Extraterritorial Personal Jurisdiction for the Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine *International Shoe* After its First Sixty Years

Jeffrey A. Van Detta[†] *& Shiv K. Kapoor*[††]

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[†] Professor of Law, John Marshall Law School, Atlanta, Georgia. Professor Van Detta is admitted to practice in New York and Georgia, as well as before many federal courts. In 1987–88, he served as law clerk to Judge Roger J. Miner, of the U.S. Second Circuit Court of Appeals.

[††] Mr. Kapoor is a member of the Georgia Bar and works as a practicing attorney with the Law Offices of Brij M. Kapoor, P.C., an Atlanta, Georgia firm. He is a 2006 alumnus of Atlanta's John Marshall Law School, and he is a pilot who holds the rank of Lieutenant Colonel in the United States Air Force Reserve.

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I. INTRODUCTION

A. An Overture to the Reader

Long-arm statutes have been around since the pioneering Illinois long-arm statute,[1] the first effort to codify *International Shoe Co. v. Washington*[2] through the use of general categories under which a nonresident was subject to personal jurisdiction. However, the world of communications and business—two of the cornerstones on which long-arms evolved out of *International Shoe*—has changed substantially since 1955, when Illinois adopted its long-arm statute.

It has been nearly twenty years since the United States Supreme Court last addressed the constitutional limitations on long-arm jurisdiction in civil cases. In that interim, long-arm jurisdiction doctrine has been challenged in several new ways, and *International Shoe*, the foundation of long-arm jurisdiction theory, has turned sixty years old. But rather than be destined for retirement, this sexagenarian remains in the bloom of youth, still awaiting its full maturation.

The two-decade lacuna in United States Supreme Court precedent has left long-arm jurisdictional law in considerable disarray. This disarray is partly the result of judicial and scholarly misunderstandings of Chief Justice Stone's *International Shoe* opinion, whose highly structured analytic template courts and many scholars have failed to discern adequately. This disarray is also partly the result of challenges that modern economy and technology have created, but which the existing case and statutory law are not fully equipped to meet. These challenges result in part from the exponential increase in interstate and globalized commercial deals, consumer transactions, and cross-border torts–all occurring in the background of worldwide, instantaneous access made possible by the Internet.

This article presents a case study of the long-arm statute in one of the country's fast-growing, globalized commercial centers, Georgia, with the objective of bringing coherence to an area noted most for its incoherence. The Georgia statute is similar to New York's long-arm statute, which, like the statutes of many other states, purported to limit

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[1] 1955 Ill. Laws 2283, § 1.
[2] 326 U.S. 310 (1945).

the reach of extraterritorial service of process by employing the narrowing device of defining categories of contacts and their relationships to causes of action. The Georgia experience, like that of many other states, is that the comfort legislators found forty years ago in the categorical approach has been undone not only by rapid changes in the nature and extent of inter-state and international litigation, but also by judicial interpretations of the statutes themselves.

The authors believe that the sixtieth anniversary of *International Shoe* should direct us to return to the fundamentals, so elegantly and foresightfully expressed in Chief Justice Stone's succinct opinion. By returning to those fundamentals, we construct an analytic model for analyzing long-arm jurisdiction cases. Based on that model, we propose reform—a model long-arm statute based on the factors used in *International Shoe*: quality and quantity of contacts between the non-resident defendant and the forum, and the connectivity of the cause of action to those specific contacts. We use that model long-arm statute to critique contemporary court decisions and explore how such cases could be more coherently decided in accordance both with constitutional limitations on the extraterritorial exercise of judicial power and with the needs of a twenty-first century business environment.

Our article will appeal both to the theorist—especially those who seek a reconceptualization of long-received doctrine based on a long-overdue critical dissection—as well as to the practicing attorney who seeks a new structure for framing long-arm jurisdictional arguments to meet the demands of the twenty-first century cases s/he is now litigating.

B. The Authors' Map of the Territory Ahead

The time, therefore, has come to take stock in a way other scholars have not. We propose to explore in detail, from the novel perspective articulated in the "Overture," a series of recurrent, pragmatic questions that arise about long-arm jurisdiction. Do the long-arms produce outcomes true to the *International Shoe* mandates? And, what about the Illinois, categorical model—has it proven effective in practice? Does it produce consistent judicial outcomes? Is the California due-process-limits model preferable? Or, finally, is there another approach altogether, one consonant for the twenty-first century realities?

In Section II, this article will show that the categorical long-arm statutes do not square with states' desire to exercise personal jurisdiction over nonresidents to the limits of due process. The article will then discuss the resulting inconsistency due to the inherent conflict between the categorical long-arm statutes that, as written, are narrower than the limits of due process, and the states' intent in enacting their long-arm

statutes that they reach to the limits of due process. These two premises will then be illustrated by a case study of Georgia's long-arm statute. Georgia's long-arm statute is used because it is fairly representative of the many state long-arms that take a categorical approach to exercising personal jurisdiction,[3] and because Georgia's rapid growth and modernization over the decades since its long-arm was enacted[4] make it an ideal laboratory to study the issues involved with the categorical long-arms and why changes are necessary to make them more user-friendly for practitioners and judges.

After showing the shortfalls of the categorical long-arm statutes through the case study untaken in Section II, this article accomplishes a visual reconceptualization of long-arm statutes in Section III. This then leads to a model long-arm statute proposal in Section IV. Rather than merely use an unguided "limits of due process" statute such as the California long-arm statute,[5] this proposed long-arm statute, founded on the visual reconceptualization of Section III, enables predictable and consistent application through specific guidance based on the actual factors and predicted outcome rules of *International Shoe*.

Finally, in Section V, the proposed model long-arm statute is applied to cases from Georgia that were decided under its traditional long-arm statute to illustrate how the proposed model statute will work in practice to provide predictable and consistent results.

II. WHY CHANGE IS NECESSARY: AN ILLUSTRATIVE CASE STUDY OF GEORGIA'S LONG-ARM STATUTE

This section begins with a discussion of two primary reasons for why a conceptual change in long-arm statutes is needed: (1) states want to exercise personal jurisdiction to the limits of due process, and (2) practitioners and judges need a more predictable and consistent long-arm statute with guidance that allows for such results. This leads to a discussion of Georgia's long-arm statute that illustrates the problems of unpredictable and inconsistent results associated with categorical long-arm statutes. These problems are caused by the conflict between the

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[3] Forty-four states enacted categorical long-arm statutes. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525-530 (2004) [hereinafter McFarland] (breaking down state long-arm statutes among those that have been construed to the limits of due process, those that have not, those where a provision was subsequently added to the statute to extend it to the limits of due process while retaining the categorical subsections, and those which subsequently switched completely to a limits-of-due-process statute). Professor McFarland refers to these long-arm statutes as "enumerated-acts" statutes. *Id*. at 497.

[4] Georgia's long-arm statute was enacted in 1966. 1966 Ga. Laws 343, § 1.

[5] CAL. CIV. PROC. CODE § 410.10 (West 2007).

state's desire to obtain personal jurisdiction to the extent allowed by due process and a long-arm statute, which, as worded, does not actually allow for personal jurisdiction to be exercised to the due process limits. Although this discussion is addressed to categorical long-arm statutes, those states with statutes which authorize jurisdiction to due process limits would benefit from a system that provides guidance for consistent and predictable application for a variety of reasons also addressed below.

A. Two Primary Reasons Why Change is Necessary

1. States Want to Exercise Personal Jurisdiction to Due Process Limits

State policymakers in general believe their citizens should be able to seek redress within their own state to the greatest extent possible for any claims arising against a nonresident. This can be seen by the fact that many states when enacting their long-arm statutes believed they were allowing for the exercise of personal jurisdiction to due process limits. For example, the first long-arm statute after *International Shoe*, enacted in Illinois in 1955 and the template for many other states' long-arm statutes, "was designed to extend the reach of Illinois state-court jurisdiction to the limits permitted by *International Shoe*."[6] While the early long-arm statutes did not actually extend to the limits of due process, this was more a result of the uncertainty of those limits. The trend of the states is unquestionably towards construing and/or changing the long-arm statutes to reach to the limits of due process, thus showing the desire of most states to have personal jurisdiction over nonresidents coterminous with due process.[7]

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[6] LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 217 (2d ed. 2000) [hereinafter TEPLY & WHITTEN] (footnote omitted). In a footnote, the authors cite an Illinois Supreme Court case, *Baltimore & Ohio R.R. v. Mosele*, 368 N.E.2d 88, 91 (1977), where the court recognized that "Illinois expanded the in personam jurisdiction of its courts to what was in 1955 understood to be the limits permitted under the Due Process Clause of the Fourteenth Amendment." TEPLY & WHITTEN at 217 n.215. *But see* McFarland, *supra* note 3, at 502 (arguing "that is not what the drafters of the long-arm statute intended." (footnote omitted)). Professor McFarland also argues that two other early long-arm statutes, Wisconsin's and the Uniform Long-Arm Act were not intended to reach the limits of due process. *Id*. at 508-11. But his reasoning, that these early long-arm statutes were merely intended "to grant only long-arm jurisdiction that the courts previously approved," illustrates the fallacy with attempting to codify specific categories of long-arm jurisdiction. *Id*. at 510. The ideal type of long-arm statute should not just be an unguided "limits of due process" statute, but should lay out guidelines that allow for fair, consistent, and predictable results in determining whether a particular factual scenario allows for personal jurisdiction over a nonresident defendant.

[7] Of the forty-four states that enacted categorical long-arm statutes, nine have since added "catch-all" provisions that extend their statute to the limits of due process while

In fact, the basis for many of the conflicts with the application of the long-arm statutes is that state legislatures enacted them with the belief that they were allowing for the exercise of personal jurisdiction to the limits of due process. However, the statutes actually did not do so. This became apparent as the scope of the limits of due process was recognized to be broader than state policy makers had originally thought through the United States Supreme Court's setting of the boundaries in cases subsequent to *International Shoe* and as commentators expounded on the limits of due process based on those cases. Both because the categorical long-arm statutes were enacted at a time when the full limits of due process as allowed by *International Shoe* was not fully understood (or developed), and because of subsequent understanding of the more expanded scope of the limits of due process, these statutes have become outdated. The courts were setting the limits of personal jurisdiction case-by-case and expanding the limits as new situations arose. State legislatures' codifying what the courts had already decided tended to freeze in place the approved categories and did not allow the courts to continue to define the limits as their contours became clear in modern-scenario cases that arose after *International Shoe*. Instead of freezing in place the already approved categories, a long-arm statute that allows for expansion to new circumstances as they arise would be more beneficial. By contrast, the open-ended California-style of long-arm statute allows for continued development of the law in response to diverse, new factual situations. Yet, it encourages a judicial "grab" for the expansion of long-arm jurisdiction (as the California courts did, e.g., in the *Asahi Metals* case) with no structured legislative guidance. The absence of legislative guidance gives cases decided under "due-process-limits" long-arm statutes a pronounced ad-hoc aura–which is accurate, because such unguided common law-decision making leads to scattered, less predictable and sometimes incoherent results.[8]

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retaining the previous categories as well (Alabama, Alaska, Illinois, Indiana, Maine, Nebraska, Oregon, South Dakota, and Tennessee) and five have changed to due process limits language exclusively (Arizona, Arkansas, Iowa, Nevada, and Oklahoma). McFarland, *supra* note 3, at 525-31. Of the thirty remaining states that have categorical-only long-arm statutes, twelve interpret their statute to reach to the limits of due process (Colorado, Kansas, Kentucky, Louisiana, Minnesota, New Hampshire, North Dakota, South Carolina, Texas, Utah, Virginia, and Washington), which leaves only eighteen states that continue to adhere to the categorical approach (Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, West Virginia, and Wisconsin). *Id*.

[8] For an example of how rule development can lead to inconsistent, vague, and indeterminate articulations of law even in the hands of some of the most skilled and learned common-law judges, see the slip opinions on the basic law of the tort of nuisance

In addition to wanting such long-arm statutes, states need them in order to protect their residents and allow them to seek redress against nonresidents who do them harm. The Illinois Supreme Court best expressed this need in *Nelson v. Miller*,[9] the first case in which that court interpreted Illinois' long-arm statute; "[t]he foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy."[10] Such a long-arm statute can also create a better environment for businesses (especially smaller businesses) in the state as they tend to minimize costs from having to pursue out-of-state legal actions that could otherwise be pursued within the state.

Furthermore, the artificial nature of the categorical approach leads to missed opportunities (and unfair results) where personal jurisdiction was pleaded but not upheld under one specific category, yet might have been under another category that was not pleaded. This occurred in *Designs Unlimited, Inc. v. Rodriguez*,[11] where the trial court determined that the defendant was not subject to personal jurisdiction under one subsection (or category) of Georgia's long-arm statute (the "transacts any business" category).[12] On appeal, Designs Unlimited argued that the trial court erred because the defendant was subject to personal jurisdiction under another subsection (the "tortious act" category).[13] The appellate court affirmed the dismissal, because the plaintiffs had not raised the issue of that subsection with the trial court.[14] Thus, due to the artificial nature of a categorical statute, the plaintiff lost an opportunity to seek redress in its own state court. This categorical nature is analogous to the

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in *Bamford v. Turnley*, 122 Eng. Rep. 27 (Exch. Ch. 1862). *Bamford* is particularly notable in Chief Justice Williams admission that the rapidity of growth in new factual scenarios as commerce and industry expanded challenged the courts' ability to adapt the law coherently to controversies arising from those new developments.

[9] 143 N.E.2d 673 (Ill. 1957).

[10] *Id*. at 676. Furthermore, "[t]he United States Supreme Court has held that '[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors,' particularly when these actors 'purposefully derive benefit from their interstate activities." First Nat'l Bank Of Ames, Iowa v. Innovative Clinical & Consulting Servs., L.L.C., 598 S.E.2d 530, 532 (Ga. Ct. App. 2004), *aff'd in part and vacated in part*, 620 S.E.2d 352 (Ga. 2005) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473(II)(A) (1985))."

[11] 601 S.E.2d 381 (Ga. Ct. App. 2004).

[12] *Id*. at 381.

[13] *Id.*

[14] *Id*. "Since Designs Unlimited failed to raise this argument below and the trial court's ruling was accordingly limited to only whether Rodriguez was subject to jurisdiction pursuant to [GA. CODE ANN.] § 9-10-91(1), Designs Unlimited has waived any argument relating to its asserted enumeration."

writ and code pleading of bygone days.[15] And just as those artificial categories of writs and code pleading have given way to notice pleading guided by the federal and state rules of civil procedure, the artificial categories under which personal jurisdiction may be allowed should give way to a due-process-limits statute which incorporates guidance reflecting the actual factors and predicted outcome rules of *International Shoe*. A proposed model long-arm statute that does just that is discussed, *infra*, in Section IV.

2. Practitioners and Judges Should Have a Long-Arm Statute that Allows for Predictable and Consistent Application

The second reason a conceptual change in long-arm statutes is needed is more of a pragmatic matter than a question of politics and policy. Lawyers, judges, and people generally that those who use the long-arm statute in practice need one that, while allowing for personal jurisdiction to the limits of due process, gives guidance to allow for an application that is predictable and consistent. As discussed above many states have construed their statutes to extend to the limits of due process. Some, though, while stating that their policy is to construe the statute to the limits of dues process, have in application not done so, due to a literal reading of the long-arm statute and early misconceptions on the limit of due process. The result has been inconsistent decisions that appear to define the scope of long-arm jurisdiction differently under the same statute. An atypical inconsistency involves the tortious act and injury subsections, where the Georgia Supreme Court initially took an expansive view of "tortious act" and later a narrower view, followed by the federal courts (in diversity-of-citizenship cases) taking a very expansive view of the scope of long-arm jurisdiction under the state categorical statute.[16] These inconsistent results are discussed next.

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[15] For a brief discussion of writ and code pleading and the problems that system created, see JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 5.4, 250 (3d ed. West 1999).

[16] See *infra* notes 95-100 and accompanying text.

B. A Case Study of Georgia's Categorical Long-Arm Statute

A study of Georgia's long-arm statute[17] illustrates the inconsistency and unpredictability that result from the inherent conflict in a categorical long-arm statute that does not, as written, provide personal jurisdiction to the limits of dues process despite the state legislature's intent that the long-arm extend personal jurisdiction as far as possible. This section will detail this tension and resulting application issues. In doing so, it will first describe how the statute as worded does not provide for due process limits. Next, it will show how the history of amendments to the long-arm statute reflects the Georgia legislature's desire to exercise jurisdiction to the limits of due process. Following that will be a description of the resulting inconsistent application of the long-arm statute by the Georgia courts due to this conflict – focusing primarily on the "transacts any business", "tortious act", and "tortious injury" subsections, and highlighting a specific example in Georgia's long-arm statute of the problems caused by the codification of what is thought to be the limits of due process–the defamation exception of subsection (2) that prohibits exercise of long-arm jurisdiction in actions for libel or slander. Finally, the shortfall in the categorical approach will be delineated as classes of lawsuits have developed that were not anticipated in the 1950s and 1960s when categorical long-arm statutes were drafted–focusing on how new technologies and commercial practices, specifically Internet commerce, pose new personal jurisdiction problems for individuals and corporations who are harmed through this medium.

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[17] The statute reads:

> A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
>
> (1) Transacts any business within this state;
>
> (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (4) Owns, uses, or possesses any real property situated within this state; or
>
> (5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

GA. CODE ANN. § 9-10-91 (West 2004).

1. How the Statute as Worded Does Not Provide Due Process Limits

A literal reading of the Georgia long-arm statute shows that it is not coextensive with the limits of due process in at least two areas. First, the preamble states that a "court of this state may exercise personal jurisdiction over any nonresident . . . as to a cause of action *arising from* any of the acts, omissions, ownership, use, or possession enumerated in this Code section."[18] The arising from language, of course, limits the statute to specific personal jurisdiction.[19] Then, the designation of

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[18] § 9-10-91.

[19] *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 420 (Brennan, J., dissenting) (arguing that due process does not require that the cause of action "arise out of" but rather, and more expansively in the jurisdictional sense, merely "be related to" the nonresident defendant's forum contacts). However, despite the limitation of the long-arm to specific jurisdiction, an alternative method is available that in effect allows for general jurisdiction over foreign corporations. Because the definition of "nonresident" as it pertains to the long-arm statute does not include foreign corporations which are authorized to do or transact business in the state, then by negative implication those foreign corporations that are authorized to transact business in Georgia have been held to be "residents" for purposes of personal jurisdiction. Allstate Ins. Co. v. Klein, 422 S.E.2d 863, 864-865 (Ga. 1992).

Under the long-arm statute, a nonresident is "a corporation which is not organized or existing under the laws of this state and *is not* authorized to do or transact business in this state at the time a claim or cause of action under Code Section 9-10-91 arises." GA. CODE ANN. § 9-10-90 (West 2004) (emphasis added). The Georgia Supreme Court has not overlooked the significance of the language:

> It is apparent from the language of this definition that a corporation which is "authorized to do or transact business in this state at the time a claim" arises is a "resident" for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state. As a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation. Therefore, a plaintiff wishing to sue in Georgia a corporation authorized to do business in Georgia is not restricted by the personal jurisdiction parameters of § 9-10-91, including the requirement that a cause of action arise out of a defendant's activities within the state.

Allstate Ins. Co., 422 S.E.2d at 865. It is questionable, however, to assume that when a foreign corporation does not meet the definition of nonresident, it must ipso-facto be deemed a resident foreign corporation upon which service can be made as with any other resident. The Georgia Supreme Court addressed the issue of the constitutionality of the definition of nonresident in the long-arm statute, stating that "it appears that the definition does not run afoul of the 'minimum contacts' requirement of procedural due process." *Id.* at 865, n.3. Yet, without a due-process-minimum-contacts analysis, a finding of general jurisdiction could potentially exceed the scope of due process. For example, if a foreign corporation registers to do business in Georgia, because it is anticipating conducting business operations there, it may not have the continuous and systematic contacts required for Quadrant III general jurisdiction (See the discussion in Section III, *infra*, for the reconceptualization of *International Shoe's* jurisdictional rules into a Cartesian-coordinate-plane metaphor.) But, by virtue of registering in the state, that corporation can nonetheless be subject to service of process on a cause of action unrelated to any activities within the state, even though those activities are insufficient to sustain general

categories further limits the exercise of personal jurisdiction to less than the limits of due process. Subsections (2) and (3), when read as the Legislature enacted them, further constrain the exercise of personnel jurisdiction *within* the already constrained scope of specific jurisdiction laid out in the preamble. Subsection (2) applies only where a nonresident commits a tortious act within the state. It is further limited by an explicit exclusion of defamation causes of action.[20] Subsection (3), allows for jurisdiction over a nonresident who causes injury in the state by an act outside the state. Yet it is then limited by requiring nonresidents to have significant contacts with the state to be amenable to personal jurisdiction. And subsection (1), which reads broadly (but still constrained by the preamble's limits of specific personal jurisdiction), had early on been narrowed in application boldly by the Georgia Supreme Court in a somewhat cabined gloss of the quality of the contacts that the nonresident defendant needed to have with the state, and also by the federal court interpretation that it applies to contract actions only.[21] The

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jurisdiction. A strained fiction of "consent" to general jurisdiction might be advanced, yet such a broad consent as a consequence of a narrow registry law hardly seems any longer reasonable or plausible, if it ever was so, in the era of globalization and e-commerce.

From a more doctrinal viewpoint, the constitutionality of such "doing business" statutes was discussed by Professors Teply and Whitten when analyzing the splintered opinions of the United States Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604 (1990), which unanimously upheld the constitutionality of exercising personal jurisdiction over a defendant who is served with process while temporarily within the state. TEPLY AND WHITTEN, *supra* note 6, at 212-16, 219-20. In upholding its constitutionality, however, the justices were divided as to the reasons: the four justice plurality held that the minimum contacts test does not apply to traditionally accepted methods of obtaining jurisdiction – those that were available when the Due Process Clause was adopted and are still in use; one justice wrote that the Fourteenth Amendment gave the Court authority to examine even traditional methods for validity; and four justices stated that the minimum contacts test should be applied to every case. TEPLY AND WHITTEN, *supra* note 6, at 213-14. Thus, it appears that the "doing business" statutes in Georgia and other states can not be applied independently of a minimum contacts analysis. *See* TEPLY AND WHITTEN, *supra* note 6, at 220 (explaining that when a state employs a pre-*International Shoe* method to assert personal jurisdiction, "an alternate analysis under the minimum contacts test must be employed to determine whether the assertion of jurisdiction will satisfy that test").

[20] Sections II.B.3.c and II.B.4, *infra*, discuss the defamation exclusion of subsection (2).

[21] Scott v. Crescent Tool Co., 296 F. Supp. 147, 152 (N.D. Ga. 1969). *See infra* Section II.B.3.a (discussing subsection (1)). This interpretation was apparently not challenged in subsequent actions in the state appellate courts, since later cases sought jurisdiction under subsection (1) based on contract causes of action only, until *Whitaker v. Krestmark of Ala., Inc.*, 278 S.E.2d 116 (Ga. Ct. App. 1981), *overruled*, *Innovative Clinical & Consulting Servs., L.L.C. v. First Nat'l Bank of Ames*, 620 S.E.2d 352 (Ga. 2005). In *Whitaker*, the Georgia Court of Appeals explicitly adopted the contract-action-only interpretation given in *Scott*, stating that although "such an analysis has never been

inadequacy of these restrictive glosses in the face of modern business reality recently compelled the Georgia Supreme Court to overrule them in *Innovative Clinical and Consulting Services, L.L.C. v. First National Bank of Ames.* The result, however, is to leave a shifting, and inconsistent, history of statutes, interpretation, followed by re-interpretation, engraved upon the Georgia long-arm-statue. The *Innovative* case may also engender its own problems, for its rejection of limits other then the bounds of due process does not square with "arising under" limitation of the statute's preamble.[22]

On the other hand, while some of the categories expressed in the long-arm stature are not coterminous with due process limits (because of the limitations of subsections (1),[23] (2), and (3)), subsections (4) and (5), do appear to reach to the currently understood limits of due process, even in the face of the "arising from" language in the statute's preamble. One whose only contact with the state is the ownership, use, or possession of real property (subsection (4))[24] would not be amenable to suit for a cause of action not arising out of that contact under due process limits. Similarly, a nonresident would not be amenable to suit for an alimony, child support or modification action (subsection (5))[25] where the nonresident had not lived in the state while married or while becoming responsible for a child.[26] Thus, in any particular case, whether the long-arm statute extends to the limits depends on which category a dispute falls in. And it is certain that the long-arm statute taken as a whole does not extend to the limits of due process.

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expressly enunciated by the courts of this state, it is entirely consistent with the decisions of this court and of the Supreme Court." *Whitaker*, 278 S.E.2d at 118.

[22] Innovative Clinical & Consulting Servs., L.L.C. v. First Nat'l Bank of Ames, 620 S.E.2d 352 (Ga. 2005) (rejecting the long-standing judge-made contact and contract limitations and holding that subsection (1) should be interpreted literally, limited only by due process, and expressly overruling all prior cases that failed to do so). The implications of this recent holding are discussed in Sections II.B.3.a–c and II.B.4, *infra*.

[23] Although subsection (1) is now to be interpreted literally, it is still limited to specific jurisdiction by the "arising from" language. *See supra* note 18 and accompanying text.

[24] GA. CODE ANN. § 9-10-91 (West 2004). While the new broad interpretation of subsection (1) does not make subsection (4) completely superfluous, there is certainly considerable overlap between the two subsections now, because most disputes related to real estate are based on the transaction of business within the state.

[25] § 9-10-91.

[26] The Georgia Supreme Court appeared implicitly to recognize that subsection (5) reaches the limits of due process, when, in an action for modification of child support, the court employed a due process analysis only, not mentioning the long-arm statute in upholding personal jurisdiction over the defendant. Chung-A-On v. Drury, 580 S.E.2d 229 (Ga. 2003).

