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Going to the Limits of Due Process: Myth, Mystery and Meaning

David S. Welkowitz*

I. INTRODUCTION

As almost any first year law student can tell you, the ability of a plaintiff to force a defendant to come to court and defend, or face a valid default judgment, is a function of several factors. Primarily, however, the plaintiff must give proper notice to the defendant (and opportunity to defend) and the court must have territorial authority over the defendant.¹ The latter factor is itself dependent on a legislative grant of authority to assert power over the defendant, which must be within the limits set by the due process clauses of the Constitution.² These grants of authority—the so-called long-arm statutes—are the subject of this article.

Every state has some kind of long-arm statute.³ These statutes vary from specific delineations of authority⁴ to very general grants of authority.⁵ Long-arm statutes are limited in their reach by the Constitution; however, there is no requirement that their reach be as long as the Constitution's grasp.⁶ And in some cases the statutes

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1. Or, to put it another way, the defendant must be *amenable* to service of process.

2. I say "clauses" because the due process clauses of both the fifth and fourteenth amendments affect jurisdiction.

3. A compendium can be found in the Appendix to CASAD, JURISDICTION IN CIVIL ACTIONS A-32 to A-101 (1983 and 1986 Supp.) [hereinafter "Casad"].

4. *E.g.*, OR. R. CIV. PROC. 4 (1987).

5. California's statute is the most notable of these, permitting jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

6. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952).

do not extend to the limits of Constitutional authority.⁷ More often, however, the statutes, either expressly or by judicial interpretation, "go to the limits of due process." Therein lies the issue for this article—what *precisely* do the states mean when they say that their statutes go to the limits of due process?

II. THE PROBLEM

The impetus for this investigation was my previous examination of personal jurisdiction in federal courts.⁸ As noted there, under Rule 4(e) of the Federal Rules of Civil Procedure, federal courts can assert jurisdiction over non-resident defendants using either of two grants of authority.⁹ First, there may be a federal long-arm statute. Unfortunately, no general federal statute exists. In a relatively few instances, Congress has given long-arm authority for specific claims.¹⁰ In the absence of a federal statute, federal courts are relegated to the second line of authority, the long arm-statutes of the state in which the district court sits.¹¹ When using state statutes, federal courts are bound to observe the limits placed on the statutes by the states.¹² But, as I have argued elsewhere, when a state statute "goes to the limits of due process" the limits of the statute are set by federal constitutional law, not state law.¹³ If that

7. See, e.g., *Galgay v. Bulletin Co., Inc.*, 504 F.2d 1062, 1066 (2d Cir. 1974) (discussing New York law); *Lavie v. Marketscope Research Co., Inc.*, 71 Misc. 2d 373, 374, 336 N.Y.S.2d 97, 99 (Sup. Ct. 1972) (dicta); *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236, 241 (5th Cir.), cert. denied, 454 U.S. 816 (1981) (Florida law).

8. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 *FORDHAM L. REV.* 1 (1987) [hereinafter Welkowitz].

9. Rule 4(e) provides, in relevant part:

Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

FED. R. CIV. P. 4(e).

10. E.g., 15 U.S.C. § 78aa (1982) (Securities Exchange Act); 28 U.S.C. § 2361 (interpleader); 42 U.S.C. § 9613(e) (Supp. 1986) (Comprehensive Environmental Response, Compensation and Liability Act); 29 U.S.C. § 1132(e) (1982) (Employee Retirement Security Act); 11 U.S.C. Rule 7004(d) (1982) (bankruptcy).

11. Because each state has at least one judicial district, this does not cause a major dilemma in determining applicable law. But there is no requirement that a judicial district be wholly within one state. It would be interesting to see what Congress would have done if multistate districts existed. Perhaps this would have forced Congress or the Supreme Court (acting pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(a) (Supp. 1989)) to deal with this problem.

12. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987). See Welkowitz, *supra* note 8 at 11-17.

13. See Welkowitz, *supra* note 8, at 17-18.

is correct, then the limits set by the applicable federal law (i.e., the fifth amendment) may be different for a federal court than for a state court.¹⁴ This may mean that a federal court could assert jurisdiction over a defendant when a state court could not do so.

However, the process of drawing the line between state and federal law in this area is not as simple as one might think. For example, some state statutes expressly incorporate the due process test of "minimum contacts with the state" in their statutes as the limiting feature of the statute.¹⁵ Has the legislature incorporated "minimum contacts with the state" literally into the statute, or are they merely using statutory language to that effect as a convenient way of recognizing the Constitutional limits on state law?¹⁶ In other states whose statutes more specifically set forth the required jurisdictional contacts, state courts have said that these go to the limits of due process.¹⁷ However, it is appropriate to ask just what state courts mean when they say that their statutes reach the limits of due process. Do they mean that the statutes reach the limits only as presently construed, or are the statutes intended to reach any defendant in any situation permitted by due process, however defined? This is particularly pertinent in states whose statutes contain specific categories. Do these statutes incorporate a *particular* due process test as a matter of state statutory law or does the statute merely reflect a state's perception of the due process standard, rather than incorporating it as state law? If the former, that might be a limit on federal court authority.

