a broad long-arm statute one year after adopting Section 3114. The Delaware courts have consistently found that nonresident directors' actions do not fall within any of the provisions of that long-arm statute, though, a result consonant with that of other states that have adopted similar long-arm provisions.

Why Delaware adopted a statute based on implied consent rather than on minimum contacts is unknown.³⁷⁰ In any event, Delaware remained the center of stockholder litigation—although its current status may be under attack—and its continued success is perhaps a bit precarious.³⁷¹

367. *Shaffer*, 433 U.S. at 227–28 (Brennan, J., concurring in part and dissenting in part) (footnote omitted) (quoting *Hanson v. Denckla*, 557 U.S. 235, 253 (1958)).

368. See generally Chiappinelli, *Myth*, *supra* note 5, at 797 (discussing the process of adoption).

369. See, e.g., Folk & Moyer, *supra* note 223, at 798–800.

370. Chiappinelli, *Underappreciated Importance*, *supra* note 2, at 944–45.

371. See *id.*