2. History of Long-Arm Statute Amendments Shows Desire by Georgia Legislature to Exercise Jurisdiction to Limits of Due Process

Like cleaning away eons of soot from the bright colors of Michelangelo's Sistine Chapel frescos, we now look to see the clarity of legislative intent that became obscured by layers of judicial gloss applied over five decades. The amendments made to the original long-arm statute[27] throughout the years show an effort by Georgia's legislature to provide for personal jurisdiction over nonresidents to the maximum extent tolerated by due process. One obvious motivation for legislative tinkering with the Georgia long-arm statute is that the limits of federal due process, as construed by United States Supreme Court decisions, were found to be broader than what was commonly understood by lawyers and legislators at the time of categorical long-arm's first iteration in Illinois, which Georgia subsequently embraced in enacting that pattern statute a decade later.[28]

The Georgia legislature's intent was tested early when an interpretation problem with the long-arm statute occurred shortly after its 1966 enactment. A federal district court held that the statute did not apply to nonresident corporations, because the language refers to a "nonresident or his executor or administrator."[29] Since only natural

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[27] 1966 Ga. Laws 343, § 1. The statute originally only had three categories and did not have a definition for nonresident. The original subsections (a), (b), and (c) correspond to the current subsections (1), (2), and (4). For those subsections, see *supra* note 17. The subsections will be referred to by their current designation. A separate section was added that defines nonresident, which is currently GA. CODE ANN. § 9-10-90 (*see infra* notes 29-31 and accompanying text).

[28] *See, e.g.*, *Burger King Corp. v. Rudzeiwicz*, 471 U.S. 462 (1985) (non-resident franchisee amenable to personal jurisdiction in breach of contract action based on franchisee's deliberately reaching out to franchisor and entering into a carefully structured long-term agreement, despite having not physically entered the state); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (non-resident insurance company amenable to personal jurisdiction in breach of contract action based on single insurance contract with resident of state, because insurer had substantial contact with state through the policy). Cases where state Supreme Courts recognized the expanding limits include: *Keefe v. Kirshenbaum & Kirshenbaum*, *P.C.*, 40 P.3d 1267, 1273 (Colo. 2002) (upholding personal jurisdiction over non-resident law firm partly based on its earlier cases which had taken an expansive view of due process limits and stating that the "subsequent jurisprudence of the [U.S.] Supreme Court has confirmed rather than brought into question the reliability of those outcomes . . . ."); *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 764 (Ill. 1961) (noting that since *International Shoe* "the requirements for [personal] jurisdiction have been further relaxed"); *Beck v. Spindler*, 99 N.W.2d 670, 675 (Minn. 1959) (stating in breach of contract action that "the trend toward greater liberality in permitting state courts to take jurisdiction in this type of case continues. And well it should.").

In fact, the Illinois statute itself was the product of cobbling together outcomes in a variety of earlier cases: according to the research of the authors of *Dictum Run Wild*,

persons have an executor or administrator, the court reasoned that the long-arm statute does not apply to corporations[30] Because such a limitation would significantly undermine the efficiency of the long-arm statute in securing remediation for Georgia residents against nonresident businesses, the Georgia General Assembly wasted little time in responding to that holding by amending statutory language explicitly to encompass legal entities in addition to natural persons corporations.[31]

The next test of the legislature's intent involved the interpretation of the "commits a tortious act within this state" portion of subsection (2).[32] In *O'Neal Steel Inc. v. Smith*, Smith brought a tort action against O'Neal Steel after he was injured in Georgia while unloading "H" beams when a metal clamp holding the beams together broke.[33] Because the beams had been manufactured and packaged by O'Neal Steel in Alabama, the issue was whether a tortious act had occurred within the state as called for in subsection (2).[34] The court compared the reasoning of the broader "Illinois Rule"[35] and the narrower "New York Rule,"[36]

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supra note 3 at 504, subsection (1) was based on *International Shoe* and *Travelers Health Association v. Virginia ex rel. State Corp. Comm.,* 339 U.S. 643 (1950); subsection (2) language chosen based on fact that constitutional challenges to nonresident motorist statutes and single-act tort statutes had been rejected; subsection (3), concerning ownership of real property, relied partially on similar Pennsylvania statute; and subsection (4), concerning insurance contracts, relied on fact that similar statutes in other states had been sustained.

[29] Wilen Mfg. Co. v. The Standard Prod. Co., C.A. No. 10532 (N.D. Ga. 1967).

[30] *Id.* This holding was later reversed by the Fifth Circuit, after the amendment had already been made. Wilen Mfg. Co., Inc. v. The Standard Prod. Co., 409 F.2d 56 (5th Cir. 1969). However, the Fifth Circuit's holding was undermined later that year when the Georgia Supreme Court held in another case that the long-arm statute did not apply to corporations prior to the amendment. Bauer Int'l. Corp. v. Cagle's, Inc., 171 S.E.2d 314 (Ga. 1969) (holding also that the amendment could not be applied retroactively to a dispute arising prior to the amendment).

[31] 1968 Ga. Laws 1419; GA. CODE ANN. § 24-117 (now GA. CODE ANN. § 9-10-90 (West 2004)). The amendment included in the definition of "nonresident" "a corporation which is not organized or existing under the laws of this state and is not authorized to do or transact business in this state at the time a claim or cause of action under Code Section 9-10-91 arises." GA. CODE ANN. § 9-10-90 (West 2004).

[32] O'Neal Steel, Inc. v. Smith, 169 S.E.2d 827 (Ga. Ct. App. 1969), *remanded on other grounds*, 171 S.E.2d 519 (Ga. 1969), *vacated and rev'd on other grounds*, 172 S.E.2d 479 (Ga. Ct. App. 1970).

[33] *Id.* at 828.

[34] *Id.*

[35] Derived from *Gray v. Am. Radiator & Standard*, 176 N.E.2d 761 (Ill. 1961), where the Illinois Supreme Court, in construing the similarly worded subsection of its long-arm statute, held that the nonresident's tortious act could not be separated from the accident, and thus the "tortious action" could be considered to have occurred in Illinois, where the plaintiff resided and was injured, though the water heater valve at issue was negligently manufactured in Ohio.

opting for the latter interpretation.[37] "The plain language of our statute requires that the tortious act be committed within the state . . . . If our legislature meant something other than what is plainly indicated by the words used, it could have used language appropriate to indicate a different intent." [38] The court pointed out that "our legislature did not choose to adopt the language of the Uniform Interstate and International Procedure Act,"[39] which contained a subsection providing for tortious injuries occurring within the state caused by an act outside the state. The court then invited the legislature to amend the long-arm if it so desired; "'Any plea for further expansion of its scope, however desirable such expansion may seem, is a matter for the legislature rather than the courts.'"[40] The court also pointed out that the New York legislature had done so after the New York Court of Appeals rejected the "Illinois

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[36] Derived from *Feathers v. McLucas*, 209 N.E.2d 68 (N.Y. 1965), where the New York Court of Appeals held that the tortious act must be physically committed within the state according to the plain language of its similarly worded subsection.

[37] *O'Neal Steel*, 169 S.E.2d at 829-30.

[38] *Id.* at 831.

[39] *Id*. *See* Unif. Interstate & Int'l Procedure Act § 1.03 (1962), 13 U.L.A. 361-62 (1986). The act was approved by the National Conference of Commissioners on Uniform State Laws in 1962, seven years after the Illinois long-arm statute, and was adopted by several states. TEPLY & WHITTEN, *supra* note 6, at 218. Section 1.03 stated:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's
> (1) transacting any business in this state;
> (2) contracting to supply services or things in this state;
> (3) causing tortious injury by an act or omission in this state;
> (4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; [or]
> (5) having an interest in, using, or possessing real property in this state [; or
> (6) contracting to insure any person, property, or risk located within this state at the time of contracting].
> (b) When jurisdiction over a person is based solely upon this Section, only a [cause of action] [claim for relief] arising from acts enumerated in this Section may be asserted against him.

Id. Portions of the Uniform Act were modeled on the Illinois long-arm statute: "The drafters of the Act identified sections 1.03(a)(1), 1.03(a)(5), and 1.03(a)(6) as 'derived from' or 'similar to' the Illinois statute." McFarland, *Dictum Run Wild*, *supra* note 3, at n.14 (citing Handbook of the Nat'l Conference of Comm'rs on Uniform State Laws & Proceedings, 1962 Nat'l Conf. Comm'n Unif. St. L. 81-82, 222-223). The Uniform Act "was later withdrawn as obsolete." McFarland, *Dictum Run Wild*, *supra* note 3, at 495 (citing Handbook of the Nat'l Conference of Comm'rs on Unif. State Laws & Proceedings, 1977 Nat'l Conf. Comm'n Unif. St. L. 118).

[40] *O'Neal Steel*, 169 S.E.2d at 832 (quoting Feathers v. McLucas, 209 N.E.2d 68, 80 (N.Y. 1965)).

Rule."[41] The Georgia legislature responded within a year; it added the current subsection (3)[42] to the long-arm statute, in yet another demonstration of its intent to exercise personal jurisdiction to the limits of due process as they were then understood. Subsection (3)'s wording was virtually identical to the subsection of the Uniform Act quoted by the *O'Neal Steel* court.[43] At that time, the more stringent contacts required by the subsection were thought to be necessary under due process;[44] thus, the Georgia legislature expanded the scope to what it believed were the limits of due process after the narrow interpretation of subsection (2) by the *O'Neal Steel* court.[45]

The legislature again demonstrated its policy to provide for the maximum ability to obtain personal jurisdiction over nonresidents when it amended the definition of nonresident to encompass those who had been residents of Georgia at the time the cause of action accrued, but had subsequently moved from the state. The Georgia courts had determined that a defendant had to be a nonresident at the time of the *occurrence* of the cause of action, and such rulings compelled a legislative response to protect the due-process limits to the legislation's purpose. When first announcing this interpretation, the Georgia Supreme Court observed, with a tincture of irony, that "[t]he ordinary signification of the term 'nonresident' would seem to be mutually exclusive with the ordinary

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[41] *Id.* at 832 n.10.

[42] 1970 Ga. Laws, p. 443, § 1. Enacted originally as GA. CODE ANN. § 24-113.1(c) (now GA. CODE ANN. § 9-10-91 (2006)).

[43] *O'Neal Steel*, 169 S.E.2d at 831 (quoting § 1.03(a)(4) of the Uniform Act, *supra* note 37). *Cf*. GA. CODE ANN. § 9-10-91(3), *supra* note 17.

[44] *See* TEPLY & WHITTEN, *supra* note 6, at 218-19 (discussing the Uniform Act's "tortious injury" subsection and stating: "Obviously, the Act was drafted under the impression that tortious acts committed outside the state would require greater contact to satisfy the *International Shoe* test.")

[45] The Georgia Supreme Court echoed this view, stating that "[s]ubsection ([3]) . . . was obviously enacted to legislatively 'get around' the legal reasoning on which the" *O'Neal Steel* decision was based. Coe & Payne Co. v. Wood-Mosaic Corp., 195 S.E.2d 399, 400 (Ga. 1973) (adopting the "Illinois Rule" for subsection (2) in cases where the cause of action accrued prior to the enactment of subsection (3)).

Also noteworthy is that subsection (1), with its "transacts any business" language, was apparently not considered to be applicable. It would seem that the Legislature had either agreed with, or at least conceded, the federal court's interpretation in *Scott v. Crescent Tool Co.*, 296 F. Supp. 147 (N.D. Ga. 1969), that subsection (1) applied to contract actions only. Otherwise that subsection could have applied in cases such as *O'Neal Steel*, where the nonresident defendant commits a tortious act outside the state causing injury in the state arising out of its transaction of business within the state–and subsection (3) would have been unnecessary. Consequently, the Georgia Supreme Court's recent pronouncement that subsection (1) is not restricted to contract actions, in *Innovative Clinical & Consulting Services, L.L.C. v. First Nat'l Bank of Ames*, 620 S.E.2d 352 (Ga. 2005), seems to conflict with the Legislature's understanding of subsection (1) when it enacted subsection (3).

signification of the word 'resident.' The [long-arm] statute in question clearly does not apply."[46] This interpretation held for several years, until shortly after the Georgia Court of Appeals' decision in *Smiley v. Davenport*.[47] This case involved a malpractice action against a military doctor who was residing in Georgia at the time the alleged malpractice occurred in the state.[48] The plaintiff had originally obtained personal jurisdiction over the doctor in her first suit, while the doctor was still living in the state, but then dismissed her suit without prejudice a few months after the doctor moved from the state.[49] The Plaintiff later refiled her suit in Georgia and served the doctor in Texas,[50] but the Georgia Court of Appeals reversed the trial court's denial of a motion to dismiss for lack of personal jurisdiction, because the doctor had been a resident of Georgia at the time the cause of action occurred.[51] Within a year of this decision, the legislature moved to secure this holding into statutory law: It enacted the amendment which added to the definition of a nonresident one who was a resident at the time the cause of action accrued and subsequently moved from the state.[52]

The final significant amendment made to Georgia's long-arm statute was the addition of subsection (5), sometimes called the "domestic-relations" long-arm statute.[53] Once again, the legislature responded to a shortfall in the originally-enacted long-arm statute in order to provide Georgia's citizens the ability to obtain personal jurisdiction allowed by the limits of due process. The triggering event was the Supreme Court of Georgia's opinion in *Warren v. Warren*.[54] In

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[46] Thompson v. Abbott, 174 S.E.2d 904, 908 (Ga. 1970). The Georgia Supreme Court had also held in a pre-long-arm statute case that Georgia's Non-Resident Motorist Act could not be constitutionally applied to one who was a resident at the time of the accident. Young v. Morrison, 137 S.E.2d 456 (Ga. 1964) (striking down the Legislature's expansion of the Non-Resident Motorist Act to those who had moved from the state subsequent to an accident). Thus, after these rulings, if a plaintiff was injured in an automobile accident by a resident who later moved out of the state, personal jurisdiction could not be obtained over the tortfeasor in Georgia under either statute.

[47] 229 S.E.2d 489 (Ga. Ct. App. 1976).

[48] *Id.* at 490.

[49] *Id*.

[50] *Id.*

[51] *Id.* at 492-93.

[52] 1977 Ga. Laws 586-87; GA. CODE ANN. § 24-117 (Now, GA. CODE ANN § 9-10-90). The Georgia Supreme Court upheld the constitutionality of the amendment in *Crowder v. Ginn*, 286 S.E.2d 706 (Ga. 1982). In doing so, the Court overruled *Young v. Morrison*, 137 S.E.2d 456 (Ga. 1964), "because *Young* relied upon the views of the Supreme Court of the United States expressed in the early case of *Pennoyer v. Neff* rather than upon the more modern views of that court set forth in *International Shoe*." *Crowder*, 286 S.E.2d at 706.

[53] GA. CODE ANN. § 9-10-91(5) (West 2004).

[54] 287 S.E.2d 524 (Ga. 1982).

that case, the wife sued her nonresident husband for divorce, alimony, custody, child support, and to have their separation agreement declared void.[55] She attempted to obtain personal jurisdiction under subsection (1), but the Court held that the "transacting any business" category did not apply to matters relating to divorce.[56] The court, however strongly exhorted the legislature to add a domestic relations category to the long-arm statute, pointing out that a number of states had done so, but "[u]nfortunately, Georgia has not."[57] The legislature responded a year later by adding subsection (5) to the long-arm statute.[58]

These amendments show a desire to exercise jurisdiction to the maximum extent possible.[59] Significantly, the legislature never amended the statute to restrict its extraterritorial reach. Nor did the legislature act to limit any expansive interpretation that the courts had given to the statute[60]-indeed, all of the amendments expanded the scope of the statute.

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[55] *Id*. at 525.

[56] *Id*. at 526. The Court did, however, hold that the separation agreement could be considered the transaction of business, and thus the husband was amenable to personal jurisdiction under subsection (1) for the separation agreement issue. *Id*.

[57] *Id*. In a later case, the Court summarized the situation leading to the enactment of subsection (5):

> [I]n *Warren v. Warren*, we noted with disapproval the fact that other states had enacted domestic relations Long-Arm Statutes, but our legislature had failed to do so. Within a year, the General Assembly enacted subsection (5) of [GA. CODE ANN.] § 9-10-91, the domestic relations subsection of our Long-Arm Statute. Subsection (5) was patterned after the Florida statute that we had studied and approved in *Whitaker v. Whitaker*, 230 S.E.2d 486 (Ga. 1976)], six years earlier.

Smith v. Smith, 330 S.E.2d 706, 707 (Ga. 1985) (upholding the constitutionality of subsection (5)).

[58] 1983 Ga. Laws 1304, § 1.

[59] "Both the 1968 and the 1970 Amendments seem clearly to be evidence of the intent of the Georgia Legislature to expand the statute to the fullest extent possible." Griffin v. Air South, Inc., 324 F. Supp. 1284, 1288 (N.D. Ga. 1971).

[60] For cases that took an expansive view of the long-arm statute (with no subsequent legislative action to narrow the scope), see, for example, Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738 (11th Cir. 2002) (finding the long-arm statute supports general jurisdiction and omitting "cause of action arises from" language in its quote of the statute); Horsley v. Feldt, 128 F. Supp. 2d 1374 (N.D. Ga 2000) (upholding personal jurisdiction in defamation suit, reasoning that the defamation exception in long-arm statute was no longer applicable); Scott v. Crescent Tool Co., 296 F. Supp. 147 (N.D. Ga. 1968) (adopting the "Illinois Rule" in holding that the "tortious act" subsection (2) applies to acts committed outside the state which cause injury in state); Regante v. Reliable-Triple Cee of N. Jersey, Inc., 308 S.E.2d 372 (Ga. 1983) (nonresident assignee of promissory note for real property with no other ties to the state amenable to personal jurisdiction under the "ownership of real property" heading in subsection (4) in action where assignment alleged to be invalid); Schuehler v. Pait, 238 S.E.2d 65 (Ga. 1977) (reversing trial court and holding that nonresident plaintiff can use the long-arm statute in action against nonresident defendant); Hart v. DeLowe Partners, Ltd., 250 S.E.2d 169 (Ga. Ct. App. 1978) (finding personal jurisdiction under "real property" subsection (4) in

This continuing legislative history of Georgia's long-arm statute harmonizes with the history of its model, the Illinois long-arm statute.[61] At the time the Georgia legislature enacted its statute, the Illinois Supreme Court had already stated that the intent of the Illinois legislature was to exercise personal jurisdiction to the limits of due process,[62] and the Illinois legislature responded to any future judicial parsimony by limiting the boundaries of the statute with quick and decisive amendments.[63]

3. The Resulting Inconsistent Application by Georgia Courts Due to the Conflict

The result of the conflict between the literal reading of the long-arm statute and the legislative intent has been inconsistent application by the Georgia courts. One reason for the seemingly contradictory "limits of due process" claim is the courts' (and hence the legislature's) early beliefs of what were the limits of due process. Although the concept of specific and general personal jurisdiction was first articulated in 1966,[64] this concept was not widely embraced until the United States Supreme

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suit on promissory note for purchase of property against original nonresident promisor, who subsequently sold the property to the corporation which defaulted on the note, and thus did not own the property when suit commenced).

[61] In 1955, the Illinois long-arm statute provided for personal jurisdiction for a cause of action arising from: "(a) The transaction of any business within this State; (b) The commission of a tortious act within this State; (c) The ownership, use, or possession of any real estate situated in this State; (d) Contracting to insure any person, property or risk located within this State at the time of contracting." 1955 Ill. Laws 2283, § 1. Georgia's long-arm statute, when originally enacted, provided three categories: "(a) Transacts any business within this state; (b) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act; or (c) Owns, uses, or possesses any real property situated within this state." 1966 Ga. Laws 343, § 1. The rationale for adding the defamation exclusion (which the Illinois long-arm did not contain) is discussed, *infra*, in Section II.B.3.c.

[62] "As we observed in *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 [(1956)], the statute contemplates the exertion of jurisdiction over nonresident defendants to the extent permitted by the due-process clause." Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 763 (Ill. 1961). Georgia's long-arm statute was enacted in 1966.

[63] *Compare* Green v. Advance Ross Elecs. Corp., 427 N.E. 2d 1203, 1206-08 (Ill. 1981) (rejecting extension of interpretation of the "tortious act within the state" category of long-arm jurisdiction to encompass nonresident defendant's alleged breaches of fiduciary duty that took place outside of Illinois but allegedly caused a diminution of funds of a corporation organized or headquartered in Illinois) *with* Ill. Rev. Stat., ch.110, 2-209 (a)(7), (11), & (12) (1989 amendments by Illinois Legislature to add categories for exercise of long-arm jurisdiction by Illinois Courts, including making or performing "any contract or state" or promise substantially connected with the performing officer or director duties of any corporation either incorporated in or headquartered in Illinois).

[64] Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

Court "endorsed the categories of specific and general jurisdiction as two distinct types of in personam jurisdiction" in 1984.[65] Consequently, in Georgia, the "arising from" requirement was not seen as limiting the long-arm because personal jurisdiction in the context of distinct specific and general jurisdiction had not been integrated into the courts' analyses.

Shellenberger v. Tanner provides a prime example of the effects of indeterminacy in establishing constitutional due process limits on judicial interpretation of categorical long-arm statutes such as Georgia's.[66] In that case, the Georgia Court of Appeals discussed *International Shoe* and subsequent cases to create a three-part test for determining constitutional due process limits. A misinterpretation is evident in the second prong of its test:

> From International Shoe's "skeleton" and the subsequent "fleshing out" cases can be gleaned three "rules" by which to judge the power of a forum state to exercise jurisdiction over a nonresident defendant. They are: . . . (2) The plaintiff must have a legal cause of action against the nonresident, which *arises out of,* or results from, the activity or activities of the defendant within the forum . . . .[67]

This statement highlights the mistaken notion by many courts at that time that the cause of action must *always* arise directly out of the nonresident defendant's activities to meet constitutional due process. Of course, *International Shoe* did not require that. Chief Justice Stone explicitly recognized that a nonresident defendant could have such extensive, regular, and systematic contacts with the forum so as to be a virtual citizen of the forum by virtue of the nonresident defendant's dominating presence.[68] That point was driven home by the United States Supreme Court's decision in *Perkins v. Benguet Consolidated Mining Co.*,[69] which upheld personal jurisdiction where the claim did not relate to the nonresident defendant's activities in the forum. The *Shellenberger* Court, however, helped perpetuate the notion that the long-arm statute was to be construed to due process limits as that court understood those limits when it stated that the Supreme Court of Georgia's decision in *Coe &*

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[65] Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 565 (1998) (citing Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn.8-9 (1984) as the case where the United States Supreme Court first recognized the concept).

[66] 227 S.E.2d 266 (Ga. Ct. App. 1976).

[67] *Id.* at 272 (emphasis added).

[68] *International Shoe*, 326 U.S. at 318.

[69] 342 U.S. 437 (1952).

Payne Co. v. Wood-Mosaic Corp.[70] had "indicated that jurisdiction over nonresidents who commit a 'tortious act' in Georgia shall be extended to the maximum limits permitted by due process."[71]

Other notable cases involving problematic, or inconsistent, judicial interpretation of the long-arm statue based on shifting views of the Constitutional limits have primarily involved subsections (1), (2) and (3) of the long-arm statute.[72] Judicial treatment of subsection (1) will be discussed first, followed by a discussion of subsections (2) and (3) together due to the interrelatedness in their application.

a. Subsection (1): "Transacts any Business" Category.

Until the recent change by the Supreme Court of Georgia,[73] subsection (1) had been consistently interpreted as applying to contract actions only. Consequently, the inconsistency in application by the Georgia state courts regarding subsection (1) primarily involves the required contacts with the state. This part will first detail the application issues with an analysis of two Supreme Court of Georgia and two Georgia Court of Appeals cases. It will then discuss how the federal court decisions are inconsistent with the state court decisions as well as with the statutory language. Finally, the recent decision by the Georgia Supreme Court,[74] which overruled all the cases that had limited the application of subsection (1) to contract causes of action and physical contacts only, will be discussed.

What constitutes "transacts any business" (and hence what falls within the category) was construed liberally in *Davis Metals, Inc. v. Allen*,[75] but the contacts required with the state were then construed narrowly in *O. N. Jonas Co. v. B & P Sales Corp*.[76] In *Davis Metals*, Davis Metals sued Allen, a former employee, for breaching a noncompete covenant after Allen moved to Alabama and started a competing business. The trial court dismissed for lack of jurisdiction and

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[70] 195 S.E.2d 399 (Ga. 1973), *overruled on other grounds by* Anderson v. Deas, 632 S.E.2d 682 (Ga. 2006).

[71] *Shellenberger*, 227 S.E.2d at 273. The perpetuation can be seen in the numerous subsequent federal court decisions citing this case, as well as *Coe & Payne Co.*, for the notion that Georgia's long-arm statute has been construed to extend to the limits of due process. Also, it indirectly did so with the numerous federal courts citing other federal court decisions which had relied on *Shellenberger*.

[72] *See supra* Section II.B.

[73] *See supra* Section II.B.1; *see also supra*, note 22.

[74] Innovative Clinical & Consulting Servs., L.L.C. v. First Nat'l Bank of Ames, 620 S.E.2d 352 (Ga. 2005).

[75] 198 S.E.2d 285 (Ga. 1973).

[76] 206 S.E.2d 437 (Ga. 1974). *But see* Innovative Clinical & Consulting Servs, L.L.C. v. First Nat'l Bank of Ames, 620 S.E.2d 352 (Ga. 2005).

the Court of Appeals affirmed, stating that the "'liability here, if any, did not arise from any business transaction in Georgia, but instead from the defendant's competing outside Georgia in the State of Alabama.'"[77] In reversing the dismissal, the Supreme Court of Georgia emphasized that the focus on where the business competition occurred was misplaced. The focus, instead, should be on the contract, which was entered into in Georgia, and not the place where ultimately it may have been breached:

> The act that gives birth to a cause of action because of the competition carried on in Alabama is the contract entered into by the parties in the State of Georgia. The Georgia contract gives the appellant a cause of action if a breach occurs, and it is immaterial if the breach occurs within or without the State of Georgia.[78]

The Court went on to state that "the trend of the opinions is to construe long arm 'transacting any business' statutes most liberally and to uphold the jurisdiction of the court of the plaintiff's residence in actions, arising either directly or indirectly, out of such transactions."[79] Thus, the category appeared to be as broad as the limits of due process.