The point can be restated this way. Let us suppose that the Supreme Court discards the minimum contacts test for a less stringent standard (either one of pure fairness under the circumstances¹⁸ or one of minimum contacts with the United States¹⁹). In those states where the long-arm statute now purports to go to the limits of due process, would it take a legislative act to conform the statute to the new due process standard? If not, then one could

14. See Welkowitz, *supra* note 8, at 22-35.

15. *E.g.*, ALA. R. CIV. PROC. 4.2 (1984); R.I. GEN. LAWS § 9-5-33 (Supp. 1989).

16. See Welkowitz, *supra* note 8, at 16-17.

17. *E.g.*, *Jonz v. Garrett/AiResearch Corp.*, 490 P.2d 1197, 1199 (Alaska 1971); *Kilcrease v. Butler*, 739 S.W.2d 139, 140 (Ark. 1987); *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986); *Cowan v. First Ins. Co. of Hawaii, Ltd.*, 608 P.2d 394, 399 (Haw. 1980).

18. Justice Brennan seems to be moving in this direction. See, *e.g.*, *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299-301 (1980) (Brennan, J., dissenting).

19. See, *e.g.*, *Gregorian v. Izvestia*, 871 F.2d 1515, 1530 (9th Cir. 1989); *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 108 S. Ct. 486 (1987).

argue reasonably that the limits on the statutes are not really those of the state legislature but the Constitution. In that case, a federal court might conclude that a different constitutional standard applies to the exercise of jurisdiction by a federal court and act accordingly. On the other hand, if it would require an amendment to the statute to conform to a new standard, a federal court might reason that the "minimum contacts with the state" limitation is a function of *state* law and thus would be bound to follow it.

Although the federal court issue prompted this discussion, it is submitted that the investigation has other rewards. It is useful to collect in one place the diversity of responses of the states to the same set of problems. It is also interesting to see how different courts react to the same statutory language. Moreover, along the way I have tried to point out some interesting quirks in some statutes that are of both theoretical and practical interest. Finally it is hoped that treating this issue with regard to long-arm statutes in all states will aid state courts and legislatures in the consideration of their own statutes.

III. TYPES OF LONG-ARM STATUTES

Long-arm statutes in one form or another have been around for many years. Among the earliest were those permitting jurisdiction over non-resident motorists who were involved in auto accidents while driving in the forum state.²⁰ As the permissible bases for jurisdiction expanded, so did the numbers of statutes permitting jurisdiction. Indeed, even today states may have numerous jurisdictional statutes dealing with narrowly defined situations.²¹ However, our concern here is primarily with the generalized long-arm statute that permits jurisdiction under a range of circumstances that fit the broad contours of the statute. Some states have more than one general long-arm statute; this usually occurs when a state has one statute applying to non-resident individuals and another to foreign corporations.²² However, the existence of such multiple statutes does not lead to different analyses because the categories in each statute tend to be the same.

20. See, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927); Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 999 (1960).

21. South Dakota, for example, has several. See statutes cited in Larson, *In Personam Jurisdiction and the South Dakota Jurisdictional Statutes: A Basic Review and Update*, 31 S.D.L. REV. 116, 140 (1985).

22. E.g., CONN. GEN. STAT. ANN. § 33-411 (1987) (service on foreign corporations); *id.* at § 52-59b (foreign partnerships and nonresidents); Vermont statutes cited *infra* in note 37.

These general long-arm statutes come in three basic varieties, which I call Types 1, 2 and 3. What I call Type 1 statutes are the simplest. They state, in one form or another, that the statute allows the assertion of jurisdiction to the limits permitted by the Constitution.²³ What I call Type 2 statutes are the archetypical long-arm statutes. They list specific acts or categories of acts that are the basis of jurisdiction. This is by far the most common type of statute. These statutes derive largely from two sources. First was the Illinois statute, passed in 1955. That statute was copied by many states.²⁴ The second influence was the Uniform Interstate and International Procedure Act, which was patterned after the Illinois statute but which differs in some important details.²⁵

These two types would seem to cover the field, but they do not. Surprisingly, there is a third type of statute—a combination of the first two. These statutes contain the same categories as Type 2 statutes *plus* a clause or subsection that looks like a Type 1 statute.²⁶

Despite this variety, the courts of most states have come to the same conclusion about their statutes—that they go to the limits of due process. However, an examination of the statutes and the cases indicates that not all states agree on what that means. Let us turn to the categories one by one to analyze this problem.