Despite the expansive application given the "transacting any business" language in *Davis Metals*, the Supreme Court of Georgia did place limits that, in effect, narrowed the scope to something less than the limits of due process in *O. N. Jonas Co.* by restricting the application of subsection (1) so as to require more forum contacts than those that would suffice to meet the minimum contacts standard.[80] That case involved a contract dispute with a nonresident defendant who had purchased goods from a Georgia corporation. In holding there was no personal jurisdiction, the Court distinguished *Davis Metals*, stating "in that case a contract between the parties had been executed and partially performed within the State of Georgia, the contract itself provided that it was to be interpreted and construed pursuant to the laws of Georgia, and the cause of action against the nonresident arose solely by breach of this Georgia contract."[81] In contrast, in *O.N. Jonas Co.*, "there were no negotiations or contracts entered into in Georgia with respect to the goods that are the subject matter of these actions. Purchase orders for the goods originated

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[77] *Davis Metals*, 198 S.E.2d at 287.

[78] *Id*.

[79] *Id* at 287-88.

[80] For example, a district court sitting in Georgia would later hold that "the Georgia long-arm statute . . . is narrower than constitutional due process and thus requires more contacts with the forum than constitutional due process." Evans v. Am. Surplus Underwriters Corp., 739 F. Supp. 1526, 1533 (N.D. Ga. 1989).

[81] *O.N. Jonas Co*., 206 S.E.2d at 439.

outside of the state."[82] The Court suggested that these are not contacts at all, reasoning:

> The goods were shipped FOB shipping point, such shipping point being in Georgia, and . . . that is the only contact that appellees had with this state with respect to the goods purchased by them. We hold that this is an insufficient "contact" with the State of Georgia to comply with the requirement of transacting "any business within this state" . . . .[83]

Although agents of the defendant had visited the plaintiff's plant in Georgia, because they had not initiated the purchase order while there, this was not deemed to be a contact: "The evidence showed that none of the goods involved in these actions was purchased by the appellees during their agents' visit to appellant's Georgia plant."[84] Thus, whereas in *Davis Metals* personal jurisdiction was found because the employee had entered into the contract in Georgia, if the contract is not consummated in Georgia, even if the nonresident defendant submitted the purchase order and agents visited the state in connection with the purchase, then personal jurisdiction does not arise under subsection (1). Based on this ruling, since the purchase orders were made by telephone or mail, Georgia courts had, until recently, held that telephonic, mail, and, later, e-mail communications from a nonresident defendant were not sufficient to create personal jurisdiction under subsection (1).[85] Those

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[82] *Id*.

[83] *Id*.

[84] *Id* at 438.

[85] *See, e.g,* Catholic Stewardship Consultants, Inc. v. Ruotolo Assocs., Inc., 608 S.E.2d 1 (Ga. Ct. App. 2004); First Nat'l Bank Of Ames v. Innovative Clinical & Consulting Servs., L.L.C., 598 S.E.2d 530 (Ga. Ct. App. 2004), *aff'd in part and vacated in part*, 620 S.E.2d 352 (Ga. 2005); First Nat'l Bank Of Ames v. Innovative Clinical & Consulting Servs., L.L.C., 598 S.E.2d 530 (Ga. Ct. App. 2004), *aff'd in part and vacated in part*, 620 S.E.2d 352 (Ga. 2005); ETS Payphone, Inc. v. TK Indus., 513 S.E.2d 257 (Ga. Ct. App. 1999); Burt v. Energy Servs. Inv. Corp., 427 S.E.2d 576 (Ga. Ct. App. 1993); Commercial Food Specialties, Inc. v. Quality Food Equip. Co., 338 S.E.2d 865 (Ga. Ct. App. 1985); Graphic Mach., Inc. v. H. M. S. Direct Mail Serv., Inc., 281 S.E.2d 343 (Ga. Ct. App. 1981). Of course, the United States Supreme Court has not restricted the exercise of personal jurisdiction to only physical contacts with the defendant, specifically holding that mail and telephone contacts are sufficient:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have

cases where personal jurisdiction was upheld involved circumstances where the contract was consummated in Georgia, or the nonresident was purposely directing activity toward Georgia for economic benefit while either physically within the state or sending physical items into the state.[86]

However, the Georgia Court of Appeals later expanded the scope of the long-arm by allowing for a new type of contact (at least with respect to bank plaintiffs) in *Georgia Railroad Bank & Trust Co. v. Barton*.[87] The court did so by shifting the focus from whether the contract was consummated in Georgia to whether the nonresident purposefully availed his or herself of the protections of Georgia law by doing some act in the state and whether there was a "substantial effect" in the forum from the contact. The "substantial effect" criterion was adopted from the three-part test the Court of Appeals had extrapolated from *International Shoe* [in *Shellenberger v. Tanner*,[88] which involved a tort claim]. In *Barton*, the nonresident defendant had obtained a $125,000 loan from the plaintiff bank and then defaulted.[89] Relying on, *inter alia*, the holding in *O.N. Jonas Co., Inc.*, *supra*, Barton argued that because he signed the promissory notes in South Carolina, and had only visited the forum a few times to negotiate the loan and its repayment, he did not have the required contacts with the forum.[90] The Court, however, citing *Shellenberger*, stated that "'[a] single event may be a sufficient basis if its effects within the forum are substantial enough . . . .'"[91] Because Barton "knowingly and purposefully availed himself of the financial resources of a Georgia banking institution" and "the economic effect of a

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> consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

[86] *See, e.g.*, Genesis Research Inst., Inc. v. Roxbury Press, Inc., 542 S.E.2d 637 (Ga. Ct. App. 2000) (negotiation within state of terms of contract upon which cause of action based is a sufficient contact); SES Indus., Inc. v. Intertrade Packaging Mach. Corp., 512 S.E.2d 316 (Ga. Ct. App. 1999) (nonresident buyer from manufacturer initiated contact with plaintiff, and traveled to Georgia plant to inspect the item and finalize and sign the contract); Bosworth v. Cooney, 274 S.E.2d 604 (Ga. Ct. App. 1980) (nonresident defendant negotiated and executed escrow contract in Georgia); Hollingsworth v. Cunard Line, Ltd.., 263 S.E.2d 190 (Ga. Ct. App. 1979) (one factor in upholding personal jurisdiction over cruise line was its distribution of ticket stock to travel agencies in Georgia); Brooks Shoe Mfg., Inc. v. Byrd, 241 S.E.2d 299 (Ga. Ct. App. 1977) (nonresident shoe manufacturer participated in Georgia trade show for three consecutive years with intent to reap economic benefit).

[87] 315 S.E.2d 17 (Ga. Ct. App. 1984).

[88] 227 S.E.2d 266 (Ga. Ct. App. 1976); *see supra* notes 62-63 and accompanying text.

[89] Ga. R. Bank & Trust Co. v. Barton, 315 S.E.2d 17, 18 (Ga. Ct. App. 1984).

[90] *Id*. at 19.

[91] *Id.*

default of $125,000 would be 'substantial'", this established "legally sufficient contacts."[92] The Court summarily distinguished *O.N. Jonas*, stating that the "contacts in the instant case differ both qualitatively and quantitatively from those in *Jonas* . . . ."[93] It is hard to see much of a difference, because one could say the nonresident buyer in *O.N. Jonas* had purposefully availed itself of the manufacturing resources of a Georgia manufacturer and that the lack of payments to O.N. Jonas had a substantial economic effect (assuming the amount owed to the plaintiff was substantial).

A more fundamental problem, however, is with the use of the test articulated in *Shellenberger*. In that case, the Court of Appeals gave two different three-part tests: the first was a test for meeting the *International Shoe* constitutional due process requirements;[94] the second was a test for meeting the tortious act requirement of the long-arm statute's subsection (2).[95] In *Barton*, the court relied on the first test, selectively picking out the portion of the first prong relating to "substantial" effects, while ignoring another part of that prong—i.e., that it "is not necessary that the defendant or his agent be physically within the forum, for an act or transaction by mail may suffice"[96]—which directly contradicted prior holdings of the Georgia Supreme Court that mail contacts are insufficient. Thus, *Barton*'s expansion of the contacts scope of subsection (1) was based on selecting a portion of the *Shellenberger* test that was meant to define constitutional due process limits and incorporating it into the judicial construction of the long-arm statute. This holding was followed in *Robertson v. CRI, Inc*.,[97] where a nonresident personal guarantor of a $400,000 loan for a corporation of which he was an officer was found to have sufficient contacts for personal jurisdiction, although he had signed the guarantee in California: "[A]s in *Barton*, Robertson could be characterized as having availed himself of the resources of a Georgia financial institution, and the loan could be characterized as substantial, thus showing the purposeful activity in Georgia required to satisfy the first prong of the test."[98] Therefore, at least where a bank loan is involved, the contact requirement of subsection (1) is broader under the Georgia Court of Appeals' holdings than it has been construed in other contexts—without any

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[92] *Id*. at 20.
[93] *Id*.
[94] *Shellenberger*, 227 S.E.2d at 272.
[95] *Id*. at 273.
[96] *Shellenberger*, 227 S.E.2d at 272.
[97] 601 S.E.2d 163 (Ga. App. 2004).
[98] *Id.* at 166.

principled justification offered to explain the difference. This is inconsistent with the Georgia Supreme Court's holdings that required consummation of the contract in the state.

Of course, application of any long-arm statute goes on in two parallel court systems. State-law claims heard in federal court under the diversity-of-citizenship category of federal subject matter jurisdiction can partake of the forum state's long-arm statute as a means of affecting extraterritorial service of process on nonresident defendants, [99] since Congress has not enabled a general federal long-arm statute. While courts of limited subject matter jurisdiction, federal courts have generally proven to be far less demure about expansive positions on their personal jurisdiction. Thus, the federal courts, sitting in their diversity-of-citizenship jurisdiction, with a few exceptions,[100] have expanded the scope of subsection (1) to the limits of due process. Most federal courts skip the long-arm analysis altogether, relying on somewhat loose dicta from the state courts in Georgia to the effect that the long-arm extends to the limits of due process, and thereby only addressing due process concerns.[101] Other federal courts purport to be applying the categorical approach of the long-arm statute, but construe it in a way that extends it to the limits of due process. *Nippon Credit Bank, Ltd. v. Matthews*[102] is a typical example. There, the federal court constructed a detailed defense of how the long-arm statute provided for general jurisdiction. In doing so

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[99] *See* FED. R. CIV. P. 4(e)(1) & (h)(1) (providing that service upon individuals, corporations and associations may be made "pursuant to the law of the state in which the district court is located. . . . ").

[100] The exceptions include: Swafford v. Avakian, 581 F.2d 1224 (5th Cir. 1978) (nonresident's only contacts with Georgia were telephone calls and letters; citing *Shellenberger*'s statement that activity under subsection (1) needs to be more extensive than activity under subsection (2)); Fulghum Indus., Inc. v. Walterboro Forest Prod., Inc., 477 F.2d 910 (5th Cir. 1973) (although nonresident defendant conducted business in Georgia, the breach of contract was unrelated to that business); Evans v. Am. Surplus Underwriters Corp., 739 F. Supp. 1526, 1533 (N.D. Ga. 1989) (finding the long-arm to be "narrower than constitutional due process and thus requir[ing] more contacts with the forum than constitutional due process."); Fowler Prods. Co. v. Coca-Cola Bottling Co. of Tulsa, Inc., 413 F. Supp. 1339 (M.D. Ga. 1976).

[101] *See, e.g.*, Francosteel Corp. v. M/V Charm, 19 F.3d 624 (11th Cir. 1994) (skipping the long-arm application and stating that general jurisdiction is available in Georgia); Mass. Mut. Life Ins. Co. v. Woodall, 304 F. Supp. 2d 1364 (S.D. Ga. 2003); Peridyne Tech. Solutions, L.L.C. v. Matheson Fast Freight, Inc., 117 F. Supp. 2d 1366 (N.D. Ga. 2000) (straight due process analysis, after citing several cases holding that long-arm extends to due process limits); Allegiant Physicians Servs., Inc. v. Sturdy, 926 F. Supp. 1106 (N.D. Ga 1996) (while acknowledging Georgia Supreme Court's restrictive holding in *Gust*, cites *Francosteel* for the proposition that, at least for contract claims, the long-arm reaches to the limits of due process); Marival, Inc. v. Planes, Inc., 302 F. Supp. 201 (N.D. Ga. 1969) (the first to state the long-arm extends to due process limits).

[102] 291 F.3d 738 (11th Cir. 2002).

the Eleventh Circuit selectively quoted from the long-arm statute, conspicuously omitting the "as to a cause of action arising from"[103] language:

> The Georgia long-arm statute provides for the exercise of "personal jurisdiction over any nonresident . . . if in person or through an agent, he: (1) Transacts any business within this state; . . . or (4) Owns, uses, or possesses any real property situated within this state.".[104]

Thus, the Eleventh Circuit's holding that the long-arm statute allows for general personal jurisdiction basically recasts the statute to mean something that appears quite different from what it says.

It may be helpful, before addressing the Georgia Supreme Court's latest rulings, to summarize the varying interpretative canons: While the "transacts any business" category is to be construed liberally, the Georgia Supreme Court narrowed it by requiring the contract to have been consummated in Georgia and by holding that telephone and mail communications from the nonresident, as well as isolated visits in relation to the contract, did not aggregate to the threshold of minimum contacts. The Court of Appeals have expanded the scope, at least for bank plaintiffs, by shifting the focus from the place of contract consummation to whether the nonresident had purposefully availed itself of the protections of Georgia law and if the contact had a substantial effect in the forum. The federal courts, despite the boundaries given in cases following *Erie Railroad Co. v. Thompkins*,[105] have expanded the reach of these subsections to the limits of due process, including even general jurisdiction, through an interpretative process that selectively ignores portions of the statute.

In *Innovative Clinical and Consulting Services, L.L.C. v. First National Bank of Ames*,[106] the Georgia Supreme Court, though, has seemingly laid to rest these differing interpretations as to this aspect of Georgia's long-arm statute. The case involved claims of breach of contract, fraud, and conversion by Innovative Clinical and Consulting Services, L.L.C. (ICCS), a Georgia resident, against First Nat. Bank of Ames (the bank), located in Iowa. The bank had taken a security interest in a lease agreement that ICCS had made as lessee with a financing

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[103] GA. CODE ANN. § 9-10-91 (West 2004).

[104] Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738, 746 (11th Cir. 2002) (quoting GA. CODE ANN. § 9-10-91).

[105] 304 U.S. 64 (1938).

[106] 620 S.E.2d 352 (Ga. 2005).

corporation, which was a customer of the bank.[107] Relying on the prior judicial holdings that subsection (1) only applied to contract actions, the Georgia Court of Appeals applied subsection (1) to the breach of contract claim only, finding that, even if the taking of a security interest in the lease constituted transacting business in Georgia, ICCS's breach of contract claim was not "remotely related to the security interest taken by the bank."[108] From this Court of Appeals ruling, the Georgia Supreme Court granted certiorari "to address perceived inconsistencies in our precedents defining the scope of personal jurisdiction that Georgia courts may exercise over nonresidents pursuant to . . . the Georgia long-arm statute."[109] After affirming an earlier holding that subsections (2) and (3) are to be interpreted literally,[110] the court stated that, to be consistent, subsection (1) should also be interpreted literally.[111] Consequently, because "[n]othing in subsection (1) limits its application to contract cases" or "requires the physical presence of the nonresident in Georgia or minimizes the import of a nonresident's intangible contacts with the State,"[112] the court held these limitations no longer apply and, therefore, subsection (1) reaches "to the maximum extent permitted by procedural due process."[113] As a result, the court "overrule[d] all prior cases that fail[ed] to accord the appropriate breadth to the construction of the 'transacting any business' language"[114] of subsection (1). The court then vacated and remanded the case to the Georgia Court of Appeals to consider whether personal jurisdiction may be obtained under subsection (1) based on the new interpretation.[115] On remand, the Court of Appeals upheld the exercise of personal jurisdiction over the defendant bank, stating that the bank's "postal, telephone, and other intangible Georgia contacts" were sufficient under the new broader interpretation of subsection (1).[116]

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[107] First Nat'l Bank of Ames v. Innovative Clinical & Consulting Servs., L.L.C., 598 S.E.2d 530, 532 (Ga. Ct. App. 2004).

[108] *Id*. at 534.

[109] *Innovative Clinical & Consulting Servs.*, 620 S.E.2d at 353.

[110] *Id*. at 354. The twists and turns of the interpretations of subsections (2) and (3), culminating in the decision to apply them separately and literally in Gust v. Flint, 356 S.E.2d 513 (Ga. 1987), are discussed, *infra*, in Section II.B.3.b.

[111] *Id* at 355.

[112] *Id*.

[113] *Id*. (quoting Coe & Payne Co. v. Wood-Mosaic Corp., 195 S.E.2d 399, 401 (Ga. 1973)).

[114] *Id*.

[115] *Id*. at 356.

[116] First Nat'l Bank of Ames v. Innovative Clinical & Consulting Servs., L.L.C., 634 S.E.2d 88, 89 (Ga. Ct. App. 2006). The court also held that the exercise of personal jurisdiction was within the limits of constitutional due process, because "the bank's

This expansion of subsection (1) makes subsection (3) superfluous. Now when a nonresident tortfeasor commits a tortious act resulting in injury within the state, personal jurisdiction is available under subsection (1). Subsection (3), with its stricter business contact requirements, would appear unnecessary. The *Innovative Clinical* holding appears also to ignore the problem of the defamation exception in subsection (2). That exception was included when the long-arm statute was originally enacted. It seems unlikely that the Legislature would have made this exception in subsection (2), without also limiting subsection (1), if subsection (1) is truly as broad in scope as declared in *Innovative Clinical*. Far more plausible is the notion that the Legislature did not contemplate that subsection (1) would be applicable to tort actions. In the wake of *Innovative Clinical*, the defamation exception of subsection (2) appears now only applicable where one defames another while not transacting business in the state. Similarly, subsection (4) now appears of limited relevance, because most causes of action relating to the ownership or use of real property usually arise out of the transaction of business.

In any event, the interpretative inconsistencies of the previously discussed state court cases have now been surmounted by a new interpretation, the incredibly broad scope of extraterritorial personal jurisdiction which, as discussed above, has been attributed by the federal courts to Georgia's long-arm statute. However, it remains to be seen whether the Eleventh Circuit will retract its interpretation that the statute extends to general jurisdiction. This does not seem likely, because the Georgia Supreme Court stated that subsection (1) now reaches to the limits of due process[117] (even though in actuality it does not – it is still limited by the "arising from" language to specific personal jurisdiction). Thus, the Eleventh Circuit will likely adhere to its sweeping gloss on the statute and allow general personal jurisdiction due to the Georgia Supreme Court's dictum in *Innovative Clinical*, just as it did in *Nippon Credit Bank, Ltd. v. Matthews*.[118]

With the opening of subsection (1) to tort actions, another issue will be the scope of the "transacts any business" language in relation to products that enter Georgia through the stream of commerce and cause injury. This is a particularly relevant inquiry given the split in the United States Supreme Court's decision in *Asahi Metal Industry Co. v. Superior*

'business' was not brought to Georgia through a 'unilateral action' of ICCS." *Id*. (citing Burger King Corp. v. Rudzewicz, 471 U. S. 462, 474-475 (1985)).

[117] Innovative Clinical & Consulting Servs., L.L.C. v. First Nat'l Bank of Ames, 620 S.E.2d 352, 355.

[118] 291 F.3d 738 (11th Cir. 2002).

Court of California[119] on what constitutes purposeful availment in those circumstances. In *Asahi*, Justice O'Connor, with three justices joining her, wrote that the purposeful availment necessary for minimum contacts requires more than just an awareness by the defendant "that the stream of commerce may or will sweep the product into the forum State. . ."[120]—it requires "[a]dditional conduct of the defendant [that] may indicate an intent or purpose to serve the market in the forum State . . . ."[121] Justice Brennan, with three justices joining him, disagreed with the "additional conduct" requirement, writing that a defendant's placing of a product in the stream of commerce with an awareness "that the final product is being marketed in the forum State"[122] is all that is necessary to meet the purposeful availment test for minimum contacts. Hence, at some point, the Georgia courts will need to decide whether to require the "additional conduct" or not.[123] The principles of corrective justice and enterprise regulation discussed in Section III, *infra*, and incorporated into our model long-arm statute in Section IV, *infra*, will help to guide the courts in this decision.

b. Subsections (2) and (3): The "Tortious Act" and "Tortious Injury" Categories

Subsections (2) and (3)[124]—the "tortious act" and "tortious injury" categories—will be discussed next. The inconsistency in application initially involved whether subsection (2) should be interpreted as the "Illinois Rule" or the "New York Rule." Later application inconsistencies involved the contact requirements of subsections (2) and (3).

As previously discussed,[125] in *O'Neal Steel* the Georgia Court of Appeals rejected the "Illinois Rule," holding that under subsection (2) personal jurisdiction over a non-resident defendant attaches only when the tortious act (or conduct) as well as the injury occurs in the state. Consequently, the legislature adopted subsection (3).[126] Despite the apparent distinction between subsections (2) and (3), as reflected by the Georgia legislature's amendment, the Supreme Court of Georgia

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[119] 480 U.S. 102 (1987).
[120] *Id.* at 112.
[121] *Id.*
[122] *Id.* at 117 (Brennan, J., concurring).
[123] *See*, *e.g.,* Parry v. Ernst Home Ctr. Corp., 779 P.2d 659, 666-67 (Utah 1989) (holding that "[w]ithout a showing of 'additional conduct,' we are unable to find that the eventual sale of a product in Utah justifies personal jurisdiction.").
[124] GA. CODE ANN. § 9-10-91 (2004).
[125] *See supra* notes 32-39 and accompanying text.
[126] *See supra* note 40 and accompanying text.

subsequently adopted the "Illinois Rule" interpretation of subsection (2) in *Coe & Payne Co. v. Wood-Mosaic Corp*.[127] "[T]he negligence occurring outside the state cannot be separated from the resulting injury occurring within the state," the court wrote, adding that "[i]n other words, a 'tortious act' is a composite of both negligence and damage, and if damage occurred within the state then the tortious act occurred within the state within the meaning of subsection [(2)] of the Long Arm Statute."[128] As many courts and commentators observed, this holding appeared to make subsection (3) superfluous.[129] Accordingly, courts using the expansive *Coe & Payne* interpretation began finding personal jurisdiction under subsection (2) where the act occurred outside the state, making subsection (3) seemingly unnecessary.[130]

But then, at its first opportunity, the Georgia Supreme Court established the relevance of subsection (3) in *Clarkson Power Flow, Inc. v. Thompson*.[131] In that case, the court reaffirmed the adoption of the "Illinois Rule" in *Coe & Payne*, but noted "that limitations similar to those present in subsection [(3)] are constitutionally mandated under subsection [(2)]."[132] This holding appeared to turn the tables and make subsection (2) superfluous. The Court said as much when it stated that "[w]e thus conclude that there is no essential difference between subsections [(2)] and [(3)]."[133] Thus, although personal jurisdiction could be obtained under subsection (2) over a nonresident who commits an act or omission outside the state resulting in an injury inside the state (á la the liberal "Illinois Rule"), the application was substantially restricted by requiring the same high level of contacts that are part-and-parcel of subsection (3).

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[127] 195 S.E.2d 399 (Ga. 1973) (upholding personal jurisdiction over nonresident manufacturer whose adhesive allegedly caused fire which killed workers and damaged building in Georgia).

[128] *Id*. at 400-01.

[129] For example, the Northern District of Georgia explained:

> Admittedly, the effect of this liberal application of subsection [(2)] is to virtually read subsection [(3)] out of existence and render it superfluous, since it adds nothing to the extent of in personam jurisdiction available under subsection [(2)], while seemingly imposing an additional and more stringent test of business contracts with the forum state.

Thornton v. Toyota Motor Sales, U.S.A., Inc., 397 F. Supp. 476, 480 n.3 (N.D. Ga. 1975) (citing several Georgia journals and publications supporting this view).

[130] *See*, *e.g.*, Greenfield v. Portman, 221 S.E.2d 704 (Ga. Ct. App. 1975); Delta Equities, Inc. v. Larwin Mortgage Investors, 211 S.E.2d 9 (Ga. Ct. App. 1974); Davis v. Haupt Bros. Gas Co., 206 S.E.2d 598 (Ga. Ct. App. 1974); Lincoln Land Co. v. Palfery, 203 S.E.2d 597 (Ga. Ct. App. 1973).

[131] 260 S.E.2d 9 (Ga. 1979).

[132] *Id.* at 11.

[133] *Id.*

Two subsequent decisions by the Georgia Supreme Court, however, reasserted the applicability of subsection (2) by separating it from subsection (3) and returning to a literal interpretation of both subsections, which is the controlling interpretation of the two subsections today by the Georgia state courts. The first decision, *Bradlee Management Services, Inc. v. Cassells*,[134] involved a defamation action against a nonresident reporter who prepared a report on nursing home abuse. That report implicated the plaintiff's nursing home when shown on the local news.[135] The court of appeals had reversed the trial court's denial of a motion to dismiss for lack of personal jurisdiction, holding "that subsection [(3)] . . . cannot be interpreted to provide jurisdiction over nonresident defendants in defamation cases because of the exclusion of defamation cases in subsection [(2)]."[136] The court of appeals based its decision on the holding in *Clarkson Power Flow*, "'that there is no essential difference between subsections [(2)] and [(3)].'"[137] The Supreme Court of Georgia affirmed, but for different reasons. The court implied that personal jurisdiction could be obtained in a defamation action using subsection (3), recognizing two federal district court cases in Georgia which had held "that under subsection [(3)] of our Long Arm Statute Georgia courts do have jurisdiction over nonresident defendants in defamation cases when there exist requisite minimum contacts other than the commission of the tort itself."[138] In this particular case, though, the court noted "the specified minimum contacts required by subsection [(3)] are not present as to defendant Cassells here."[139] Thus, as one court later observed, "the *Bradlee* decision in fact departs from *Clarkson Power Flow* because it reads subsections (2) and (3) separately."[140]

The second decision by the Supreme Court of Georgia, *Gust v. Flint*,[141] involved a tort claim for fraud against a Wisconsin resident who had kept the plaintiff's deposit for the purchase of a truck the defendant had advertised in a trade publication after the plaintiff refused to accept a substitute truck. The defendant's only contacts with the state were the advertisement and subsequent phone calls with the plaintiff concerning

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[134] 292 S.E.2d 717 (Ga. 1982).
[135] *Id.* at 718-19.
[136] *Id.* at 720.
[137] *Id.* (quoting Clarkson Power Flow, Inc. v. Thompson, 260 S.E.2d 9 (Ga. 1979)).
[138] *Id.* (citing Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284 (N.D. Ga 1975) and Southard v. Forbes, Inc., Civ. No. 74-1984A (N.D. Ga. Mar. 25, 1975).
[139] *Id.*
[140] James Whiten Livestock, Inc. v. W. Iowa Farms, Co., 750 F. Supp. 529, 533-34 (N.D. Ga. 1990).
[141] 356 S.E.2d 513 (Ga. 1987).

the sale of the truck. The court of appeals had reversed the trial court's dismissal for lack of jurisdiction. In doing so, it acknowledged the ruling in *Clarkson Power Flow* that subsections (2) and (3) are essentially the same. However, the court stated that since the Supreme Court of Georgia had not expressed an intention to renounce the principle adopted in *Coe & Payne*—that the long-arm statute be construed to the maximum extent of due process—it could find personal jurisdiction under subsection (2).[142] The Supreme Court of Georgia reversed with a terse analysis, simply stating that the case was controlled by a "literal construction of Georgia's long-arm statute."[143] The court observed, "[w]e need not discuss the relative merits of a 'New York rule' or an 'Illinois rule;'" rather, "[t]he rule that controls is our statute, which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction. Where, as here, it is shown that no such acts were committed, there is no jurisdiction."[144]

After these two cases, it was apparent that Georgia courts would interpret subsections (3) and (2) separately and literally, and that is what the appellate courts did.[145] Yet, Georgia courts recognized the disparity

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[142] Flint v. Gust, 351 S.E.2d 95 (Ga. Ct. App. 1986), *rev'd*, 356 S.E.2d 513 (Ga. 1987).

[143] *Gust*, 356 S.E.2d at 514.

[144] *Id.* One justice observed, however, that "[f]or my part, I fail to see why Georgia would not want its courts to have the maximum jurisdiction permissible within constitutional due process." *Id.* at 130 (Gregory, J., concurring). Thus, there was recognition from the court that this decision made it such that the long-arm statute was now not being interpreted to the limits of due process, despite the previous statement in *Coe & Payne*.

[145] For cases supporting this separate and literal interpretation, see Catholic Stewardship Consultants, Inc. v. Ruotolo Assocs., Inc., 608 S.E.2d 1 (Ga. Ct. App. 2004) (analyzing theft of propriety information claim under subsection (3) because the alleged act occurred outside the state and finding personal jurisdiction lacking since the defendant did not regularly conduct business in the state), *cert. denied*, 2005 Ga. LEXIS 401 (May 23, 2005); First Nat'l Bank of Ames v. Innovative Clinical & Consulting Servs., L.L.C., 598 S.E.2d 530 (Ga. Ct. App. 2004) (following *Gust* with reservations in dismissing fraud claim analyzed under subsection (3), because alleged tortious act occurred outside state by defendant that did not regularly do business in the state), *aff'd in part and vacated in part*, 620 S.E.2d 352 (Ga. 2005); Worthy v. Eller, 594 S.E.2d 699 (Ga. Ct. App. 2004) (asserting personal jurisdiction over intentional infliction of emotional distress claim against Alabama attorney analyzed under subsection (3), because alleged act originated in Alabama; claim dismissed due to lack of the contacts required by that subsection) *cert. denied*, 2004 Ga. LEXIS 514 (June 7, 2004); ETS Payphone, Inc. v. TK Indus., 513 S.E.2d 257 (Ga. Ct. App. 1999) (analyzing the determination of personal jurisdiction under subsection (3) because defendant committed alleged tortious act outside the state; dismissed due to lack of the contacts required by that subsection; performing no analysis under subsection (2)); Metzler v. Love, 428 S.E.2d 384 (Ga. Ct. App. 1993) (personal jurisdiction denied because the defendant did not commit the tortious act within the state as required by subsection (2) and did not have the contacts required under subsection (3)); Showa Denko K.K. v. Pangle, 414 S.E.2d

between the Supreme Court of Georgia precedents which had stated that the long-arm statute extends to the limits of due process and the holding in *Gust*. For example, on remand in *Gust*, the Court of Appeals pointed out that in *Coe & Payne*,

> the Supreme Court had expressed the view that our long-arm statute authorized the exercise of jurisdiction over nonresident defendants "to the maximum extent permitted by procedural due process." In its decision in the present case, the Supreme Court would appear to have abandoned that view and to have adopted the position that our long-arm statute is not susceptible to such an interpretation. However, since *Coe & Payne* was not overruled, clarification of the Supreme Court's position on this important issue will have to await a future litigation.[146]

That clarification finally arrived eighteen years later when the Supreme Court of Georgia held that in *Gust* it had "rejected" *Coe & Payne Co*., as well as other cases, and had "reinstated the difference between subsections (2) and (3) established by the literal language of the statute."[147] More significant than the clarification, however, was the expansion of subsection (1) to tort actions, as discussed, *supra*, in Section II.B.3.b, which has made subsection (2) of limited application and subsection (3) superfluous.[148] Subsection (2) appears to have a distinct function only where a nonresident commits a tort in the state that does not arise out of the transaction of business. Likewise, subsection (3), due to its business contact requirements, appears now completely subsumed within the broader "transacts any business" contact requirement of subsection (1). Thus, while reiterating the separateness of

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658 (Ga. Ct. App. 1991) (upholding personal jurisdiction under subsection (3) due to defendant's agent's contacts with the state) (reaffirming separate and literal interpretation of subsections (2) and (3), but also announcing a literal interpretation of subsection (1) which expands that subsection to the limits of due process by allowing personal jurisdiction over any nonresident who transacts any business in Georgia).

[146] Flint v. Gust, 361 S.E.2d 722, 723 (Ga. Ct. App. 1987).

[147] Innovative Clinical & Consulting Services, L.L.C. v. First Nat'l Bank of Ames, 620 S.E.2d 352, 354 (Ga. 2005). In *Innovative Clinical*, the court made a point to note that the legislature had chosen not to expand the statute to the limits of due process since the holding in *Gust*. This might strike the reader as somewhat ironic, given the history of amendments that the legislature enacted to expand the statute as limitations were encountered through early federal and state court decisions, as discussed in Section II.B.2, *supra*, and given the dicta by the court itself in many cases stating the state's policy was to reach the limits of due process. Even after *Gust*, which purported to abandon the "Illinois Rule," the court in *Allstate Ins. Co. v. Klein*, 422 S.E.2d 863 (Ga. 1992), reiterated in a footnote the same limits of due process policy. Thus, it is quite possible that the court's own history of dicta that the long-arm statute reached due process limits influenced legislative somnolence on delivering a legislative coup de gras.

[148] S*upra* notes 106-16 and accompanying text.

subsections (2) and (3), the Court, in *Innovative Clinical*, *supra*, made the point moot when it expanded subsection (1) such that subsection (3) has no necessary application.

This somewhat confusing litany of judicial interpretation of Georgia's long-arm statute has been made more complicated by the federal courts, which held shortly after the enactment of the long-arm statute that it was coterminous with due process limits and adopted the "Illinois Rule" for subsection (2).[149] And, despite the holding in *Gust*, the federal courts in Georgia, particularly after the Eleventh Circuit's decision in *Francosteel Corp. v. M/V Charm*,[150] have continued to interpret the long-arm statute to the limits of due process, and thus ignore the contacts requirement of subsection (3),[151] with a few exceptions.[152]

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[149] The district court in Georgia (which was the first court to interpret the long-arm's "tortious act" language) adopted the "Illinois Rule," holding that the place of the injury is where the tortious act occurs. Scott v. Crescent Tool Co., 296 F. Supp. 147 (N.D. Ga. 1968) (upholding personal jurisdiction in negligence action against nonresident manufacturer of punch machine that injured resident plaintiff). Coming to this conclusion, the court looked to *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961), which interpreted an Illinois statute similarly to the Georgia statute at issue. The court stated that "[s]ince the Georgia legislature might have had the *Gray* case . . . in mind when it wrote a very similar statute for Georgia, there is good reason to think that the highest court in the state would similarly interpret the Georgia statute." *Scott,* 176 N.E.2d at 156-57. The court offered several justifications for adopting the broader interpretation, including the following (which are just as relevant today):

> [I]f the court decided that the negligence here could not be considered within § [9-10-91(2)], a gaping hole in Georgia's long-arm statute would be left. Cases of negligent manufacture outside the state are numerous and will continue to grow in number with the increased tempo of interstate business being done by corporate enterprise. The purpose of the statute is to protect Georgia residents from the torts of foreign corporations suffered within this state. The beneficiaries of this act would be ill-protected if they were forced to go to distant places to sue for injuries committed within this state by negligently manufactured goods from outside. Georgia should not be a safe haven for the negligence of foreign corporations sending goods into the state. This court will not impute to the Georgia legislature, nor to the Georgia courts, a desire to leave Georgia citizens unprotected in such an important, and growing, area of litigation.

Id. at 157.

[150] 19 F.3d 624 (11th Cir. 1994) (stating in dictum that general jurisdiction is available under Georgia's long-arm statute).

[151] Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 848-49 (11th Cir. 1988) (stating that subsections (2) and (3) have been "interpreted to the maximum limits of due process . . ." without mentioning *Gust*, decided eight months earlier, and instead applying the *Shellenberger* test, which it states applies to both subsections (2) and (3)); Barton S. Co. v. Manhole Barrier Sys., Inc., 318 F. Supp. 2d 1174 (N.D. Ga. 2004) (analyzing internet tort action under due process analysis because long-arm extends to limits of due process, but also finding lack of personal jurisdiction under due process); Horsley v. Feldt, 128 F. Supp. 2d 1374, 1377 (N.D. Ga. 2000) (citing *Francosteel*, and also stating that the Georgia Supreme Court after *Gust* reaffirmed due process limits policy of long-arm in Allstate v. Klein, 422 S.E.2d 863 (Ga. 1992), in holding that courts

Initially, some federal district courts followed the newly restrictive approach of the Georgia Supreme Court.[153] However, after *Francosteel*, where the Eleventh Circuit reaffirmed its view that the long-arm statute went to the limits of due process, most federal courts, while acknowledging *Gust* and the uncertainty of the extensiveness of the long-arm statute in some cases, construed the long-arm to the limits of due process and went straight to a due process analysis[154]—despite the fact that *Francosteel* was a breach of contract action that cited only breach of contract cases from the Georgia courts in evaluating the due process limits of the long-arm statute. Because *Francosteel* did not limit its assertion, as prior cases had, to contract actions and subsection (1) of the long-arm statute, federal courts appear ro have overlooked this important qualification and simply applied *Francosteel*'s gloss to tort actions,

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"may pass over analysis of the statute and exercise jurisdiction where the constitutional requirements are satisfied."); Peridyne Tech. Solutions, L.L.C. v. Matheson Fast Freight, Inc., 117 F. Supp. 2d. 1366, 1369 (N.D. Ga. 2000) ("Although there has been some disagreement as to whether the Georgia long-arm statute extends to the maximum extent of due process for all claims, numerous district courts in the Eleventh Circuit have held in recent decisions that the Georgia long-arm statute confers personal Jurisdiction to the full extent permitted by the Due Process Clause of the United States Constitution" and thus can go straight to due process analysis regarding all claims); Allegiant Physicians Servs., Inc. v. Sturdy Mem'l Hosp., 926 F. Supp. 1106, 1112-1113 (N.D. Ga. 1996) (recognizing controversy over whether long-arm extends to due process limits; although Eleventh Circuit in *Francosteel* continued to construe long-arm to due process limits, it was a contract action and did not specify whether it also applied to tort actions; however, in this case due process limits not met so no need to decide whether long-arm statute extends to due process limits for tort actions); Urspruch v. Greenblum, 968 F. Supp. 707 (S.D. Ga. 1996) (although refers to subsection (3), no mention of *Gust* and states the long-arm is coextensive with due process, citing *Francosteel* and thus extending to tort actions *Francosteel*'s statement regarding the long-arm's coextensiveness with due process limits); Howell v. Komori Am. Corp., 816 F. Supp. 1547, 1552 n.9 (N.D. Ga. 1993) ("Subsections two and three have the same analytical framework to determine whether jurisdiction is proper." Thus the court simply determines whether either the act or injury occurred in Georgia and then applies due process analysis).

[152] Weinstock v. Gannett, Inc., No. 1:00-CV-2935-ODE, 2001 WL 1147214 (N.D. Ga. June 20, 2001) (recognizing a distinction between subsections (2) and (3)—finding personal jurisdiction lacking in libel action due to defamation exception of subsection (2), and because defendant did not have contacts required by subsection (3)); James Whiten Livestock, Inc. v. W. Iowa Farms, *Co*., 750 F. Supp. 529, 532-534 (N.D. Ga. 1990) (*Gust*, together with *Bradlee*, established that subsections (2) and (3) are separate and to be construed literally; reasoning that *Gust* impliedly overruled *Clarkson Power Flow*'s holding that the same contacts of subsection (3) are mandated for subsection (2)); Cable News Network, Inc. v. Video Monitoring Servs. of Am., Inc., 723 F. Supp. 765, 769-70 (N.D. Ga. 1989) (interpreting "the *Gust* opinion as renouncing the broad reading of subsection (2) in favor of a literal reading . . ." thus, holding that only subsection (3) applies in this case because defendant's alleged act of copyright infringement occurred outside state).

[153] *See supra* note 152.

[154] *See supra* note 151.

ruling that the long-arm was coextensive with due process despite *Gust*.[155] And, when the Georgia Supreme Court in a footnote in *Allstate Insurance Co. v. Klein*,[156] restated that the policy of the long-arm statute is to obtain personal jurisdiction over nonresident defendants to the limits of due process, federal courts zeroed in on that statement to limit the *Gust* ruling, initially for contract actions, but then also for tort actions.[157] In taking the *Allstate* court's statement out of context, these federal courts have overlooked the fuller context of the ruling in *Allstate*, in which the Georgia Supreme Court held that the long-arm statute did not apply because Allstate was a resident foreign corporation and, thus, amenable to suit as any other resident of the state, making the footnote dicta.[158] Relying on this dicta and the *Francosteel* case, which involved a contract claim, federal courts expanded the policy of due process limits to all the subsections (categories) of the Georgia long-arm statute. This expansion process by the Eleventh Circuit culminated in *Nippon Credit Bank, Ltd. v. Matthews*, which was the first case where the exercise of personal jurisdiction under Georgia's long-arm statute was actually upheld under a general jurisdiction theory.[159]

c. The Defamation Exclusion of Subsection (2)

The defamation exclusion further highlights the trouble resulting from categorical long-arm statutes codifying and thus freezing in place what is thought to be the limits of due process at the time, and the resulting inconsistent application. It is out of date, based on a Fifth Circuit line of cases in the 1960s decided prior to the enactment of the long-arm, which held that First Amendment concerns required greater showing of contacts to satisfy due process in defamation cases against nonresidents.[160] The rationale was that, because First Amendment concerns required a heightened burden of proof,[161] then these same

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[155] *See, e.g.,* Urspruch v. Greenblum, 968 F. Supp. 707 (S.D. Ga. 1996).

[156] 422 S.E.2d 863, 865 n.1 (Ga. 1992).

[157] *See*, *e.g.*, Horsley v. Feldt, 128 F. Supp. 2d 1374 (N.D. Ga. 2000).

[158] *Allstate*, 422 S.E.2d at 865.

[159] *See supra* notes 102-04 and accompanying text.

[160] "It would appear that subsection [(2)]'s exclusion of causes of action for defamation of character is based on a line of decisions rendered by the Fifth Circuit Court of Appeals." Bradlee Mgmt. Servs., Inc. v. Cassells, 292 S.E.2d 717, 720 (Ga. 1982). One of the Fifth Circuit cases was New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966) (ruling that there were not sufficient contacts for an Alabama federal court to exercise personal jurisdiction over the New York Times, because "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity").

[161] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

concerns required a greater level of contacts under due process. However, this rationale was rejected by the United States Supreme Court in *Calder v. Jones*[162] and *Keeton v. Hustler Magazine, Inc.*[163] The *Calder* Court rejected "the suggestion that First Amendment concerns enter into jurisdictional analysis," explaining that "[t]he infusion of such concerns would needlessly complicate an already imprecise inquiry,"[164] and thus the *Keeton* Court "categorically [rejected] the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."[165] Thus, the conclusion appears inescapable that the defamation exclusion is an anachronism imposing a now-unnecessary limitation on Georgia's long-arm statute.

Eventually, the federal district court in the Northern District of Georgia completely disregarded the defamation exclusion, reasoning that, after *Calder*, the Georgia courts would uphold personal jurisdiction in defamation suits.[166] The court held that "[t]he 'effects' test affirmed in *Calder* is alive and well and Defendants' motions to dismiss Plaintiff's claims in this case based upon personal jurisdiction are squarely controlled thereby."[167] One might legitimately ask if the federal court, in light of *Erie*, might have respected federalism as well as separation of powers by restraining itself to commending a re-examination of the defamation exception to the attention of the legislature, rather than effectively "amending" the statute by a judicial gloss that ignores the defamation exclusion.[168]

Despite the "*Erie*-guess" by the federal district court that Georgia courts would disregard the defamation exclusion which makes unfounded assumptions that the Georgia appellate courts do not defer to the legislature, the Georgia Court of Appeals subsequently dismissed a defamation suit for lack of personal jurisdiction due to the defamation

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[162] 465 U.S. 783 (1984).

[163] 465 U.S. 770 (1984).

[164] *Calder*, 465 U.S. at 790.

[165] *Keeton*, 465 U.S. at 780, n.12.

[166] Horsley v. Feldt, 128 F. Supp. 2d 1374 (N.D. Ga. 2000) (upholding personal jurisdiction where anti-abortion activist sues for defamation due to statements defendants made on national television after plaintiff put crossed-out picture of murdered abortion doctor on his website), *aff'd on other grounds*, 304 F.3d 1125 (11th Cir. 2002).

[167] *Id.* at 1379.

[168] Further adding to the inconsistency, the following year, another district court judge held that a nonresident defendant was not amenable to personal jurisdiction under subsection (2) due to the defamation exception. *See* Weinstock v. Gannett, Inc., No. 1:00-CV-2935-ODE, 2001 WL 1147214 (N.D. Ga. June 20, 2001) (recognizing, however, that personal jurisdiction could be obtained in a defamation suit under subsection (3), but holding that defendant did not have the contacts required by that subsection).

exclusion in *Worthy v. Eller*.[169] The Court did not refer to *Horsley*, or even to *Bradlee Management Services, Inc.*'s acknowledgement of a limited exception to the defamation exclusion through subsection (3). In *Worthy*, though, the only contact was that the defamatory cause of action arose out of the defamatory act—there were not sufficient additional contacts that would allow application of subsection (3) to avoid the defamation exclusion of subsection (2).[170]

The contradictory interpretations of the defamation exclusion further highlight the necessity of a fairer, more predictable long-arm statute to apply which does not lead to differing interpretations, such that a plaintiff's right to relief turns on the court the plaintiff brings suit in.[171]

4. Limitations of the Statute in Light of Internet Commerce

As the personal jurisdiction jurisprudence of Internet commerce disputes evolves, courts must have a long-arm statute sufficiently flexible to adapt to the evolution so that its residents are not unfairly excluded from redressing grievances in their own state's courts from injuries inflicted by nonresidents using this rapidly growing medium. Indeed, otherwise the ability to resolve the exploding number of cases arising from e-commerce will be hindered in ways reminiscent of the problems, before *International Shoe*, in obtaining personal jurisdiction over nonresident defendants engaged in interstate commerce[172]—without resorting to ad hoc legal fictions or a plethora of clumsy "exceptions" to find personal jurisdiction to allow in-state plaintiffs to enjoy a domestic forum.

There are several differing interpretations of how to analyze personal jurisdiction in cases involving the Internet which are beyond the scope of this article.[173] The purpose of discussing the effect of the

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[169] 594 S.E.2d 699 (Ga. Ct. App. 2004) (defamation and intentional infliction of emotional distress action by husband against attorney representing wife in divorce action)..

[170] *Id.* at 700-01.

[171] The recent holding by the Georgia Supreme Court in *Innovative Clinical & Consulting Services, L.L.C. v. First National Bank of Ames*, 620 S.E.2d 352 (Ga. 2005), expanding subsection (1) to tort actions, will seemingly result in anomalous outcomes in exercising personal jurisdiction for defamation causes of action – if the defamatory act arises from the transaction of business, then personal jurisdiction will be available under subsection (1); but if the act does not arise from the transaction of business, then subsection (2) applies and its defamation exception will prevent the exercise of personal jurisdiction. No principled reason has been suggested for such a distinction.

[172] *See e.g.,* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).

[173] *See e.g.*, Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601 (2003); Nicholas R. Spampata, *King* Pennoyer *Dethroned: A Policy-Analysis-Influenced Study of the Limits of*

Internet on personal jurisdiction in this section is to highlight shortfalls of categorical long-arm statutes, such as Georgia's, which restrict residents' ability to redress injuries in their home state that arise in the milieu of the evolving commercial and other Internet activity of nonresidents.

The recent expansion of subsection (1) by the Georgia Supreme Court,[174] which rejected both the contract-only restriction and the requirement for physical contacts by the nonresident defendant with the state, has greatly increased the amenability of a nonresident to personal jurisdiction in causes of actions arising from the transaction of business over the Internet. Consequently, because the Court's decision now allows for obtaining specific personal jurisdiction to the limits of due process, there is greater need for principled guidance to ensure this power is applied predictably and fairly—in other words, due to the expansion of subsection (1), the focus has changed 180 degrees from a lack of sufficient protection for residents harmed from the transaction of business over the Internet (due to the previous contract-only and physical contact requirement), to a concern now that courts and the bar have at their disposal a way to analyze and to justify the exercise of personal jurisdiction without reaching past the limits of due process. Additionally, considerations such as whether the business was transacted in the state (where the website is located on an out-of state server, for example) will test long-arm statute notions of what constitutes "transacting any business within the state."

Despite the expansion of subsection (1), residents are still not fully protected in their ability to obtain long-arm jurisdiction over nonresident defendants in cases arising in the context of internet activity. There are circumstances where the technicalities of business transactions are not involved that will necessarily require the employment of subsection (2), with all its corresponding limitations, to obtain personal jurisdiction.[175] The literal reading of subsection (2) by the Georgia state courts, which requires the tortious act to be committed within the state, severely limits the ability of injured residents to obtain personal jurisdiction over

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Pennoyer v. Neff *in the Personal Jurisdictional Environment of the Internet*, 85 CORNELL L. REV. 1742 (2000); Allan R. Stein, Symposium, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411 (2004); Note, *A "Category-Specific" Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law*, 117 HARV. L. REV. 1617 (2004); Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821 (2003).

[174] *See supra* notes 106-117 and accompanying text.

[175] Because, as discussed previously, subsection (3) is now effectively superfluous, it is not necessary to discuss its limitations here.

nonresidents who commit "cybertorts." Using the Georgia state courts' literal reading, it is doubtful whether one located outside the state who hacks into a computer in the state and deletes or damages files, sends a virus, otherwise invades privacy, or commits a trespass to chattels involving a resident's computer or server, would be amenable to personal jurisdiction in Georgia, since the tortious act arguably takes place on the tortfeasor's computer outside the state. Additionally, the defamation exclusion is a further limitation: a plaintiff would have no recourse in Georgia courts under subsection (2) to a nonresident's posting of defamatory material on a website that could be accessed in Georgia and thus cause effects in Georgia. Hence, it is evident even from a cursory review that the long-arm statute in its current iteration is likely not sufficient to ensure a resident's ability to obtain personal jurisdiction for Internet-related torts where the transaction of business is not involved.

Given their activist roles as glossators upon the long-arm statute, however, the federal courts in Georgia would seem unlikely to let express statutory language stand in the way of the exercise of personal jurisdiction, given their assertion that the long-arm statute reaches to the limits of due process. The question would become, however, as it does with all judicial activism, how far are the federal courts willing to go in their departure from the moorings of the legislated word? And it is this question that raises a serious problem of indeterminacy in predicting with any reasonable accuracy, the contours of internet-based personal jurisdiction in diversity cases where Georgia law would provide the long-arm statute for the service of the federal court's process and upon which the validity of the ultimate judgment under Full Faith and Credit principles would depend.