A. *Type 1 Statutes*

Six states—California, Oklahoma, New Jersey, Rhode Island, Vermont and Wyoming—have this kind of statute. California, Oklahoma and Wyoming have substantially identical statutes. All allow jurisdiction “on any basis consistent with the Constitution of this state and the Constitution of the United States.”²⁷ New

23. The model is the California statute. CAL. CIV. PROC. CODE § 410.10 (West 1973).

24. See, e.g., Casad, *supra* note 3, ¶4.01.

25. Section 1.03 of the Act, Unif. Interstate and Int'l. Procedure Act § 1.03, 13 U.L.A. 361 (1986). Many states also incorporate a portion of § 8 of the Uniform Parentage Act into their long-arm statutes. Unif. Parentage Act § 8, 9B U.L.A. 309 (1987). This section deals with jurisdiction over certain paternity claims.

26. The latest such statute is Louisiana's. LA. REV. STAT. ANN. § 13:3201(B) (West Supp. 1989). However, a number of other statutes have them, including Alabama, Iowa, Maine, Pennsylvania, South Dakota, Tennessee, Oregon and Utah. See statutes cited *infra* note 40.

27. OKLA. STAT. ANN. tit. 12, § 2004 (West Supp. 1988-1989). Until 1987, Oklahoma had a Type 3 statute. OKLA. STAT. ANN. tit. 12, § 1701.03(7) (West 1980). California's statute is CAL. CIV. PROC. CODE § 410.10 (West 1973). The Wyoming statute is WYO. STAT. ANN. § 5-1-107(a) (1977).

Jersey's statute is essentially the same, allowing jurisdiction in any case "consistent with due process of law."²⁸ By their language these statutes allow their courts to exercise the maximum reach of long-arm jurisdiction, no matter what constitutional test for due process is used.²⁹ There is nothing on the faces of the statutes limiting them to a particular due process test. In fact, the statutes seem deliberately designed to avoid such limitations. It is reasonable to assume that the state legislatures that enacted them did not want the statutes tied rigidly to the due process model then in vogue. The legislatures would be mindful of the many changes that have occurred in jurisdictional decisions over the years and seem to have chosen to, so to speak, go with the flow. The best interpretation of such statutes is that the forum states want to assert authority under all possible conditions, regardless of whether the constitutional test used is "minimum contacts with the state" or some other test that the Supreme Court uses. A federal court using these statutes ought to be able to use a fifth amendment jurisdictional test, even if it differs from the fourteenth amendment standard.³⁰

The Rhode Island statute is a little different. Any person having "minimum contacts with the state" is subject to its reach "in every case not contrary to the provisions of the constitution or laws of the United States."³¹ For most purposes, this will operate the same way as the California, New Jersey and Wyoming statutes. But what if minimum contacts were no longer the due process test? Would this statute simply use the new test? And is it the intent of the legislature that contacts "with the state" [of Rhode Island] are essential, or was that an unfortunate shorthand for the type of statute found in California?

These questions are not easily answered. Legislative history on

28. N.J. CIV. PRAC. R. 4:4-4(i) (West 1989).

29. There do not appear to be any different restrictions placed by state constitutions than those placed by the federal one. *Data Disc, Inc. v. Systems Technology Assoc., Ltd.*, 557 F.2d 1280, 1286 n.3 (9th Cir. 1977) (California); see *Nutri-West v. Gibson*, 764 P.2d 693, 694-95 (Wyo. 1988) (Defendant claimed jurisdiction violated federal *and* state constitutions; court looked only to a federal constitutional test). Whether this would be true if federal courts applied a radically different test under the fifth amendment than state courts use under the fourteenth amendment is unclear. However, the state courts probably would not be offended because the seeming intrusion on a defendant's right would be by a federal court, not a state court. Indeed, the state court might find that its statute was not intended to limit federal courts at all.

30. *Cf. Nutri-West v. Gibson*, 764 P.2d at 695 (Wyo. 1988) (finding that due process analysis does not require use of "minimum contacts" test where defendant is present in the state when served).

31. R.I. GEN. LAWS § 9-5-33 (1985).

the statute is scarce.³² At the time of its enactment, it is doubtful that the Rhode Island legislature gave any thought to these matters. Minimum contacts *was* (and for that matter still is) the due process test, and had been for over a decade. The effect of the statute on federal courts probably was of little concern to these legislators. Indeed, at that time, federal venue restrictions made the problem of long-arm jurisdiction in federal courts unusual outside of diversity cases.³³ And the federal courts were just at the point of deciding that diversity cases were bound on this point by state law, which seemed at least outwardly logical.³⁴