The first internet-tort case in Georgia involving a nonresident defendant was litigated in a federal court, which upheld personal jurisdiction.[176] In that case, the plaintiff, a computer consulting corporation, entered into a consulting agreement with the defendant trucking corporation, which was located in California.[177] In providing the service, the corporations "repeatedly used their respective computer systems to interface and exchange information."[178] When the plaintiff demanded payment, the defendant corporation terminated the plaintiff's

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[176] Peridyne Tech. Solutions, L.L.C. v. Matheson Fast Freight, Inc., 117 F. Supp. 2d 1366 (N.D. Ga. 2000). Plaintiff's counsel stated in an interview that the "ruling mark[ed] the beginning of Internet case law in Georgia." R. Robin McDonald, *Internet Reach Allows Calif. Firm to be Sued Here*, FULTON COUNTY DAILY REPORTER., Oct. 19, 2000, at 1.

[177] *Peridyne Technology*, 117 F. Supp. 2d at 1368.

[178] *Id*. at 1369.

services, and an employee of the defendant corporation allegedly hacked into the plaintiff's computer system, inflicting damage on the plaintiff's server and, *inter alia*, stealing and deleting files.[179] The plaintiff brought several state law claims and federal computer fraud claims against the corporation and employee. Defendants, predictably, challenged whether the district court could exercise personal jurisdiction over them by means of service effectuated pursuant to the Georgia long-arm statute.[180] The court went straight to a due process analysis, stating that the Georgia long-arm statute had been construed to reach the limits of due process.[181] The court first noted "that the defendants should not be permitted to take advantage of modern technology via the Internet or other electronic means to escape traditional notions of jurisdiction."[182] In upholding personal jurisdiction, the court emphasized the location of the servers in Georgia as a key factor to a characterization of the tortious activity as having "occurred" in Georgia, and, based on that characterization, ruled consequently that the "plaintiff's claims arise out of or relate to the defendants' activities, albeit largely electronic, directed at Georgia."[183]

A federal court holding that would seemingly allow for personal jurisdiction in internet-related "defamation" actions was given in *Horsley v. Feldt*.[184] That case, as previously discussed,[185] allowed personal jurisdiction in a defamation action involving defamatory remarks on television.[186] The *Horsley* court, however, also approvingly cited a Virginia federal district court's finding of personal jurisdiction over a nonresident who posted defamatory remarks on a website which caused reputational harm to the Virginia plaintiff in Virginia where he lived and worked.[187] Therefore, it seems likely that the Georgia federal courts would do the same, despite the defamation exclusion of subsection (2).[188]

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[179] *Id*.

[180] *Id.*

[181] *Id*.

[182] *Id*. at 1371 (citing Cybersell, Inc. v. Cybersell. Inc., 130 F.3d 414, 419 (9th Cir. 1997) (internal quotations omitted).

[183] *Id*. at 1372. The Georgia state courts would likely now also uphold personal jurisdiction under subsection (1), since the claims arose out of the employer's transaction of business in the state with the plaintiff.

[184] 128 F. Supp. 2d 1374 (N.D. Ga. 2000).

[185] *Id. See also supra* notes 166-68 and accompanying text.

[186] This outcome should now be the same in Georgia's state courts, since the claim arose from the transaction of business, thus allowing the newly expanded subsection (1) to be employed.

[187] *Horsley*, 128 F. Supp. 2d 1374 (N.D. Ga. 2000) (citing Bochan v. La Fontaine, 68 F. Supp. 2d 692, 702 (E.D. Va. 1999)).

[188] The Virginia case did not involve the transaction of business, so in Georgia such a case would require application of subsection (2). Georgia's state courts would then have to apply the defamation exception and dismiss for lack of personal jurisdiction.

Yet, just because the federal courts have ruled first on these internet-based personal jurisdiction issues does not, of course, bind the Georgia courts. Indeed, under *Erie* principles, Georgia courts—as they have done in the past in other long-arm jurisdiction issues—may decide that the legislated language of the long-arm statute affords a narrower scope of extraterritorial jurisdiction in internet-based cases. Likewise, the rulings of individual district court judges do not actually bind the district court to follow these interpretations of the long-arm statute in future cases, no matter how advisable it may be for the district court to do so. And until the Eleventh Circuit weighs in on the scope of internet-based personal jurisdiction under Georgia law, there may well be considerable indeterminacy in the scope of extraterritorial personal jurisdiction countenanced by federal courts in internet-based cases. Thus, even under the best of circumstances, leaving the development of internet-based personal jurisdiction law to ad hoc, case-by-case glosses or on "applications" of a telephone-and-mimeograph-era categorical long-arm statute invites a level of indeterminate and expensive, contour-setting litigation that militates strongly for a complete reconceptualization of the long-arm statute by the Georgia legislature. That reconceptualization should start with a firm rejection of a "patchwork" regime that is incompatible with the rapidly evolving Internet world. After the recent holding by the Georgia Supreme Court, the Legislature should take the opportunity to exchange the old "patched-up" statute for one that provides due-process-limits protection to residents while providing guidance for principled, fair and predictable outcomes rooted in the fundamental rules established in *International Shoe*.

In the next two sections, the authors walk through the reconceptualization and legislation that they believe are needed to resolve the inconsistencies and indeterminacy they have exposed in Section II. A proposed long-arm statute that would do much to minimize inconsistencies and eliminate indeterminacy is discussed in Section IV. The visual reconceptualization of long-arm jurisdiction from which the model long-arm is derived is explored in Section III.

III. VISUAL RECONCEPTUALIZATION

Thus far, we have explained the operation of typical long-arm statutes at the rule-based level. Looking at specific cases decided under our chosen long-arm statute examples (i.e., Georgia's), we have established the unnecessary deficiencies of the old-style categorical long-arm statutes. The authors' evaluations have been made from the assumption that the statutes would operate better—more efficiently and fairly—if they reached to the limits of due process. Before proceeding

further to deal with the practical implications of our claim, the authors believe it is appropriate to establish more than the proposition that a due-process-limits approach to long-arm statutes will produce "better outcomes," for better-outcomes rationales offer only an instrumentalist perspective. As one of the authors has argued elsewhere, "instrumentalism is insufficient to meet our long-term jurisprudential needs."[189] Thus, the authors also believe it is necessary to establish that due-process-limits personal jurisdiction is supported at a higher level of principle—the important concepts that underlie every legitimate legal rule. The due-process-based long-arm jurisprudence of *International Shoe* is strongly supported by the relevant underlying principles, as we demonstrate below.[190]

The analytic framework for discerning the foundation of juridical jurisdiction, commonly called "personal jurisdiction," is focused on a single word encapsulating manifold and interlaced concepts, issues, and policies: power.[191] The power in question is that "of a state to apply its

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[189] Jeffrey A. Van Detta, *The Irony Of Instrumentalism: Using Dworkin's Principle-Rule Distinction To Reconceptualize Metaphorically A Substance-Procedure Dissonance Exemplified By Forum Non Conveniens Dismissals In International Product Injury Cases*, 87 MARQ. L. REV. 425, 427-428 (2004) [hereinafter Van Detta, *The Irony of Instrumentalism*].

[190] Van Detta, *The Irony of Instrumentalism*, *supra* note 189; Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 NW. J. INT'L. L. & BUS. 53 (2003) [hereinafter Van Detta, *Justice Restored*].

[191] John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591 (1995); TEPLY & WHITTEN, *supra* note 6, at 164. The origins of modern personal jurisdiction doctrine are rooted in "the concept that governments had *territorial* power over persons and things within their boundaries." TEPLEY & WHITTEN, *supra* note 6, at 125. This is reflected in the most famous personal jurisdiction opinion of them all, *Pennoyer v. Neff*. 95 U.S. 714 (1878). *See* Adrian M. Tocklin, Pennoyer v. Neff: *The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75 (1997). In *Pennoyer*, Justice Field made it clear that his "territorial rule" is based on the enterprise regulation principle:

> To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *Status* of one of its citizens towards a non-resident . . . . The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on . . . .
>
> . . . Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked . . . .

Pennoyer, 95 U.S. at 734-35. The American model of personal jurisdiction that arose with *Pennoyer* has come under attack from numerous scholars, particularly on the constitutionalization of personal jurisdiction doctrine. It is true that the doctrine is less

local law."[192] The classic expression of state power is the minimum contacts rules articulated in *International Shoe v. Washington*.[193] Those rules are based on the internal structure of the litigation — they describe a fixed number of scenarios based on an internal structure composed of facts about the defendant, the litigation, and the forum.[194] The relationship among this triumvirate of variables can conveniently be called a litigation event,[195] and the litigation event is created by the common intersection at their domains, as illustrated on the following page by Diagram 1.

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than perfect, and that the Supreme Court's struggle to articulate workable common-law jurisdictional rules has left analytic holes and excessive judicial intervention due to the heavily factual nature of the multi-factored legal tests that courts employ. However, efforts to separate personal jurisdiction from the regulatory powers of the state, as much of the scholarship in this area of late has been devoted to attempting, is misplaced. For example, some commentators see *Pennoyer's* influence differently—as undermining rather than strengthening personal jurisdiction law by placing the defendant's in forum physical presence in a posture of primacy. Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2190-92 (1997). In terms of defendants located outside of the forum, this is certainly true, but that observation is insufficient to undermine the territorial personal jurisdiction. To the contrary, the territorial principle still has validity for if it is not the defendant's contacts that justify the exercise of personal jurisdiction, then it may be the plaintiff's contacts—i.e., residence in and injury in the state—that give rise to the kinds of regulatory interests that justify application of jurisdiction and substantive law. Van Detta, *The Irony of Instrumentalism*, *supra* note 187, at 472 n.125. *Pennoyer* and the sovereignty model of personal jurisdiction continue to be the theoretical underpinnings that justify the core of most assertions of jurisdiction by state courts. *See* Stewart Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 434, 473 (1981) (*International Shoe* is neither an exception to nor an overruling of *Pennoyer*, but is "representative of a different basis for approaching jurisdiction"); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction,* 63 WASH. U. L.Q. 377 (1985) (arguing that, because assertions of jurisdiction are exercises of sovereignty, limits on judicial power must be derived from limits on the sovereignty of the states). *But see* Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 735-36 (1983) (criticizing the role of sovereignty and state interests in personal jurisdiction doctrine).

[192] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 (1971).

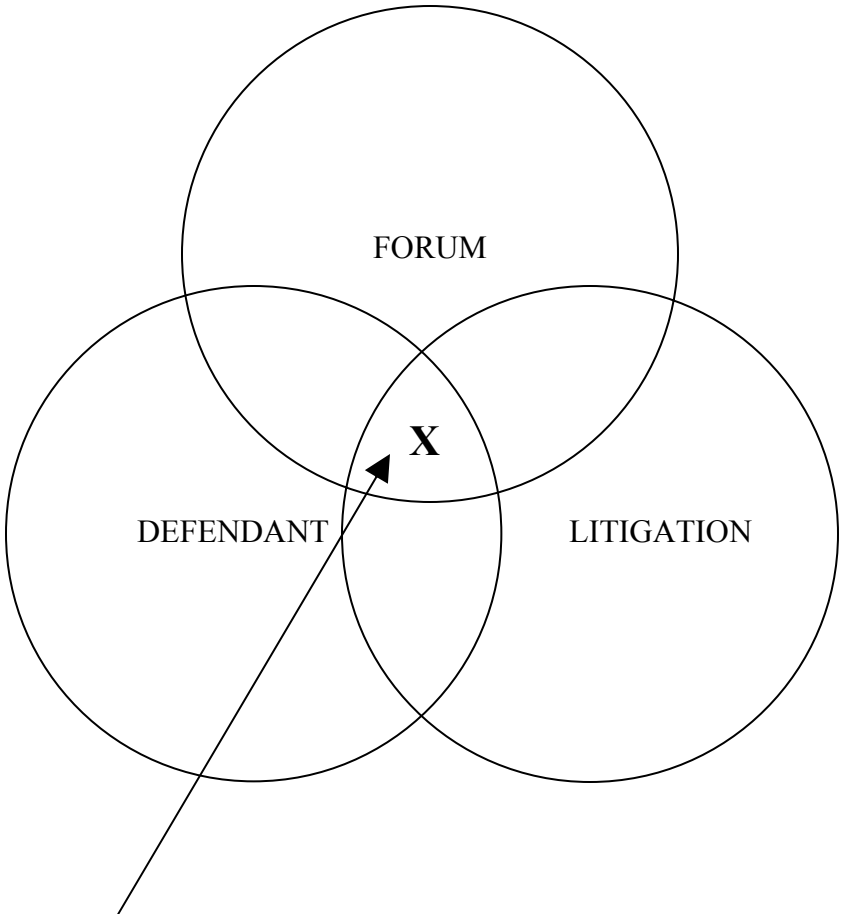
[193] 326 U.S. 310 (1945).

[194] *Id*. at 317-18.

[195] For a complete discussion of the nature and significance of the concept of "litigation event," see Van Detta, *The Irony of Instrumentalism*, *supra* note 189, at 441-47.

DIAGRAM 1

Constitutional Limits on Personal Jurisdiction: The Domain of Minimum Contacts[196]



[196] *See* Int'l Shoe v. Washington, 326 U.S. 310, 317–18 (1945); Patricia Youngblood, *Constitutional Constraints on Choice of Law: The Nexus Between* World-Wide Volkswagen Corp. v. Woodson *and* Allstate Ins. Co. v. Hague, 50 ALB. L. REV. 1, 3-11 (1985).

The intersection of the three fact domains in a common domain of overlapping operative facts produces a subset of *minimum contact* facts that create a *litigation event* and have significance for the operation of juridical jurisdiction rules. As Professor Youngblood pointed out in 1985, *International Shoe* "identified two jurisdictional variables of primary relevance" that function as the basis for the minimum contacts rules: [1] "the quantity or frequency of the defendant's forum acts" which "distinguishes continuous and systematic forum contacts from single or occasional forum contacts"; and [2] "the relationship these acts bear to the cause of action upon which the plaintiff sues."[197]

There are four possible combinations for describing the litigation event using these variables, as Professor Youngblood illustrated using the graphic metaphor of the Cartesian coordinate plane represented in Diagram 2.[198] Diagram 3 illustrates that each of the four quadrants of Professor Youngblood's Cartesian metaphor is an archetypical litigation event to which one of the four general rules articulated in the *International Shoe* opinion directly corresponds.

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[197] Youngblood, *supra* note 196, at 5.
[198] *Id.* at 6.

DIAGRAM 2

Cartesian Metaphor for Personal Jurisdiction Rules[199]

CAUSE OF ACTION

TYPE OF CONTACT	**CONNECTED**	**UNCONNECTED**
CONTINUOUS & SYSTEMATIC	QUADRANT I Continuous & Systematic Contact & Connected Cause of Action	QUADRANT III Continuous & Systematic Contact (Quantity Focus) & Unconnected Cause of Action (Quality Focus)
SINGLE OR OCCASIONAL	QUADRANT II Single or Occasional Contact (Quantity Focus) & Connected Cause of Action (Quality Focus)	QUADRANT IV Single or Occasional Contact & Unconnected Cause of Action

[199] Youngblood, *supra* note 196, at 6.

DIAGRAM 3

Detailed Cartesian Metaphor for Personal Jurisdiction: Correlation with International Shoe[200]

CAUSE OF ACTION

TYPE OF CONTACT	**CONNECTED**	**UNCONNECTED**
CONTINUOUS & SYSTEMATIC	QUADRANT I Continuous & Systematic Contact & Connected Cause of Action "'Presence' in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on. . . ." 326 U.S. at 317.	QUADRANT III Continuous & Systematic Contact (Quantity Focus) & Unconnected Cause of Action (Quality Focus) "[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318.
SINGLE OR OCCASIONAL	QUADRANT II Single or Occasional Contact (Quantity Focus) & Connected Cause of Action (Quality Focus) "[T]he commission of some single or occasional acts . . . because of their nature and *quality* and the circumstances of their commission, *may* be deemed sufficient to render the corporation liable to suit." 326 U.S. at 318 (citations omitted) (emphasis added).	QUADRANT IV Single or Occasional Contact & Unconnected Cause of Action "Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." 326 U.S. at 317 (citations omitted).

[200] Correlation legend between quadrants and rules as stated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Professor Youngblood notes that litigation events in Quadrants I or IV "compel[] a particular conclusion" about whether the litigation event falls within the rules of juridical jurisdiction.[201] By contrast, she observes that litigation events within Quadrant II or III sit in gray areas of the rules:

> [T]here exists one supporting and one debilitating jurisdictional factor. In Quadrant II cases, involving single or occasional acts and a cause of action connected to those acts, the propriety of the jurisdictional exercise will depend upon the *quality* of the defendant's forum acts. In Quadrant III, the constitutional propriety of a jurisdictional exercise . . . depends upon the *quantity* of the defendant's forum [connections].[202]

Significantly, the forum court may assert jurisdiction where a corporate defendant is incorporated in the forum, makes its headquarters in the forum, or "does"—rather than merely "transacts"—"business" in the forum.[203] Professor Youngblood's graphic depiction of the litigation

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[201] Youngblood, *supra* note 196, at 7.

[202] *Id.* at 7-8 (citations omitted).

[203] *International Shoe* instructs us that a Quadrant III analysis becomes transformed into a conclusion of general jurisdiction when corporate activities become "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. General jurisdiction exists when the forum state has "a regulatory relationship with the defendant sufficient to justify jurisdiction over any and all claims." Mary Twitchell, *Why We Keep Doing Business With Doing Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 171-72, 205 (2001). Professor Twitchell notes that "doing business" jurisdiction is a form of general personal jurisdiction that applies when "the state would be justified in deciding a claim that is wholly unrelated to the defendant's forum contacts." *Id.* at 172. General jurisdiction clearly applies to the forum states in which a corporate defendant is either incorporated or has its principal place of business. *Id.* at 171-72.

Professor Sarah Cebik has tied general jurisdiction over corporate defendants to sovereign interests in regulating the conduct of a corporation which it incorporated, which develops corporate policy within the forum (i.e., headquarters or autonomous branch office functions), or which conducts "core activities" in the forum. Sarah R. Cebik, *A Riddle Wrapped in a Mystery Inside an Enigma: General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 33, 36, 40 (1998). This is another way of saying that general jurisdiction based upon any of the three factual bundles present in a litigation event is most persuasively supported by the enterprise regulation principle. Van Detta, *The Irony of Instrumentalism*, *supra* note 189, at 477 n.135. As Professor Cebik describes it, "an 'interest' in the defendant [sufficient for general jurisdiction] is legitimate if the state would have a reason to be concerned about the rights and duties of the defendant under any circumstances." Cebik, *supra*, at 33.

For other views of the scope and application of the general jurisdiction rule, see, for example, Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723 (1988); Friedrick K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141 (2001); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 722, 741, 758

event as rules of juridical jurisdiction is firmly rooted at the level of principle.[204] Indeed, each of the rules depicted by the four Quadrants directly corresponds to the interaction of the corrective justice and enterprise regulation principles.[205] The principles apply to the basic

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(1987) (finding close connection between "doing business" general jurisdiction and the most significant interest test for applying forum law).

[204] *Burnham v. Superior Court* implicitly recognized the significance of the enterprise regulation principle for the rules of juridical jurisdiction:

> [A] "totality of the circumstances" test [] guarantee[s] what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence. It may be that those evils, necessarily accompanying a freestanding "reasonableness" inquiry, must be accepted at the margins, when we evaluate *non*traditional forms of jurisdiction newly adopted by the States. But that is no reason for injecting them into the core of our American practice, exposing to such a "reasonableness" inquiry the ground of jurisdiction that has hitherto been considered the very *baseline* of reasonableness, physical presence.

495 U.S. 604, 626-27 (1990) (citations omitted) (emphasis added). The physical presence of the defendant in a forum that forms "the very baseline of reasonableness" (to use language of personal jurisdiction) explains the power of the finding that a defendant is subject to the personal jurisdiction of the forum. *Id*. at 627. Assignment of a "litigation event" to the rule of Quadrants I, II, or III and satisfaction of that rule is more than a conclusion that a court is empowered to hear a particular dispute. It is also a finding that the state's substantive law may regulate the actions of the parties. The stronger the case for personal jurisdiction, the stronger the case for applying the forum state's law. James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872; Courtland H. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS. L. REV. 869 (1981); Youngblood, *supra* note 196, at 50-51. Indeed, as Professor Youngblood has observed, there are a "myriad of values . . . linking judicial and legislative jurisdiction." Youngblood, *supra* note 196, at 38. As Professor Korn has observed, "[i]n the United States, . . . the permissible extrastate reach of each state's law is circumscribed by federal constitutional limitations—analogous to those governing the reach of its judicial jurisdiction—commonly referred to as constraints on each state's 'legislative jurisdiction.'" Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Torts*, 97 COLUM. L. REV. 2183, 2196 (1997). Professor Stein has defined legislative jurisdiction as "[t]he sphere of a state's substantive rule making authority, its 'legislative jurisdiction,'" and notes that legislative jurisdiction "is tied to its interest in regulating activity within its borders." Stein, *supra* note 201, at 742.

[205] In this sense, personal jurisdiction doctrine leads cleanly to an underlying observation that connects personal jurisdiction to regulatory power via the due process clause. Indeed, "a forum's assertion of jurisdiction constitute[s] the imposition of its sovereign's regulatory machinery." *See, e.g.*, Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 273-76 (1991); Philip F. Cramer, Note, *Constructing Alternative Avenues of Jurisdictional Protection: Bypassing* Burnham's *Roadblock Via* § 1404(A), 53 VAND. L. REV. 311, 325-26 (2000) (discussing "a unified theory of jurisdiction based on the idea of jurisdiction as not place but rather the imposition of a regulatory regime"); *see also* Harry B. Cummins, Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1963); Allan R. Stein, *Styles of Argument and Interstate Federalism In the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63

human areas of endeavor that produce the three broad categories of civil law subjects out of which a plethora of most modern non-criminal law grow: torts, contracts, and property law. Moreover, these principles are sufficiently generous in scope to take within them both individual, as well as corporate and other business associational, activities that typically give rise to issues and claims classifiable under long-recognized divisions of tort law, contract law, property law, or combinations of them. By far, however, the greatest significance of both long-arm statutes as well as these principles lies in their application to claims that are rooted in business activity – particularly the commerce of the most prevalent business associations of them all, the corporation, in its dealings with business entities, groups, individuals, and the public generally.

Corrective justice is the "principle that requires compensating individuals for injury caused to their persons and property when corporations engage in commercial activity that creates a nonreciprocal risk to those individuals."[206] Enterprise regulation is the "principle that sovereigns should regulate conduct of corporations that they either create or assist by fostering a business environment in which corporations may operate."[207] These two principles are related in that "[t]he enterprise

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WASH. U. L.Q. 377 (1985) (arguing that, because assertions of jurisdiction are exercises of sovereignty, limits on judicial power must be derived from limits on the sovereignty of the states). This "unified standard for both general and specific jurisdiction not only recognizes that imposition of the appropriate regulatory regime should be the real issue, but it also acknowledges the merging of choice of jurisdiction with choice of law." Cramer, 53 VAND. L. REV. at 333. Included in this "machinery" is the substantive law (including choice of law rules) that implement the state's legislative policies—the very fabric that controls the conduct of the state's individual and corporate citizens. Professor Heiser has effectively summarized this relationship as the natural implication of the multi-branch system of government in the American model:

> [T]he assertion of personal jurisdiction is not merely the assertion of the right to decide a case between the parties at a given geographical location. Rather, as Maier and McCoy explain, the selection of the forum is the selection of an "entire decision-making regime." Constitutional controls on personal jurisdiction, Maier and McCoy astutely observe, "determine the legitimacy of the forum as a decision maker and thus the legitimacy of imposing that forum's policy choices" on the parties. What is at stake in the constitutional restriction on personal jurisdiction is whether it is unfair for the forum to select and apply the legal policies that will govern the relationship between the plaintiff and the defendant as to the cause of action. Convenience in terms of geographic location is not much of a concern, and will be increasingly less so as technology makes interstate litigation even easier than it already is.

Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 935-37 (2000) (footnotes omitted).

[206] Van Detta, *The Irony of Instrumentalism*, *supra* note 189, at 442.

[207] *Id.* at 442–43.

regulation principle makes it legitimate for a sovereign to act to affect the corrective justice principle."[208] While their interaction implicates both substantive and procedural rules,[209] of interest to us is how this interaction corresponds to the procedural rules of personal jurisdiction—namely, that a court may exercise jurisdiction over a defendant only if the forum sovereign has a legitimate interest in regulating the defendant's conduct.

The correspondence between the four Quadrants and the interaction of the corrective justice and enterprise regulation principle is effectively illustrated in Diagram 4. In Quadrant I, each litigation event falls within the domains of both the corrective justice *and* enterprise regulation principles. In contrast, Quadrant IV comprises those litigation events within the domain of the corrective justice principle, but outside of the enterprise regulation principle—in other words, the plaintiff has suffered a wrong, but the forum in question cannot adjudicate or remedy the wrong. Significantly, the two "gray area" litigation events described by Quadrant II and III sit on the limbs of intersection between the domain of the corrective justice and the enterprise regulation principles. As limb-dwellers, those litigation events in Quadrant II or III may fall either *inside* the common domain of the two principles[210]—or *outside* of the

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[208] *Id.* at 443.

[209] *Id*. at 441.

[210] The personal jurisdiction rules of *International Shoe* already imbed a shorthand *forum non conveniens* analysis—not as elaborate as the Gilbert factors but directed at the same kind of facts. *See* Jacquelyn Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 664-65 & nn.105-20 (1992); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 803-05 & nn.88-92 (1985); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1266 & nn.23-117 (1986). As to Quadrant III cases where corporations are sued in a home state, however, Chief Justice Stone clearly assumed that no FNC-type analysis would apply when a corporation was sued where it resides. An "'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant" to determine whether the demand the court makes based on the defendant's contacts with the forum "make it reasonable . . . to require the corporation to defend the particular suit" in the forum. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). Indeed, it is quite plausible that the convenience factors were not meant to come into play when minimum contacts are established in Quadrants II and III. To the contrary, the convenience factors do not "short-circuit" the exercise of personal jurisdiction in cases where there are minimum contacts. The convenience factors merely function as a means of articulating *why* a Quadrant II or III case that does not present sufficient forum contacts not be dismissed because such cases fall outside of the domain illustrated in Diagram 1. So complete is the analysis under the convenience branch that Professor Heiser observes that sufficient minimum contacts for sovereignty purposes generally guarantee that there will be no "manifest and grave" inconvenience, and that the convenience branch analysis effectively renders the FNC analysis moot:

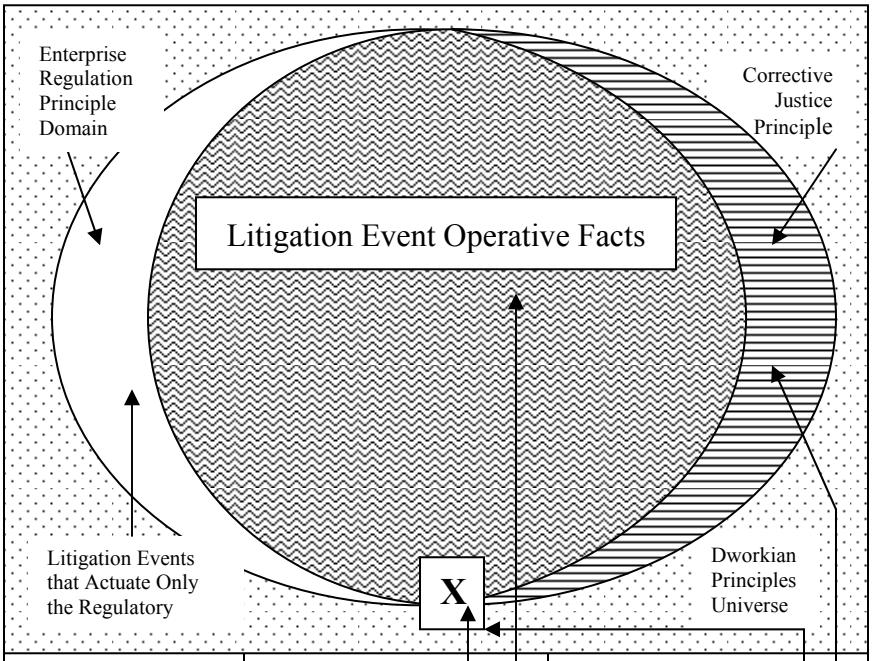
common domain and solely within the corrective justice principle's domain.

> In light of the current level of communication and litigation technology, such due process violations should rarely occur. Inconvenience to the defendant should only be sufficient to defeat personal jurisdiction on an individualized basis, but does not provide justification for broad invalidating rules such as "minimum contacts."

Heiser, *supra* note 205, at 935-36.

DIAGRAM 4

Conceptualization of Litigation Events as Principles Mapped to Juridical Jurisdiction Rules



	CONNECTED CAUSE OF ACTION	UNCONNECTED CAUSE OF ACTION
CONTINUOUS & SYSTEMATIC CONTACT	QUADRANT I Continuous & Systematic Contact & Connected Cause of Action	QUADRANT III Continuous & Systematic Contact & Unconnected Cause of Action
SINGLE OR OCCASIONAL CONTACT	QUADRANT II Single or Occasional Contact & Connected Cause of Action	QUADRANT IV Single or Occasional Contact & Unconnected Cause of Action

Operative facts of litigation events fall within domain of Corrective Justice Principle, but outside domain of Enterprise Regulation Principle—Maps to Cartesian (Quadrant IV).

Operative facts of litigation events fall within domain of both Corrective Justice and Enterprise Regulation Principles—Maps to Cartesian (Quadrant I).

X — Falls on limb of intersection between domains of Enterprise Regulation and Corrective Justice Principles—May fall outside Enterprise Regulation Principle Domain depending on [1] Quality and/or [2] Quantity of minimum contacts (Quadrants II and III).

IV. MODEL LONG-ARM STATUTE

A. Option For Reform: Why a Due-Process-Limits Long-Arm Statute Guided by Predicted-Outcome Rules of International Shoe *is the Better Choice*

It is evident from the reconceptualization in Section III that at the level of principled theory, long-arm jurisdiction practiced within the parameters of *International Shoe* serves critical state interests. The state's interests in providing a forum to protect its citizens from harm, or to at least secure compensation for their injuries and to regulate business activity affecting their citizens, have their theoretical underpinnings in the corrective justice and enterprise regulation principles. As we have demonstrated, the *International Shoe* approach to long-arm jurisdiction is an elegant and congruent expression of those principles through positive law. Therefore, rather than continuing to build long-arm statutes on outdated proto-models[211] (such as the classic Illinois, New York, and Georgia long-arm statutes), or to open long-arm jurisdiction to the limits of due process without specific statutory guidance as to what those limits are (forcing litigants to divine limits from Delphic appeals courts pronouncements on an ad hoc basis), the authors advance a different

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[211] Some commentators argue for a return to categorical-based long-arms. Professor McFarland concludes that the better policy choice is for states to adopt categorical long-arm statutes. McFarland, *supra* note 3, at 536-37. However, as we showed in Section II, *supra*, the states desire to exercise personal jurisdiction to the limits of due process. Therefore, it does not make sense to limit long-arm statutes to specifically enumerated categories which will inevitably cause unfair results for a resident plaintiff as the categorical approach fails to keep up with new circumstances and rapidly evolving Internet-based technologies. Nor do we concur that the only other available option is to "adopt the worst of both worlds by adding a catch-all, no-limits clause to an enumerated-acts long-arm statute." *Id.* at 537. A state should, instead, have a due-process-limits long-arm statute with principled-based guidance for its application.

Other scholars have proposed recently not merely a return to categorical long-arm statutes, but would seek to federalize this approach to establish uniformity. Accordingly, these writers propose using a draft Hague treaty as the model for a federal statute which all states would be required by Congress to adopt. KEVIN M. CLERMONT & KUO-CHANG HUANG, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, *in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 191 (John J. Barcelo III & Kevin M. Clermont eds., Kluwer Law International 2005). In addition to the reasons already discussed for not perpetuating categorical long-arm statutes, this proposal has additional drawbacks when examined through the lens of federalism. Not only would the states be giving up control over a traditionally state procedural matter to the federal government, but they would be doing so based on a treaty involving compromises with and among other nations. In essence, foreign preferences in international personal jurisdiction would end up dictating purely interstate personal jurisdiction matters (where there is no foreign-citizen defendant involved). It is doubtful that states would be agreeable to such a loss of sovereignty, nor that it would address the enterprise regulation and corrective justice needs examined above.

approach. That approach is to create a long-arm statute that in its terms embodies the relevant limits, considerations, and factors that define the limits of due process, as distilled from the jumble of decided cases.

Here, for example is how such a twenty-first century statute might be drafted in Georgia:

> Title 9, Chapter 10, of the Georgia Civil Practice Act, as codified, shall be amended to add a new section to be numbered "9-10-100." The text of 9-10-100 follows:
>
> 9-10-100 [1]: It shall be the policy of the State of Georgia that jurisdiction under this section shall be exercised to the limits provided under due process as delineated by the decisions of the United States Supreme Court.[212]
>
> 9-10-100 [2]: Definitions:
>
> A. *Prejudice* shall mean that the defendant cannot enjoy the opportunity to present a defense that satisfies the minimum standards of due process of law in the U.S. Constitution. To demonstrate prejudice, a defendant must by a preponderance of the evidence establish that it would be a manifest miscarriage of justice for trial to be held in the plaintiff's chosen forum. In order to establish such a manifest miscarriage, defendant must show that:
>
> 1. It would be deprived of access to evidence necessary to preserve a substantial right; or
>
> 2. The cost of the litigation in the forum is so disproportionate to the defendant's financial and physical resources that defendant would be deprived of the opportunity to be heard; or

---

[212] Of course, some state constitutions may have been construed to provide greater due-process protections than those afforded under the U.S. Supreme Court's decisions defining the contours of federal due process under the Fifth and Fourteenth Amendments. If that is the case in a particular state, the legislature would need to take two additional steps. First, evaluate case law to determine whether *state* due process rights have been invoked to protect nonresident defendants from overreaching exercise of personal jurisdiction by that state's courts. *See, e.g.*, Jeffrey A. Van Detta, Comment, *Compelling State Interest Jurisprudence of the Burger Court: A New Perspective on* Roe v. Wade, 50 ALB. L. REV. 675 (1986) (discussing state constitutions as independent sources of government protection of individual rights, and the potential for greater protection sometimes afforded in state constitutions). Second, if state due process is found to figure into the jurisdictional equation, then a legislature would need to decide how to craft this section to address the level of due process, or similar, state constitutional protection afforded to nonresidents who find themselves defending a case in the courts of that state.

> 3. The forum state has no legitimate, regulatory interest in the defendant's conduct that might be advanced by adjudication in the forum; or
>
> 4. It would violate the defendant's rights under an international treaty ratified by the United States or to which the United States is a signatory.

In determining prejudice to the defendant of a trial in the forum, the fact there may be other fora in which the action may be filed shall be accorded no consideration.

B. *Minimum contacts* shall mean the operative facts that describe a relationship between the defendant and the forum. These operative facts are those that define "the litigation event," which includes all of the facts out of which the relationship between the defendant, the forum, and the cause of action arose.

C. *Defendant* shall mean a non-resident natural person or juridical entity who is not a citizen or resident of the State of Georgia at the time a lawsuit is commenced in a state or federal court in Georgia.

D. *Cause of action* shall mean any set of facts admissible in evidence that creates a claim for relief under applicable law.

E. *Arising out of,* when used in reference to a cause of action in this section, shall refer to the circumstances in which a defendant's minimum contacts form the common set of operative facts, the litigation event, that also give rise to the plaintiff's cause of action.

F. Every use of the masculine pronoun shall include the feminine pronoun.

9-10-100 [3] Exercise of Personal Jurisdiction by the Courts of this State Over Defendants Neither Resident In Nor Served Within the State

A. General Rule of Court Access

In all civil cases, a court of the State of Georgia —

> (i) may exercise personal jurisdiction over the defendant consistent with the sovereignty

requirements of the U.S. Constitution as expressed in Section 3.B, *infra*; and

(ii) shall not dismiss a case under this section unless the defendant makes one of the showings specified in Section 3.C, *infra*.

B. Minimum Contacts and Limits of State Sovereignty Over Defendants

1. In all cases in which it is shown a defendant has systematic and continuous minimum contacts with the forum and the plaintiff is suing on one or more causes of action arising out of those contacts, it is conclusively presumed that the courts of the state have personal jurisdiction over the defendant.

2. In all cases in which it is shown that a defendant has only single or occasional minimum contacts with the forum and the plaintiff is suing on one or more causes of action arising out of those contacts, a presumption arises that defendant is subject to personal jurisdiction in the courts of the state. The defendant may rebut that presumption through admissible evidence that clearly and convincingly dispels this presumption to the satisfaction of the forum court.

3. In all cases in which it is shown that a defendant has continuous and systematic minimum contacts with the forum state, and plaintiff's cause of action does not arise out of those contacts, the inquiry shall be whether the defendant's activities physically within a state, or directed to persons within the state by electronic communications, are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. Personal jurisdiction shall be found when the plaintiff—

i. establishes that defendant is either incorporated in the forum or maintains a principal residence, a functional headquarters, or a branch office in the forum; or

ii. establishes that the defendant's contacts with the forum demonstrate that defendant has engaged in such a continuous and systematic course of "doing business" in the forum as to support the conclusion that it is virtually present in the forum; or

iii. establishes that one of his causes of action are related to the defendant's forum contacts and defendant would not be prejudiced by maintenance of the entire suit within the forum.

4. In all cases in which it is shown that a defendant has only single or occasional minimum contacts with the forum and the plaintiff's cause of action does not arise out of those facts, the absence of personal jurisdiction over the defendant is established as a matter of law.

5. The showings described in this section shall be made by a preponderance of admissible evidence, except as specifically stated otherwise.

C. Grounds for Dismissal Upon Defendant's Showing of Prejudice

1. In all cases in which a defendant has systematic and continuous minimum contacts with the forum and the plaintiff is suing on one or more causes of action arising out of those contacts, it is conclusively presumed that defendant cannot establish prejudice and that personal jurisdiction may properly be exercised.

2. In all cases in which a defendant has only single or occasional minimum contacts with the forum and the plaintiff is suing on one or more causes of action arising out of those contacts, a presumption arises that defendant is not prejudiced by the maintenance of action in the forum and that personal jurisdiction may properly be exercised. The defendant may rebut that presumption through admissible evidence that clearly and convincingly establishes prejudice.

3. In all cases in which a defendant has continuous and systematic minimum contacts with the forum and plaintiff's cause of action does not arise out of those

contacts, a presumption arises that defendant is prejudiced by maintenance of the action in the forum and that personal jurisdiction is therefore not properly exercised. The plaintiff may rebut that presumption through admissible evidence that:

i. establishes that defendant is either incorporated in the forum or maintains a principal residence, a functional headquarters, or a branch office in the forum; or

ii. establishes that the defendant's contacts with the forum demonstrate that defendant has engaged in such a continuous and systematic course of "doing business" in the forum as to support the conclusion that it is virtually present in the forum; or

iii. establishes that one of his causes of action are related to the defendant's forum contacts and defendant would not be prejudiced by maintenance of the suit within the forum.

4. In all cases in which a defendant has only single or occasional minimum contacts with the forum and the plaintiff's cause of action do not arise out of those facts, prejudice to defendant requiring dismissal of the case shall be conclusively presumed.

5. The showings described in this section shall be made by a preponderance of admissible evidence, except as specifically stated otherwise.

COMMENTS TO SECTION 9-10-100

Comment to Section 9-10-100[2]A: The definition of prejudice is a consolidation of the factors given in the "convenience" branch ("traditional notions of fair play and substantial justice") of the *International Shoe* test as articulated in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and tweaked, for international elements, by *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). The intent is to make more concise and coherent the factors given in those two cases, based on the notion that the real point of the "convenience" branch of International Shoe (as delineated by Justice White in *World-Wide Volkswagen*) is not really so much "reasonableness" or "convenience" or "traditional notions, etc.",

but that it instead boils down to *prejudice*. The prejudice factors given in this section also incorporate the overlapping factors from *forum non conveniens* analysis, recognizing that both analyses are essentially the same. As one commentator noted, because the *forum non conveniens*

> private and public interest factors, taken together, overlap to a large degree with the reasonableness factors from the personal jurisdiction test, as articulated by the [United States Supreme] Court . . . it would appear that the court is required in nearly all cases to apply the same factors twice; once as part of the personal jurisdiction inquiry, and again as part of the forum non conveniens balancing test.[213]

Comment to Section 9-10-100[2]B: Traditionally, minimum contacts have been defined instrumentally by the concept of purposeful availment. For example, synthesizing much case law on the subject, it appears that courts count defendant-forum contacts as "minimum contacts" where it was reasonably foreseeable to the defendant that the defendant's conduct would affect a person, business entity, property, or another legally protected interest within the forum. However, such terminology misfocuses the inquiry. It suggests that the courts must divine the intent of the defendant in creating contacts, and must apply a tort-type standard of foreseeability in deciding whether a connection between the defendant and the forum state should be classified as "foreseeably" affecting an interest in the forum state. We, however, think that such inquiries border on the metaphysical, and they import tort-type notions of proximate cause into an inquiry where they are inappropriate. Proximate cause seeks to impose judicial policy-making limits on the extent of tort liability, by, in effect, cutting off the natural consequences of a factual cause analysis by empowering fact-finders to declare that causation, although logically linked, must be cut off at some point, on the grounds of an amorphous and ill-defined policy on limiting liability. Concomitantly, importing that standard into personal jurisdiction analysis has the effect of deflecting the inquiry to a mode of constricting jurisdiction in all civil cases on the basis of a tort-type policy limitation for liability. This is inappropriate. In fact, it gives double-duty, in torts cases, and consequential damages cases in contract law, to a proximate

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[213] Lonny Hoffman, *Forum Non Conveniens—State and Federal Movements*, ALI-ABA COURSE OF STUDY MATERIALS: CIVIL PROCEDURE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURT 441, 441 (Feb. 2002).

> cause analysis, which is already available to curtail liability in the substantive phase of the case. It is inappropriate to deny plaintiffs a forum on that basis, particularly since personal jurisdiction is primarily based on two concepts that are connected, yet in constant tension: [1] the convergence of the corrective justice and enterprise regulation principles and [2] the avoidance of unbearable prejudice on non-resident defendants. That tension is best resolved on the basis of treating all contacts as relevant under the "litigation event" approach, rather than isolating certain contacts from the litigation event as determinative and elevating them in importance over the cumulative effect of the whole and disadvantaging the plaintiff if those particular paradigm facts don't fall within a zone of foreseeability. It is more appropriate to find a broad power of personal jurisdiction when the entire factual scenario points to appropriate exercise of personal jurisdiction, without superimposing substantive law concepts of liability limitation through the importation of a pseudo-proximate cause standard into the personal jurisdiction analysis. Rather, that question is better addressed in the forum courts as part of the "merits" of the claims themselves by means of traditional proximate cause analysis, which relates more to foreseeability of extent of liability, rather than of being haled into court. That is not to say the foreseeability is not a component of personal jurisdiction under the due process clause; it is merely to say that foreseeability is implicit in the treatment of minimum contacts as defined by the litigation event concept, rather than by a parsing analysis that allows courts to pick and choose carelessly or inconsistently among facts in the litigation event, view them out of context, and then make a plenary, outcome determinative pronouncement that they are either "foreseeable" or "unforeseeable" to a particular defendant. Such ad hoc characterization unnecessarily introduces dissonance into personal jurisdiction law, and provides an excessively pro-defendant jurisprudence, when, in fact, as was demonstrated by one of the authors in another writing,[214] the contacts should be viewed holistically as part of a larger bundle of facts we call "the litigation event."

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[214] Van Detta, *The Irony of Instrumentalism*, *supra* note 189, at 443-44.

V. APPLICATION TO REPRESENTATIVE CASES ORIGINALLY DECIDED UNDER A CATEGORICAL LONG-ARM STATUTE

As Don Quixote is reported by Cervantes to have said once, profoundly, "the proof of the pudding is in the eating."[215] Pointing out the deficiencies in categorical long-arm statutes, extolling the virtues of the *International Shoe* parameters as a principled antidote to the ills caused by categorical long-arm statutes, and proposing a codification of the due-process-limit rules set out in *International Shoe* but largely overlooked or misunderstood by the courts, simply serves to set the table for the work of this section. In this section, we eat our pudding by examining the practical consequences of our work. We do this by answering two questions: (1) Would our proposed long-arm statute make a difference in cases in which personal jurisdiction would have been constitutionally exercised—but was denied due to the doctrinal penury inherent in categorical long-arm statutes? (2) If our proposal would make a difference, what kind of difference would it make—and would this be a *desirable* difference in outcomes?

In considering the second half of this second inquiry, we will make specific reference to the corrective justice and enterprise regulation principles discussed in Section III. Our operating premise is that the Model Long-Arm statute will produce more than greater consistency and predictability in litigation outcomes. It will also produce outcomes that advance the corrective justice and enterprise regulation principles upon which the modern conceptualization of personal jurisdiction is founded.[216]

In this section, the Model Long-Arm statute will be applied to representative Georgia cases to illustrate how it should work in practice to accomplish the goals of providing maximum exercise of personal jurisdiction with guidance that allows for more predictable and consistent jurisdiction determinations. The chosen cases are organized by the four-quadrant approach to reifying the *International Shoe* rules, which, as discussed in Section III, *supra*, are derived directly from Chief Justice Stone's carefully chosen words. Within each quadrant, we will first discuss the chosen case's outcome under the Georgia long-arm statute and then discuss the application of the Model Long-Arm statute, explaining why each case was placed in that particular quadrant. The four quadrants correspond to subsections [3](B)(1)-(4) of the Model Long-Arm statute in Section IV, *supra*. Consequently, applying the

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[215] MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE, 419 (Peter Motteux trans., Random House 1941) (1615).

[216] *See supra* note 204 and accompanying text; *see also* Van Detta, *The Irony of Instrumentalism*, *supra* note 189; Van Detta, *Justice Restored*, *supra* note 190.

Model Long-Arm statute and placing each case within a particular quadrant entails a two-part inquiry:[217] (1) Whether the defendant's forum activities were continuous and systematic, or single or occasional—as determined by the quantity and frequency of said forum activities; and (2) whether or not the cause of action upon which the plaintiff sues arises from those defendant forum activities. Once a case is placed in one of the quadrants (or one of the subsections [3](B)(1)–(4)), then it must be determined whether exercise of personal jurisdiction comports with "notions of fairplay and substantial justice."[218] This is accomplished in the Model Long-Arm statute through application of subsections [3](C)(1)-(3) and the definition of "prejudice" given in subsection [2](A). Finally, following the Model Long-Arm statute application is a discussion of how its application would advance both the principles of corrective justice and enterprise regulation in the particular case.

The cases to be considered were selected based on the following criteria:

1) Quadrants: representative cases that fit within each of the four quadrants were selected.

2) Using the Georgia long-arm statute: the case must either have been decided by a state court, or a federal court that applied the Georgia long-arm statute (rather than going straight to a due process analysis), so the differences with the Model Long-Arm statute could be illustrated.

3) Characterization of contacts: cases were selected where the greater clarity of characterizing the quality and/or quantity of contacts, and/or their relationship to the cause of action sued on, would have produced either a different personal jurisdiction outcome, or articulated the outcome in a clearer and more defensible basis to promote the development of a more coherent and consistent course of assertion of long-arm jurisdiction by Georgia courts.

Two cases from each of the four quadrants will be analyzed. Diagram 5 illustrates within which quadrant each chosen case falls.

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[217] Derived from the "two jurisdictional variables of primary relevance" previously discussed, *supra* note 197 and accompanying text.

[218] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

DIAGRAM 5

Chosen Cases Plotted by Quadrant

	CONNECTED	**UNCONNECTED**
CONTINUOUS & SYSTEMATIC	QUADRANT I Hollingsworth v. Cunard Line, Ltd.. Griffin v. Air South, Inc.	QUADRANT III Allstate Ins. Co. v. Klein Pratt & Whitney Canada, Inc. v. Sanders
SINGLE OR OCCASIONAL	QUADRANT II Catholic Stewardship Consultants, Inc. v. Ruotolo Associates, Inc. Worthy v. Eller	QUADRANT IV Barton Southern Co., Inc. v. Manhole Barrier Systems, Inc. Gee v. Reingold

A. Quadrant I—Continuous and Systematic + Connected Cause of Action

Subsection [3](B)(1) of the Model Long-Arm corresponds to Quadrant I. In such cases, the state's interest in providing a forum for a cause of action that occurred within the state against a defendant who has substantial contacts with the state strongly implicates both the corrective justice and enterprise regulation interests. The Georgia cases within this quadrant uphold personal jurisdiction under the Georgia long-arm statute because the cause of action arises from the defendant's activities within the state as required in the preamble of the long-arm. There are few Georgia cases that fall within this quadrant, however. This is likely because nonresident defendants that have continuous and systematic contacts with Georgia are virtually always corporations, and such corporations usually have obtained authorization to transact business in the state.[219] These corporations are not covered under Georgia's long-arm statute, because corporations authorized to transact business in Georgia are specifically excluded from the definition of nonresident in the long-arm statute—instead, they are considered to be resident foreign corporations and, thus, amenable to service of process on any cause of action like a resident.[220] Thus, only those corporations that have continuous and systematic activities within the state, but yet are not required to register as doing business within the state are covered by Georgia's long-arm statute.

1. *Hollingsworth v. Cunard Line, Ltd*.[221]

This case involved a breach of contract and fraud action against defendant cruise line by plaintiffs due to lack of promised activities and services on an around-the-world cruise.[222]

a. Georgia Long-Arm Application

Because subsections (1) and (3) of the Georgia long-arm statute were implicated, the Georgia Court of Appeals stated that it "need only consider whether the defendant transacted any business within the state."[223] The court cited the three-pronged test by the Georgia Supreme

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[219] As required by GA. CODE ANN. § 14-2-1501 (West 2004).

[220] *See supra* note 19 for discussion regarding corporations authorized to transact business in Georgia and their treatment under the long-arm statute.

[221] 263 S.E.2d 190 (Ga. Ct. App. 1979).

[222] *Id.* at 192.

[223] *Id.*

Court from *Davis Metals v. Allen*,[224] and also the policy from *Coe & Payne*[225] that personal jurisdiction be exercised over nonresidents to the maximum extent allowed by due process of law.[226] Consequently, the court's analysis under the long-arm amounted to a due process analysis. The court detailed Cunard Line's business activities within the state–the advertising of the cruise in the state by a travel agency it hired, the use of travel agencies within the state, the sending of ticket stock to those agencies to print the contract tickets, and the sending of the contract to residents within the state[227]—which established that it was transacting business within the state. The court dismissed the notion that the independent travel agencies used by Cunard Line insulated it from local jurisdiction.[228] The court also cited that portion of *International Sho*e which we have used to define Quadrant I: "'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.'"[229] In reversing the trial court's dismissal, and holding the defendant amenable to service of process, the court concluded that "[i]t is undisputed that Cunard voluntarily availed itself of the right to conduct commercial activities within the State of Georgia on a continuing and systematic basis through" the several business activities previously listed.[230]

b. Model Long-Arm Application

The first inquiry is whether Cunard Line's forum activities were continuous and systematic, or single or occasional–as determined by the quantity and frequency of said forum activities. In this case, as the Georgia Court of Appeals stated, the fact that Cunard Line was using travel agencies within the state to conduct its business is not a shield—

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[224] 198 S.E.2d 285 (Ga. 1973).
[225] 195 S.E.2d 399 (Ga. 1973).
[226] *Hollingsworth*, 263 S.E.2d at 192-93.
[227] *Id.* at 193.
[228] The court held that
> with the liberalization of due process criteria [*McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)], the jurisdictional distinction between agents and independent contractors has begun to fade. Courts treat persons who derive commission revenue [travel agencies], not in terms of agents or independent contractors, but they view their activities and status in a realistic commercial light.

Id. at 193 (quoting Mulhern v. Holland Am. Cruise*s*, 393 F. Supp. 1298, 1302 (D.N.H. 1975))."
[229] *Id.* at 194 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).
[230] *Id.*

the activities of an agent within the scope of the agency are clearly chargeable to the principle under elementary agency law. Consequently, there were numerous activities conducted in an ongoing frequency through the travel agencies, as discussed previously—in other words, the activities were continuous and systematic.

The second inquiry is whether or not the breach of contract and fraud claims for the lack of the promised services and amenities arose from Cunard Line's forum activities. The Hollingsworths responded to the advertising in Georgia, relied on brochures and promises by an agent of the availability of certain services and amenities, and purchased the tickets in Georgia.[231] Thus, their cause of action arose from Cunard Line's continuous and systematic activities within Georgia. Accordingly, this case falls within Quadrant I.

Regarding any "prejudice" to the defendant, under subsection [3](C)(1) of the Model Long-Arm statute, in a Quadrant I case, it is conclusively presumed that the courts of the state have personal jurisdiction over the defendant. Therefore, Georgia courts can exercise personal jurisdiction over Cunard Lines under the Model Long-Arm statute—without the doubt and indeterminacy present in the limitations of a categorical long-arm statute.

While the outcome is the same, applying the Model Long-Arm in this case gives a much "cleaner" analysis of why personal jurisdiction should be upheld. The focus on all the operating facts together as part of the litigation event sharpens the analysis, unlike the Georgia Court of Appeals' analysis which pays lip service to the Georgia long-arm statute by quoting it (as though that is sufficient) and then employing a somewhat unpersuasive federal due process analysis that mixes together U.S. Supreme Court cases with a state court test which was created for application of the Georgia long-arm statute.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

The need to effectuate the corrective justice principle is strong in cases such as this where the corporate defendant is in complete control of the services provided to its customers who have relied on its promised services in their decision to purchase a ticket. The customers pay for the trip up-front, thus creating a nonreciprocal risk – the cruise line is paid, but the customers are at its mercy as to whether the promised services are

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[231] *Id.* at 191-92.

provided.[232] The state has a strong interest in protecting consumers within its borders from suffering consumer fraud, especially where the corporation is conducting ongoing business within the state. Thus, in this case, the enterprise regulation principle clearly permits the state to act to effectuate corrective justice – in other words, this case inhabits that core domain where the corrective justice and enterprise regulation principles fully overlap.[233]

2. Griffin v. Air South, Inc.[234]

A wrongful death action against Air South and Beech Aircraft Corp. arose out of an aircraft crash in Georgia.[235] The aircraft was operated by Air South and manufactured by Beech Aircraft.[236] This appeal involved Beech Aircraft's motion to dismiss for lack of personal jurisdiction.[237] Beech Aircraft was a Delaware corporation with its principal place of business in Wichita, Kansas, but it sold the particular type of aircraft in question directly to customers in Georgia, while selling other aircraft through a distributor in Georgia.[238]

a. Georgia Long-Arm Application

The court began with a due process analysis after stating that Georgia's long-arm statute had been held in a previous federal court decision to be coterminous with due process limits.[239] The court cited several cases from other districts that had held that Beech's distributor agreements gave such control to Beech that it was doing business within those states.[240] Thus, the federal court held, Beech was also doing business within Georgia through its distributor. As a result, there were "sufficient contacts to satisfy the constitutional imperatives."[241]

Although the court had already said that Georgia's long-arm reached due process limits, it then, curiously, stated that the long-arm statue needed to be analyzed next. In doing so, the court analyzed the

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[232] For an explanation of how Professor Fletcher's theory of nonreciprocal risk exposure as a basis for tort liability informs personal jurisdiction analysis under the "litigation-event" approach, see Van Detta, *The Irony of Instrumentalism*, *supra* note 189, at 447-49.

[233] See Diagram 4, *supra* p. 395.

[234] 324 F. Supp. 1284 (N.D. Ga. 1971).

[235] *Id.*

[236] *Id.* at 1286.

[237] *Id.*

[238] *Id.*

[239] *Id.* at 1286-87.

[240] *Id.* at 1287-88.

[241] *Id.* at 1288.

history of the statute and restated the proposition that the long-arm was coterminous with due process limits.[242] However, the court felt that it was still necessary to apply the long-arm statute's limiting language as it went on to analyze subsections (2) and (3) and determined that jurisdiction was valid under both of them.[243] Personal jurisdiction was valid under subsection (2), because, according to the court, its prior decision which had held that the "Illinois Rule" applied to that subsection was still valid—thus, Beech's alleged negligence in manufacturing the aircraft outside the state which caused injury in the state was a sufficient basis upon which to predicate personal jurisdiction under that subsection.[244] Similarly, the court said, personal jurisdiction was valid under subsection (3) because Beech was regularly doing business in Georgia.[245]

b. Model Long-Arm Application

The first inquiry is whether Beech Aircraft's forum activities were continuous and systematic, or single or occasional. The operative facts were as follows: Beech sold the particular type aircraft directly to customers in Georgia.[246] In addition, it sold all its other type aircraft through a distributor in Georgia.[247] The distribution agreement Beech had with its distributors gave it such control that Beech should be considered to be doing business within the state. Therefore, Beech's activities (its aircraft marketing and sales through the distributor) were continuous and systematic.

The second inquiry is whether or not the wrongful death claim for the aircraft crash arose out of those forum activities. In this case, Beech sold the particular aircraft to the airline in Georgia.[248] Thus, the wrongful death action arises out of Beech's forum activity—the operative facts. As a result, the case falls within Quadrant I.

Regarding "prejudice," under subsection [3](C)(1) of the Model Long-Arm, once it is determined that a case falls within Quadrant I, it is conclusively presumed that the courts of the state have personal jurisdiction over the defendant. Therefore, Georgia courts can exercise

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[242] *Id.* at 1288-89.
[243] *Id.* at 1289.
[244] *Id.*
[245] *Id.* at 1289-90. The court refers to the subsections as (a-c). For purposes of uniformity, this article refers to them as (1-3).
[246] *Id.* at 1286.
[247] *Id.*
[248] *Id.*

personal jurisdiction over Beech Aircraft under the Model Long-Arm statute.

Once again, although the result is the same, the analysis by the federal district court was internally contradictory and analytically dissonant—the court applied a due process analysis, but then, after restating that Georgia's long-arm was coterminous with due process, the court parsed through the detailed interstices of the long-arm statute anyway.[249] The Model Statute, on the other hand, proceeds in a systematic, consistent fashion to lead a court to determine that personal jurisdiction was validly exercised. It is this cleaning up of analytic dissonance in all varieties of litigation events presented in long-arm cases that is a critical objective of the Model Long-Arm Statute. By removing the dissonance, the analytic process becomes regularized and transparent, which far better equips courts to take on the kind of "tough" jurisdictional cases which, in the past, have either sent courts scrambling for glosses or patches, or simply ignoring the legislated language of the long-arm statute. Both phenomena produce dissonance and indeterminacy, the elimination of which in all litigation events with an extraterritorial element is a key objective of the Model Statute.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

As in the previous case, the need to effectuate the corrective justice principle is strong in this case. The necessity of the production of safe aircraft can not be overstated, given the pervasive use of aircraft for travel in today's society. A poorly designed, manufactured, or maintained aircraft creates a nonreciprocal risk to those who fly and travel on aircraft – the high probability of loss of life due to an aircraft crash. Where, as here, a large number of such aircraft are sold within the state, the state has a strong interest to provide redress in order to allow effective enterprise regulation, as well as compensation for loss in accordance with the corrective justice principle. Thus, as the regulatory interest in Georgia is strong, this case falls in that core domain where the corrective justice and enterprise regulation principles fully overlap.

B. Quadrant II—Single or Occasional Contact + Connected Cause of Action

Subsection [3](B)(2) of the Model Long-Arm corresponds to Quadrant II. Cases fall in this quadrant when the defendant's single or

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[249] *Id.* at 1289-90.

occasional forum activities give rise to the cause of action(s) on which the plaintiff is suing. These are by far the most numerous types of cases under Georgia's long arm, a fact not surprising given the explicit "arising from" requirement in the statute. Due to the categorical nature of the long-arm, there are many cases for which personal jurisdiction is not currently available under the Georgia long-arm where it would be constitutional under due process to exercise personal jurisdiction within specific jurisdiction.

1. Catholic Stewardship Consultants, Inc. v. Ruotolo Associates, Inc.[250]

This case involved a breach of contract, theft of proprietary information, and misrepresentation suit against Ruotolo, a New Jersey corporation with no offices in Georgia.[251] The parties had agreed to work together to provide stewardship campaigns for various parishes and dioceses throughout the country.[252] While Catholic Stewardship Consultants (CSC) worked on proposals for other dioceses in its Georgia office, Ruotolo requested that CSC prepare a stewardship proposal for the Diocese of Camden in New Jersey, which CSC agreed to do and worked on at its Georgia office.[253] Subsequently, Ruotolo secured a contract with the New Jersey diocese to the exclusion of the CSC.[254]

a. Georgia Long-Arm Application

After citing the long-arm statute, the Georgia Court of Appeals stated that the long-arm "confers jurisdiction over nonresidents to the maximum extent permitted by due process."[255] Despite this pronouncement, the Court of Appeals proceeded to apply Georgia's long-arm statute and its corresponding less-than-due-process-limits restrictions on contacts. The Court of Appeals first analyzed whether Ruotolo transacted any business under subsection (1) of the long-arm statute and found personal jurisdiction lacking under that subsection, because no negotiations for the projects, including the one for New Jersey, were held in Georgia, and Ruotolo took no actions in Georgia that were related to the projects with the CSC.[256] Ruotolo's telephone and e-mail communications directed at the plaintiff regarding the projects were

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[250] 608 S.E.2d 1 (Ga. Ct. App. 2004).
[251] *Id.* at 2-3.
[252] *Id.* at 2.
[253] *Id.*
[254] *Id.*
[255] *Id.* at 3.
[256] *Id.*

not sufficient activities under the Georgia courts' prior interpretations.[257] Next, the Court of Appeals analyzed the theft of proprietary information and misrepresentation claims under subsection (3), holding that because "Ruotolo Associates did not engage in a persistent course of conduct in Georgia or derive substantial revenues from goods used or services rendered in Georgia," personal jurisdiction was unavailable under that subsection as well.[258] Thus, the Court of Appeals affirmed the trial court's dismissal for lack of personal jurisdiction.

b. Model Long-Arm Application

The first inquiry is whether Ruotolo's forum activities were continuous and systematic, or single or occasional. While the agreement was not negotiated or consummated in Georgia, Ruotolo did direct communications at CSC by telephone and e-mail concerning the projects that CSC was preparing, as stated previously. Although Georgia courts hold these activities to be insufficient contacts, the United States Supreme Court has held they are sufficient, at least where they are purposefully directed toward a party in another state.[259] Thus, these communications directed to CSC count as contacts under due process limits. Ruotolo had other isolated activities in Georgia which were not related to its agreement with CSC.[260] Thus the communications, as the only legitimate contacts, can be classified as "occasional," because they do not, standing alone, amount to "systematic or continuous" activities in the forum.

The second inquiry is whether or not the cause of actions arose from Ruotolo's forum activities. The breach of contract and theft of proprietary information occurred based on Ruotolo's request for CSC's work on the New Jersey diocese project, which CSC accomplished and sent to Ruotolo, and which Ruotolo then used to obtain a contract only for itself. Ruotolo contacted CSC using the telephone and e-mail about the stewardship projects as they were prepared by CSC in Georgia.[261] Therefore the cause of action arose from Ruotolo's telephone and e-mail contacts with CSC. Consequently, the case falls within Quadrant II.

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[257] *Id.*

[258] *Id.* at 6.

[259] *See supra* note 85.

[260] These activities were attending a trade show and performing a fundraising project for a Georgia school. *Catholic Stewardship Consultants*, 608 S.E.2d at 2-3.

[261] Officer of defendant "made numerous electronic mail transmissions to CSC personnel which included comments on stewardship projects as they were prepared by CSC in Georgia . . . ." *Id*. at 3.

Under subsection [3](C)(2) of the Model Long-Arm, in a Quadrant II case the defendant is presumed to be amenable to personal jurisdiction and may rebut the presumption through admissible evidence that clearly and convincingly establishes prejudice (as defined in subsection [2](A)). It is unlikely that any of the four factors there would apply in this case. First, Ruotolo would not be deprived of access to evidence. Second, the cost of litigating in Georgia is not likely significantly disproportionate to Ruotolo's resources. Third, as discussed next, in subsection c, *infra*, the state has a legitimate regulatory interest; and fourth, there is no applicable treaty. Thus, personal jurisdiction would be upheld under the Model Long-Arm statute in this case.

This result illustrates the differing outcomes that occur due to the problems of making the critical characterization of a non-forum defendant's contacts that have arisen under the régime of the categorical long-arm statute by the Georgia state courts. E-mail, phone calls, and facsimile contacts by a defendant were not sufficient contacts with the forum under Georgia's long-arm statute, according to those rulings. But, as recognized under the Model Long-Arm statute, these contacts are of sufficient quality where the cause of action arises out of them. Further, these contacts should place the burden of challenging personal jurisdiction on the defendant, rather than place the burden on the plaintiff to meet the indeterminate and ad hoc pronouncements that have been given in wrestling with the unilluminating provisions of the current statute, which do not focus the courts on the most relevant considerations.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

In this case, the corrective justice principle is applicable in remedying a pecuniary injury experienced by a resident corporation from a nonresident corporation. Where one corporation seeks to take unfair advantage of another, the corporation taken advantage of needs a remedy through which it may obtain justice at home. Now that a substantial amount of business is done via the Internet and electronic communications, a state needs to be better equipped to protect residents doing business with distant parties. The enterprise regulation principle is applicable in the general sense that a state needs to effectuate corrective justice in order to discourage nonresident corporations from attempting to take unfair advantage of resident corporations, and to foster a better business climate – especially for smaller corporations, where it is important to limit the expenses that would otherwise occur from having

to litigate a claim in a distant forum. The foregoing reasons, along with the quality of the contacts (e-mail and telephone discussion from which the claim arises from) push this case from the limb-dweller status into the overlapping portion of the corrective justice and enterprise regulation principles.[262]

2. *Worthy v. Eller*[263]

This case involved a defamation and intentional infliction of emotional distress action[264] by a husband against an Alabama attorney representing his wife in an Alabama divorce action.[265] When the wife did not want her husband to pick up their three-year-old child from a day care center located just across the border in Columbus, Georgia, her attorney contacted the center which stated it would need a court order to deny the husband from picking up the child.[266] The attorney faxed a fake court order to the center from Alabama and the center then called the police, who prevented the husband from seeing the child.[267]

a. Georgia Long-Arm Application

The Georgia Court of Appeals reversed the trial court's denial of motion to dismiss for lack of personal jurisdiction and ordered the case dismissed for lack of personal jurisdiction. The court held that subsection (2) barred personal jurisdiction over the defamation claim.[268] The court then held that the defendant, who practiced in Alabama only, did not have the required contacts under subsection (3) for the intentional infliction of emotional distress claim, stating that telephone and facsimile were not sufficient contacts.[269] The court did not analyze whether that claim would allow for jurisdiction under subsection (2), presumably because it did not consider the tortious act to have occurred in the state.

b. Model Long-Arm Application

The first inquiry is whether Worthy's forum activities were continuous and systematic, or single or occasional. As discussed previously, Worthy telephoned and sent a facsimile to the center located

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[262] *See* Diagram 4, *supra* p. 395.
[263] 594 S.E.2d 699 (Ga. Ct. App. 2004).
[264] *See* RESTATEMENT (SECOND) OF TORTS § 312 (1965) (listing the elements of the tort of intentional infliction of emotional distress).
[265] 594 S.E.2d at 700.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.* at 701.

in Georgia. These were single or occasional contacts directed at Georgia by the nonresident defendant.

The second inquiry is whether or not the defamation and intentional infliction of emotional distress claims arise out of Worthy's forum activities. The telephone conversation with the center's representatives and the facsimile sent to the center were the activities which gave rise to Eller's claims. These facts fall easily within the litigation event as described in subsections (2)(B) and (2)(E) of the Model Long-Arm. Therefore, the cause of actions arose from Worthy's forum activities and the case falls within Quadrant II.

Under subsection (3)(C)(2) of the Model Long-Arm, in a Quadrant II case the defendant is presumed to be amenable to personal jurisdiction and may rebut the presumption through admissible evidence that clearly and convincingly establishes "prejudice" (as defined in subsection (2)(A)). It is unlikely that any of the four factors there would apply in this case. First, the defendant would not be deprived of access to evidence by litigating the suit in Georgia; second, the cost of the suit over the border in nearby Columbus would not be disproportionate to the Alabama attorney's financial resources; third, Georgia has a legitimate interest in preventing false court orders from being sent into the state, causing severe emotional distress to forum-state residents, and tying up police resources; and fourth, there is not a treaty that applies in this situation. Therefore, Worthy would be amenable to personal jurisdiction in Georgia.

The difference in result under the Model Long-Arm statute is due to the Georgia long-arm statute's out-of-date defamation exception. Also Georgia's long-arm statute lacks reach under subsection (2) when the tortious act is committed outside the state. These shortcomings, combined with the problems of properly characterizing the quality of telephone and facsimile contacts by Georgia courts, as described in the discussion of *Catholic Stewardship Consultants v. Ruotolo Associates* contribute to the resulting differences.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

Although no corporation is involved here, Eller's claim involves a harm that occurred within Georgia as a result of the nonresident attorney's action. A state certainly has an interest in regulating nonresidents conducting legal service-related business within the state, whether it is an individual attorney or a large law firm, and effectuating the corrective justice principle when such professionals engage in

(mis)conduct that damages the interests of Georgia residents. As such, this case comes within the area where the corrective justice and enterprise regulation principles overlap.

C. Quadrant III—Continuous and Systematic Contacts, but Unconnected Cause of Action

Quadrant III, which is equivalent to general jurisdiction, is represented by subsection (3)(B)(3) of the Model Long-Arm statute. Causes of action fall into this quadrant where the nonresident defendant has continuous and systematic activities within the state such that personal jurisdiction may be upheld in a cause of action unrelated to those activities. This is generally the case if the defendant is a corporation with a principal residence, a functional headquarters, or a branch office in the forum, or one which is "doing business" in the forum such that the state has an interest in regulating its rights and duties (under the enterprise regulation principle). There are no cases decided by Georgia state courts that have upheld personal jurisdiction under the long-arm statute within Quadrant III criteria due to the "arising from" requirement of Georgia's long-arm statute.[270]

Yet, Georgia does allow what amounts to Quadrant III general jurisdiction through the Georgia Business Corporation Act[271] and the definition of nonresident in its long-arm statute.[272] As a result, "a plaintiff wishing to sue in Georgia a corporation authorized to do business in Georgia is not restricted by the personal jurisdiction parameters of § 9-10-91, including the requirement that a cause of action arise out of a defendant's activities within the state."[273] The effect of this holding is that once it is deemed that a corporation is authorized to do business in Georgia, it is then essentially subject to Quadrant III general personal jurisdiction–not, however, through the long-arm statute.[274]

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[270] However, the Eleventh Circuit upheld personal jurisdiction in a general jurisdiction or Quadrant III case, based on its position that Georgia's statute is coterminous with the limits of due process. *See supra* notes 102-04 and accompanying text.

[271] *See* GA. CODE ANN. § 14-2-1501 (2006) (concerning when authority to transact business is required).

[272] As discussed in note 19, *supra*.

[273] Allstate Ins. Co. v. Klein, 422 S.E.2d 863, 865 (Ga. 1992). This case is discussed *infra* as one of the Quadrant III cases.

[274] One court explained:

> The corporations over which Georgia might exercise jurisdiction fall into three categories: (1) domestic corporations, i.e., corporations organized and existing under the laws of Georgia; (2) resident foreign corporations, i.e., corporations organized and existing under the laws of another state but authorized to do business in Georgia ([GA. CODE ANN.] § 14-2-1501); and

Some might argue that since there are these vicarious means through which Georgia courts may effectively exercise general jurisdiction, there is no "problem" to be remedied here by a Model Statute. That is an instrumentalist perspective, however, that ignores the problems raised by the current régime. First, to rely on a patchwork of laws, external to the long-arm statute itself, to create a substitute for general personal jurisdiction invites considerable indeterminacy and ensures analytic dissonance. Second, it leaves discord between the state courts and the federal courts sitting in their diversity jurisdiction, for the federal courts have entertained full general personal jurisdiction under Georgia's long-arm statute, even where the patchwork of external statutes might not cover a particular nonresident defendant. This second problem leads directly to the third, and perhaps most significant problem with continued reliance on the current régime for a synthetic general jurisdiction–there are holes, such as those illustrated by the Georgia court's adherence to the "arising under" preamble of the long-arm contrasted with the federal court's flat assertion of the availability of general personal jurisdiction, where a nonresident defendant may escape personal jurisdiction on a "non-arising-out-of" cause of action when it is not technically registered "to do" or "transact" business in Georgia. The Model Long-Arm statute would ameliorate the three problems with the current approach to general jurisdiction by allowing Quadrant III general jurisdiction. This also would eliminate the potential due process violations that may occur from failing to conduct a minimum contacts analysis.[275] Two cases in which the exercise of personal jurisdiction was thwarted by the particular structure of the categorical long-arm statute are evaluated below.

1. *Allstate Insurance Co. v. Klein*[276]

This case involved an action by the insured against insurer to obtain insurance benefits allegedly due insured for automobile accident.[277] Klein, a nonresident of Georgia, was traveling through Georgia as a

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> (3) nonresident foreign corporations, i.e., corporations organized and existing under the laws of another state and not authorized to do or transact business in this state ([GA. CODE ANN.] § 9-10-90). General jurisdiction can be exercised over domestic corporations and resident foreign corporations. However, jurisdiction is limited by the Long Arm Statute when dealing with nonresident foreign corporations.

Pratt & Whitney Canada, Inc. v. Sanders, 460 S.E.2d 94, 95 (Ga. Ct. App. 1995) (en banc) (internal citations omitted).

[275] *See supra* note 19.

[276] 422 S.E.2d 863 (Ga. 1992).

[277] *Id.* at 864.

passenger in his father's car when he was injured in an automobile accident.[278] The car was insured by Allstate under a New Jersey policy.[279] When Allstate did not pay benefits that Klein alleged were due under Georgia's no-fault statute, he sued Allstate in Georgia.[280]

a. Georgia Long-Arm Application

Klein did not employ the long-arm statute as a basis for personal jurisdiction. He instead argued that because Allstate is authorized to transact business in Georgia, and has an office and registered agent in the county where suit was brought, it is not a "nonresident" as that term is defined in the long-arm statute.[281] Allstate, while admitting it was authorized to transact business in Georgia, argued that subsection (1) of the long-arm statute still applied, and that because "the contract was not entered into in Georgia and . . . there were no contacts within Georgia between Klein and Allstate with respect to the contract," it was not amenable to personal jurisdiction.[282] The trial court agreed and granted Allstate's motion to dismiss.[283] The Georgia Court of Appeals reversed, applying the long-arm statute and holding "that because 'the claim in this case adequately *results from or is linked to* Allstate's broad-based *forum-related* insurance activities,' the exercise of personal jurisdiction by a Georgia court over Allstate is justified."[284] The Georgia Supreme Court affirmed the reversal, but on the grounds that Klein had originally argued–that because Allstate was authorized to transact business in Georgia, it was considered a "resident" for purposes of service of process.[285] Yet, in so ruling, the court did not give much consideration to whether that registration is really sufficient to satisfy due process requirements. The United States Supreme Court has held that all extraterritorial exercises of personal jurisdiction are subject to the *International Shoe* analysis.[286] The United States Supreme Court has condemned using, e.g., stock registration or "situs-ing" rules as a legal fiction to stand in the place, virtually, of a nonresident defendant having constitutionally meaningful contacts with a forum.[287] The Court has not accepted a case since *Shaffer* to reconsider whether other legal fictions—

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278 *Id.*
279 *Id.*
280 *Id.* at 864.
281 *Id.*
282 *Id.*
283 *Id.*
284 *Id.* (citation omitted).
285 *Id.* at 865.
286 Shaffer v. Heitner, 433 U.S. 186 (1977).
287 *Id.*. at 213-17.

like a requirement of registration to merely transact business—supplies a constitutionally sufficient nexus upon which to predicate personal jurisdiction. Indeed, the Court last examined such a law—which is based on questionable notions of fictionalized, implied consent under the *Pennoyer v. Neff* régime–in an opinion by Justice Butler in 1927.[288] Eighty years, and a revolution in the views of personal jurisdiction, may well have entirely eroded such relics, which continue to stand primarily because no one has pushed hard enough to topple them.

b. Model Long-Arm Application

The first inquiry is whether Allstate's forum activities were continuous and systematic, or single or occasional. As a nationwide insurance corporation, Allstate has several offices in the state of Georgia and does substantial business in the state. Thus, its forum activities in Georgia are continuous and systematic.

The second inquiry is whether or not the cause of action arose from Allstate's forum activities. In this case, the insurance policy on the car was made in New Jersey. Thus, the action to obtain personal injury benefits was not related to Allstate's activities in Georgia, since the policy upon which the claim was based was made in New Jersey. Accordingly, under subsection (3)(B)(3) of the Model Long-Arm statute, a further inquiry is necessary to determine if the defendant's contacts are so substantial and of such a nature to justify an action based on a cause of action not arising from its activities in Georgia. Allstate has a branch office in the county where suit was brought. Under subsection (3)B)(3)(i), having a branch office in the state may, or may not, be sufficient to exercise general personal jurisdiction in a Quadrant III situation. The constitutionally proper inquiry in such a case, then, will focus on the quality and quantity of the nonresident defendant's forum activities,[289] rather than upon glib notions of fictionalized consent under business regulation statutes.

Regarding "prejudice," under subsection (3)(C)(3)(a), the presumption that the defendant is prejudiced by maintenance of the action can be rebutted by the plaintiff if he establishes that the defendant has a branch office in the forum. Because Allstate has a branch office in Georgia, and in the county where suit was brought, the exercise of personal jurisdiction over Allstate would appear constitutionally permitted, but Allstate would have an opportunity to rebut this

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[288] Hess v. Pawloski, 274 U.S. 352 (1927).

[289] *See*, *e.g.*, Perkins v. Benguet Mining Co., 342 U.S. 437, 445-49 (1950) (examining in detail a Philippine corporation's activities while in exile in Ohio during Japanese occupation of Philippines during World War II).

presumption factually, which it is not accorded under the "transacting business" registration statute approach.

While the application of the Model Long-Arm statute arrives at the same result, it does so by a minimum contacts analysis, rather than relying on the fiction of a non-jurisdictional registration statute. By analyzing facts relevant to the litigation event, rather than short-circuiting relevant analysis with what amounts to an unrebuttable presumption that personal jurisdiction exists, the Model Statute avoids potential due process violations, as previously discussed, when a minimum contacts analysis is not accomplished.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

Sometimes the corrective justice principle and enterprise regulation principle do not overlap into a common domain to justify jurisdiction over a nonresident defendant. Even when they do, the analysis undertaken by the court should be supported by the analytic framework of *International Shoe*. The *Allstate* court's analysis skips this critical step, by resorting to an early twentieth century *Pennoyer*-era legal fiction. It may well be that the litigation event does fall at the parallax of the relevant working principles: insureds who have paid premiums to their insurer are faced with a nonreciprocal risk of the insurer not paying a claim as required, and as suggested by the highly regulated nature of the insurance business, a state has a strong reason to regulate insurers conducting business within it in order to effectuate corrective justice. Hence, in this case, Georgia may have a strong interest in adjudicating an alleged wrongful denial of a claim by an insurer within its borders. However, a relevant inquiry, under the rule of general personal jurisdiction articulated in the Model Statute, needs to be undertaken before general jurisdiction will yield transparent and coherent results.

2. *Pratt & Whitney Canada, Inc. v. Sanders*[290]

Pratt & Whitney Canada, Inc. ("PWC") manufactured the engine that was used by a commuter aircraft which crashed in Kentucky.[291] Representatives of a passenger who was killed brought a products liability action against PWC in Georgia.[292]

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[290] 460 S.E.2d 94 (Ga. Ct. App. 1995) (en banc).
[291] *Id.* at 95.
[292] *Id*.

a. Georgia Long-Arm Application

The basis for the trial court's denial of PWC's motion to dismiss for lack of personal jurisdiction is not discussed. In finding a lack of personal jurisdiction and reversing, the Georgia Court of Appeals first analyzed whether PWC was a "resident" foreign corporation according to the definition of "non-resident" in the long-arm statute. It held that PWC was not a "resident," because "PWC is not authorized to do or transact business in Georgia, does not have any offices or employees in Georgia, and does not have a registered agent for service of process in Georgia."[293] Thus, because PWC was a nonresident, the Court of Appeals analyzed whether the long-arm statute allowed for the exercise of personal jurisdiction. Since the aircraft crash occurred outside Georgia, the cause of action did not arise from the defendant's activities within Georgia as required by the long-arm statute. Thus, "Georgia has no basis to assert jurisdiction over PWC, a nonresident foreign corporation, because the cause of action did not occur in Georgia, and no other basis exists therefor."[294] The dissent argued, however, that general personal jurisdiction was available over the defendant.[295]

b. Model Long-Arm Application

The first inquiry is whether PWC's activities within Georgia were continuous and systematic, or single or occasional. PWC had not registered for authorization to transact business in Georgia, but it did business with at least two customers there, including three to four million dollars of business a year with one of those customers.[296] Also, an affiliated company, P&WC Aircraft Services, Inc., operated a service station in Atlanta, Georgia, to which PWC shipped spare parts.[297] Additionally, PWC sent employees to the state for customer relations and marketing.[298] These activities were more than merely occasional, but were ongoing, and continuous and systematic activities by PWC with the forum.

The second inquiry is whether or not the cause of action arose from PWC's forum activities. In this case, PWC manufactured its engines in Canada and the aircraft crash occurred in Kentucky. Therefore, the

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[293] *Id*. at 96.
[294] *Id*. at 97.
[295] "It is my view that PWC is subject to a general jurisdiction in the courts of Georgia due to its continuous and systematic commercial activities in Georgia." *Id*. at 98 (McMurray, P. J., dissenting).
[296] *Id.* at 99.
[297] *Id.*
[298] *Id.*

products liability action did not arise from PWC's activities within Georgia, and the case must be further analyzed under subsection (3)(B)(3). Under subsection (3)(B)(3)(ii), it must then be determined whether the continuous and systematic contacts are of such quantity as to support the conclusion that PWC is present in the forum. The numerous, ongoing contacts described above are such that, at least arguably, PWC should be considered present in Georgia. Therefore, the case appears to satisfy the minimum contact requirement of Quadrant III.

Under subsection (3)(C)(3), in a Quadrant III case, there is a rebuttable presumption that the defendant is prejudiced by maintenance of the action within the forum. This presumption can be rebutted, however, under subsection (3)(C)(3)(b), if the plaintiff establishes that the defendant's contacts with the forum demonstrate that the defendant has engaged in such a continuous and systematic course of "doing business" in the forum as to support the conclusion that it is present in the forum. This places an appropriate burden on the plaintiffs seeking to invoke general personal jurisdiction to compile a competently detailed and factually adequate record of the nonresident defendant's forum activities. In this case, the numerous continuous and systematic contacts discussed above appear to be the kind of information required for a court to support the notion that PWC is "doing business" within Georgia. The proper analysis, therefore, focuses on a qualitative assessment of PWC's in-state activities, which is the only defensible way to evaluate whether PWC would be prejudiced by maintenance of the action within Georgia, and personal jurisdiction would be validly exercised over the corporation.

The difference in outcome under the Model Long-Arm statute illustrates how it properly characterizes the quantity of contacts as continuous and systematic, unlike the Georgia courts, which, due to the constraints of the Georgia long-arm statute, do not recognize the significance of the quantity of contacts when the cause of action does not arise out of them.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

The need for corrective justice in this type of case is strong. The manufacturer of an aircraft engine clearly creates a nonreciprocal risk to those traveling in an aircraft—the risk of death or serious injury due to an engine failure. Although the allegedly defective part was manufactured in Canada and the aircraft crash that the cause of action is based upon did not occur in Georgia, the state has an interest in

regulating PWC and effectuating the corrective justice principle because of the extent of business that PWC does within Georgia and the presence of its products in the air over the state. Admittedly, this is not a circumstance where the cause of action lies within the heart of the overlap between the corrective justice and enterprise regulation principles because the alleged tortious act and injury occurred outside the state, but the importance of ensuring that PWC's products shipped into Georgia are safe helps to push this case from the limb into the area of overlap.

D. Quadrant 4—Single or Occasional Contact + Unconnected Cause of Action

Quadrant IV corresponds to subsection (3)(B)(4) of the Model Long-Arm statute. The cause of action falls within the domain of the corrective justice principle, but outside the enterprise regulation principle of the state. The plaintiff has suffered a wrong, but the forum state can not properly adjudicate or remedy the wrong. Personal jurisdiction is also lacking under the Georgia long-arm statute in such situations, because the cause of action is not related to any forum activity and additionally, in some cases, the defendant's forum activities do not fit within the statute's enumerated categories.

1. *Barton Southern Co. v. Manhole Barrier Systems, Inc*.[299]

Barton Southern Co., Inc., a Georgia company that sells manhole security devices, brought a trademark infringement action against Manhole Barrier Systems, Inc. ("MBS"), a New York company that also sells the devices, and against JFC Company. MBS, which had no customers in Georgia and had not solicited orders from Georgia, contacted Barton Southern requesting information about its products and ordered one of its devices.[300] A few months later, after two more phone calls requesting price information, MBS ordered several more devices, and on another occasion contacted Barton Southern about distributing its devices in South America.[301] In the meantime, JFC Company established a website whose name allegedly infringed Barton Southern's registered trademark for its security devices and which had a link to MBS's website that advertised its manhole protection devices.[302] Barton Southern

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[299] 318 F. Supp. 2d 1174 (N.D. Ga. 2004).
[300] *Id.* at 1175.
[301] *Id.* at 1175-76.
[302] *Id.* at 1176.

brought the trademark infringement action against both companies, alleging they were working together to capitalize on its trademark.[303]

a. Georgia Long-Arm Application

The court began its analysis by quoting a portion of the Georgia long-arm statute.[304] However, the court then stated that "[t]he statute confers jurisdiction to the 'maximum extent permitted by due process.'"[305] Consequently, the court proceeded with a due process analysis.[306] Yet, in doing so, the court stated a "fair warning" test for due process, listing several factors that had been given in a Georgia Court of Appeals case in order to determine whether there were minimum contacts.[307] After listing these factors, the court then proceeded to analyze MBS's website contact and its telephone/purchase order contacts separately, finding that the website contact failed under the "purposeful availment" factor and that the telephone/purchase order contacts failed under the "claims-must-relate-to-the-act" factor, as discussed next. The court, using the *Zippo* test,[308] determined that MBS's website was a semi-

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[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] The factors to determine "fair warning" are "whether the nonresident's conduct and connection with the forum state are such that the nonresident should reasonably anticipate being haled into court there, whether the nonresident acted to avail itself of the forum state's law, whether the claim relates to those acts, and whether the exercise of jurisdiction is reasonable." *Barton S. Co.*, 318 F. Supp. 2d at 1176 (citing SES Indus., Inc. v. Intertrade Packaging Mach. Corp., 512 S.E.2d 316, 319 (Ga. Ct. App. 1999)).

[308] The *Zippo* test derived from Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D. Pa.1997), which introduced the "influential 'sliding scale' model for applying personal jurisdiction principles to cases arising from electronic commerce." *Barton S. Co.*, 318 F. Supp.2d at 1177. The court found that

> [i]n holding that personal jurisdiction over the defendant was proper in the plaintiff's home state, the Zippo court distinguished among interactive, semi-interactive, and passive websites:
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> > . . . At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users of foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of

interactive website because customers could only fill out an order form and could not make payments or complete the order through the website.[309]

Additionally, the MBS website had never received any e-mail from anyone in Georgia, nor had MBS sent any e-mail via its website to anyone in Georgia. Thus, the court concluded "that the MBS website fails to furnish a Georgia contact adequate to support personal jurisdiction over MBS in the Georgia courts."[310] Regarding the telephone and the purchase order contacts, the court determined that the trademark infringement action was not *related* to those activities, and then stated that the trademark infringement claim did not *directly arise from* these limited commercial contacts.[311] Therefore, personal jurisdiction over MBS was lacking.

b. Model Long-Arm Application

The first inquiry is whether MBS's forum activities (website, telephone and purchase orders) were continuous and systematic, or single or occasional. The website was not even a forum activity due to the fact that no one in Georgia had placed orders on the site and MBS had not received e-mail from or sent e-mail to anyone in Georgia through the site. The telephone and purchase order activities by MBS directed toward Barton Southern were single or occasional, because they were made on an infrequent basis and were not ongoing.

The second inquiry is whether or not the trademark infringement action arose out of MBS's forum activities. The website is not a forum activity, as discussed previously. The other activities describe a relationship between the defendant and the forum, but the trademark infringement claim did not arise out of the telephone conversations, which concerned the potential of MBS becoming a distributor of Barton Southern's products, and the claim did not arise out of the purchase of Barton Southern products. Consequently, because there are no forum activities out of which the cause of action arises, the suit falls within Quadrant IV and, under subsection (3)(B)(4) of the Model Long-Arm, the absence of personal jurisdiction is established as a matter of law.

Although the result is the same, the differences in application are worth noting. The federal district court's analysis first cites the Georgia

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> interactivity and commercial nature of the exchange of information that occurs on the Web site.

Barton S. Co., 318 F. Supp. 2d at 1177 (citing *Zippo Mfg.*, 952 F. Supp. at 1124).

309 *Id.* at 1177-78.

310 *Barton S. Co*., 318 F. Supp. 2d. at 1177.

311 *Id*. at 1178.

Long-Arm statute, as though it will apply it, but then goes on to say that it reaches to due process limits. The court then states a *federal* due process "fairness test," which it derives from a Georgia *state* court case. Then, for the telephone and purchase contacts, the court first states that the claim is not *related* to and then that the claim does not *directly arise from* these contacts. This mixture of terminology shows a lack of appreciation of the difference between the two phrases. For if a claim is not related to a contact, then it is a given that it does not directly arise from that same contact. The Model Long-Arm Statute's application gives a much more logical and structured analysis of the question of personal jurisdiction, and strictly uses an "arising out of" criteria, as the looser "related to" criteria has not been adopted by a United States Supreme Court majority.[312]

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

In this case, Barton Southern has allegedly suffered a wrong that requires a remedy. There is a nonreciprocal risk involved where one company's trademark is infringed–it risks losing goodwill for its product as well as a loss in sales, while the infringer gains from additional sales–but the level of non-reciprocity is minimal since the victim may engage (albeit not lawfully) in similar anti-competitive activity, may appeal directly to consumers to counteract the effects of infringement, and may stop the infringement altogether by the injunctive remedy afforded under both state and federal trademark protection laws. Further, in this case, the lack of substantial contacts with the forum does not justify Georgia in regulating MBS. Its website was not connected with Georgia and the trademark infringement claim did not arise out of the telephone and orders, which were also not sufficiently pervasive to justify the ultimate in regulation – treating a non-resident as a virtual resident under the compulsion of process predicated upon general personal jurisdiction. Thus, the operative facts of this case implicate only the corrective justice principle within the Georgia forum, falling outside the intersection with the enterprise regulation principle that would allow for the exercise of personal jurisdiction.

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[312] *Compare* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1981) (majority opinion) *with Helicopteros*, 466 U.S. at 419-20 (Brennan, J., dissenting).

2. *Gee v. Reingold*[313]

This case involved a breach of contract, negligence, and breach of fiduciary duty action by a client against his nonresident attorney. After Gee received a complaint, delivered by Federal Express from a Wisconsin company that was suing him in Wisconsin, Gee contacted Reingold, a Tennessee attorney, who advised him that the service was insufficient under Georgia law.[314] When Gee was served by a sheriff's deputy about two weeks later, Reingold contacted the corporation's attorney to request an extension of time to answer the complaint. Subsequently, "Gee called Reingold's office several times and left messages, and Gee went to Reingold's office 'two or three times,' but Reingold never responded to the messages or saw Gee. No answer was filed in the Wisconsin action, and a default judgment was entered against Gee . . . for $356,800."[315] When the corporation filed suit in Georgia to domesticate the judgment against Gee, he filed suit against Reingold. The trial court dismissed the complaint against Reingold due to lack of personal jurisdiction.[316]

a. Georgia Long-Arm Application

In affirming the dismissal for lack of personal jurisdiction, the Georgia Court of Appeals discussed subsections (1), (2), and (3) of the long-arm statute. First, the Court of Appeals determined that Reingold had not transacted business in Georgia in relation to the Wisconsin suit. "[T]he telephone conversations between Reingold and Gee, facsimile transmissions by Gee from Georgia to Tennessee, and Reingold's mailing of bills to Gee in Georgia do not show that Reingold transacted business in Georgia within the meaning of the statute. Reingold's services were performed in Tennessee and pertained to non-Georgia matters."[317] Also, "there [was] no evidence that Gee and Reingold negotiated any contracts in Georgia."[318] Thus, the court reasoned, Reingold was not amenable to personal jurisdiction under subsection (1). The court also determined that Reingold did not commit a tortious act within Georgia as required by subsection (2), because the alleged tortious act (or omission) occurred with respect to the default judgment in Wisconsin.[319] Under subsection (3), the Court found that Reingold's

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313 578 S.E.2d 575 (Ga. Ct. App. 2003).
314 *Id.* at 577.
315 *Id.*
316 *Id.*
317 *Id.* at 578.
318 *Id.*
319 *Id.* at 579.

activities in Georgia were not sufficient to meet the requirements of that subsection.[320] Consequently, the court declined to permit the state to exercise personal jurisdiction over Reingold.[321]

b. Model Long-Arm Application

The first inquiry is whether Reingold's forum activities were continuous and systematic, or single or occasional. Reingold, who had been practicing for 40 years, had handled no more than ten cases in Georgia.[322] Reingold had sent bills to Gee, as stated previously. These forum activities were only isolated. The telephone calls and facsimiles were initiated by Gee from Georgia, and thus were arguably not forum activities by Reingold. Also Reingold's representation of Gee in an unrelated case involving a Tennessee employee of Gee's was not a forum activity .[323] Consequently, Reingold participated in only occasional or isolated forum activities.

The second inquiry is whether or not the breach of contract, negligence, or breach of fiduciary duty claims arose out of Reingold's forum activities. His only forum activities were the handling of a few cases in Georgia courts and the mailing of bills to Gee. The claims arose out of a default judgment that occurred in Wisconsin. The claims were in no way related to Reingold's handling of the other Georgia cases, and did not arise out of his sending of bills to Gee. Therefore, because there are no forum activities out of which the cause of action arises, the suit falls within Quadrant IV and, under subsection (3)(B)(4) of the Model Long-Arm, the absence of personal jurisdiction is established as a matter of law.

While the result is the same, the Model Long-Arm, by focusing on the characterization of the quality of the contacts, presents the rationale for the lack of minimum contacts in a more structured and principled manner.

c. How Applying the Model Long-Arm Statute Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

In this case, Gee has suffered an alleged injury that requires a remedy. However, because the operative facts showed little relation between Reingold and the forum, Georgia's regulatory interest was weak

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320 *Id.*
321 *Id.*
322 *Id.*
323 *Id.* at 578.

where the cause of action did not arise out of the few relations it had with the defendant. Thus, once again, the operative facts fall within the corrective justice domain, but outside the enterprise regulation domain of Georgia, making it improper for personal jurisdiction to be exercised over the defendant in Georgia.

VI. CONCLUSION

A. The Authors' Map of the Territory Traversed

We have shown in this article how the categorical long-arm statutes, with their inherent limitations, do not accord with the states' desire to enable the exercise of personal jurisdiction to the limits of the due process clause as set by *International Shoe*. The resulting inconsistencies in interpretation as cases arose which revealed the unnecessary restrictions of the categorical approach, were highlighted by a case study of Georgia's categorical long-arm statute. The need for a new approach was thus made clear. However, instead of simply proposing that states adopt an unguided limits-of-due-process approach, we, through a visual reconceptualization of personal jurisdiction, exposit a method that allows for the exercise of personal jurisdiction to reach the limits of due process with principled guidance based on the corrective justice and enterprise regulation principles. This visual reconceptualization was the basis for our proposed Model Long-Arm statute. That statute is logically and intellectually true to a regime of personal jurisdiction inaugurated by *International Shoe* that is consistently and completely laid out in the case, but whose existence is often overlooked by those who measure *International Shoe* by how other judges have employed it, rather than by the context and logic of the opinion itself. Finally, the application of the Model Long-Arm statute was compared to the application of Georgia's categorical long-arm statute to illustrate how the Model Long-Arm is to be applied and how it would provide better and more predictable and principled results.

B. A Coda for the Reader

A decade ago, at its fiftieth anniversary, *International Shoe* was the subject of intensive scholarly scrutiny, generating a dozen articles, most of which denounced *International Shoe* as standardless, and sought to replace it with a variety of approaches, including a venue-style

analysis.[324] What is rather amazing is that few of these experts appeared to have spent much time reading and evaluating *International Shoe* itself. Rather like a glossator who glosses upon the glosses of others, scholars have spilled much laser-printer ink complaining about the shortcomings of how subsequent courts have decided cases after International Shoe.[325] They have not devoted much, if any, time to encountering the text of the 1945 opinion on its own terms and logic and, by critical reading, revealing the powerful internal logic of the approach. Not a single of these authors did so; not a single one recognized that the problem with subsequent cases was their failure to recognize the internal logic for the paradigm personal jurisdiction cases that, in this article, the authors have made transparent through identifying often-overlooked normative rules statements within *International Shoe* as well as visual conceputalizations of the operation of those rules.

In recent years, Professor George Rutherglen has made one of the more aggressive assaults on *International Shoe*, declaring that the case "is one of the enduring monuments of Legal Realism and this is, we are told, a 'negative philosophy fit to do negative work.'"[326] And true to his charge that *International Shoe* is *bete noir*, the unwelcome offspring of legal realism, Professor Rutherglen declares that "it is difficult . . . to find a more effective and more thorough job of 'trashing' legal rules than has been accomplished by *International Shoe*."[327] He accuses the opinion of being written "at a very high level of abstraction," of constituting no more than "realist criticism . . . disguised as a magisterial summary of existing law," and, in his view, of amounting to a failure: "[I]n writing an opinion that tried to satisfy everyone, [Chief Justice] Stone offered guidance to no one."[328]

Yet, as Professor Youngblood first perceived in 1985, and as the authors have fully developed here and in earlier articles, *International Shoe* is a kind of Rosetta Stone that rewards those who study its text holistically. In fact, these efforts, the authors believe, fully meet Rutherglen's concerns that "it should be possible to state more

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[324] *See, e.g.*, Rex R. Perschbacher, *Foreward: Fifty Years Of* International Shoe*: The Past And Future Of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513, 513-29 (1995) (summarizing the work of each of the twelve contributors to the symposium).

[325] *See, e.g.*, *id.*; George Rutherglen, International Shoe *And The Legacy Of Legal Realism*, 2001 SUP. CT. REV. 347, 358 (2001) (relying on "the reception and consequences of *International Shoe*" to "bear out" the thesis that *International Shoe* "offer[s] guidance to no one").

[326] *Id.* at 349 (quoting Ronald Dworkin, *Dissent On Douglas,* NEW YORK REVIEW OF BOOKS, at 6 (Feb. 19, 1981)).

[327] *Id.* at 349.

[328] *Id.* at 358.

specifically" the rules that create a general consistency among jurisdictional outcomes and that such an "effort . . . would be entirely consistent with the structure and ambitions of *International Shoe* itself."[329] Indeed, the authors here have used the text of *International Shoe* itself to go beyond the discernment of the rules by Youngblood in 1985 to meet Rutherglen's call for devising "presumptive rules,"[330] which the authors have done using the imperative implications that flow from the four scenarios of contacts and connectedness to cause of action envisioned in *International Shoe* itself.

Grudgingly, it seems, Professor Rutherglen also observes that *International Shoe* "was a fine first step in the reexamination of jurisdictional theories, but it was never intended to be the last step." With this, the authors agree in part. The solution that the authors see is not to resort, as some have done, to casting the eye wistfully abroad, wishing upon our legal system a European-style solution to a uniquely American jurisdictional problem.[331] Rather, the solution is in reforming long-arm statutes themselves. The pedigree of such statutes along the early efforts of the Illinois model lies separate and apart from *International Shoe's* internal logic. Thus, long-arm statutes, the implementing device of *International Shoe*, have been in a constant state of tension with the principle of *International Shoe* itself. This tension has lead to an incoherent distortion of the rules stated in that opinion, either along the lines of trying to make the statute such an incredibly lengthy laundry list of forecasts as to sink under its own hyper-categorization, as the North Carolina long-arm statute[332] does, or to abdicate the legislative function entirely by simply, and lazily, incorporating gauzy, difficult to rectify notions of "due process" as the limit, as California[333] and Rhode Island[334] famously have done in their long-arm statutes. The right approach is a twin-aimed one.

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[329] *Id.* at 371.

[330] *Id.* One notable difference is that the authors' emphasis was on consistency with the internal logic of *International Shoe* itself, while Professor Rutherglen seeks an attractive, but ethereal, focus on "presumptive rules . . . to allocate cases in a way that fosters interjusidictional cooperation" and a "cooperative approach to personal jurisdiction." *Id.* at 371-72.

[331] *See, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990); Rutherglen, *supra* note 296, at 371-73.

[332] N.C. GEN. STAT. § 1-75.4 (2006) (listing 12 major categories of long-arm jurisdiction, with numerous sub-categories within them).

[333] CAL. CIV. PROC. § 410.10 (2006) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

[334] R.I. GEN. LAWS § 9-5-33(a) (2007) (bestowing personal jurisdiction in Rhode Island courts over non-resident defendants "in every case not contrary to the provisions of the constitution or laws of the United States").

First, we must return to *International Shoe* for a close reading of the jurisdictional rules set out there, and to use those rules—and their vocabulary and concepts, rather than those of the Illinois legislature of the 1950s—to craft the long-arm statutes of the twenty-first century.

Second, we must read International Shoe logically, holistically, and with metaphoric insight (for jurisdiction is one of the theoretical legal topics best understood by metaphor),[335] to deduce the important evidentiary presumptions that Chief Justice Stone, most able lawyer and teacher that he was, instinctively and effortlessly embedded into the opinion, at such a level of subtlety that even the keenest observers of procedure in the last 60 years have tended to overlook their significance.

Legislatures whose procedure committees will undertake this twin-aimed effort are likely to produce a statute remarkable in at least two way: [1] that statute will appear alien in light of the received traditions of long-arm statutes; yet [2] that statute will recast the long-arm as in as revolutionary a manner as *International Shoe* recast *Pennoyer*. Such a statute is likely to look like the model statute propounded by the authors here; and such a statute is likely to foster the kind of results that have compelling integrity, both intellectually and practically.

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[335] *See, e.g.*, Van Detta, *The Irony Of Instrumentalism*, *supra* note 189.