There is some evidence of legislative intent, however. In *Conn v. ITT Aetna Finance Co.*,³⁵ the Rhode Island Supreme Court cited a report of the Judicial Council to the legislature proposing the passage of the long-arm statute. In that report, the Judicial Council urged the legislature to enact a statute broad enough "to make full use of the jurisdiction permitted by these recent decisions [*International Shoe* and *McGee v. International Life Insurance Co.*] and to direct that the Rhode Island Courts hold non-residents amendable to suit in every case except those where the due process of the Federal constitution interferes."³⁶ Assuming that this report accurately reflects the legislature's intent, the language used in the statute appears to be just a poor way of expressing the Judicial Council's proposal. It is likely that the Rhode Island legislature thought it was doing what California did some years later—extending its statute as far as possible. If asked, one would expect that the legislators would not have objected to their statute being used to assert jurisdiction over a defendant who lacked "contact" if it was otherwise fair and reasonable to assert authority.

The Vermont statute is also different in form from the California model. It permits litigants to serve process on "[a] person whose contact or activity in this state . . . is sufficient to support a

32. In preparing this article I contacted the Rhode Island state library and was informed that documents relating to this statute, passed some 30 years ago, no longer exist. Attempts to contact a co-sponsor of the bill in the Rhode Island Legislature have been unavailing.

33. Until 1966, the general federal venue statute (28 U.S.C. § 1391 (1963)) only permitted venue in federal question cases where all of the defendants resided. In diversity cases, the district where all plaintiffs resided was also proper. In 1966 Congress amended the statute to permit venue where the claim arose.

34. *But see* Welkowitz, *supra* note 8, at 19-21.

35. 105 R.I. 397, 252 A.2d 184 (1969).

36. 252 A.2d at 186 n.3. *See* Riverhouse Publishing Co. v. Porter, 287 F. Supp. 1, 6 (D.R.I. 1968).

personal judgment against him."³⁷ Curiously, there is no true amenability standard set out in the law.³⁸ But it is difficult to fathom any other explanation for this statute than that the legislature believed its courts should have the maximum allowable jurisdictional reach.³⁹

Type 1 statutes do not purport to limit the reach of any courts, state or federal. A federal court using such a statute should feel free to use the appropriate federal constitutional test with no worry about any state statutory restrictions.

B. Type 3 Statutes

Surprisingly (at least to this writer), nine states have this type of long-arm statute.⁴⁰ One would think that the legislatures simply

37. VT. R. CIV. PROC. 4. Another statute is found at VT. STAT. ANN. tit. 12, § 913 (West 1973). It is essentially identical. There is also a statute pertaining to foreign corporations, VT. STAT. ANN. tit. 12, § 855 (West 1973), again with the same wording.

38. One would have to look to VT. STAT. ANN. tit. 12, § 913 (1973) for any stab at amenability. Unfortunately, it contains the same vague language as the rule and therefore is not very helpful.

39. The Reporter's Notes to the 1979 amendment of the Rule support this belief. They state that the intent of the rule as amended was to conform to *Shaffer v. Heitner*, 433 U.S. 186 (1977).

40. ALA R. CIV. PROC. 4.2(a) (1984); IOWA CODE ANN. § 617.3 (West 1980) and IOWA RULES OF COURT 56.2 (1988); LA. REV. STAT. § 13:3201(B) (1988); ME. REV. STAT. ANN. tit. 14, § 704-A (1980); NEB. REV. STAT. § 25-536 (1985); OR. R. CIV. PROC. 4 (1987); 42 PA. CONS. STAT. ANN. § 5322 (1981); S.D. CODIFIED LAWS § 15-7-2; TENN. CODE ANN. § 20-2-214 (1980); see UTAH CODE ANN. § 78-27-22. On the face of its laws, Texas would be classified as a Type 3 or Type 1 state. It has four major rules or statutes dealing with long-arm jurisdiction. It has a general Type 2 statute, TEX. REV. CIV. PROC. & REM. CODE § 17.042 (Vernon 1986) and two domestic relations long-arm statutes, TEX. FAM. CODE §§ 3.26 and 11.051 (Vernon 1986). In addition, effective in 1976, the Texas Supreme Court amended TEX. R. CIV. P. 108, adding a sentence stating that someone served under the rule "may be required to appear and answer under the Constitution of the United States in an action . . . in personam." This looks like a Type 3 clause and some Texas case law supports this conclusion. *E.g.*, *Paramount Pipe & Supply Co., Inc. v. Muhr*, 749 S.W.2d 491, 495 (Tex. 1988); *Fox v. Fox*, 559 S.W.2d 407, 409 (Tex. Civ. App. 1977). However, the Fifth Circuit has held that Rule 108 is not a separate long-arm statute, thus restricting its use by federal litigants. *Wyatt v. Kaplan*, 686 F.2d 276, 285 (5th Cir. 1982) (questioning whether the Texas Supreme Court would be acting within its powers to add an amenability provision to Rule 108). Research on LEXIS and Westlaw indicates that Rule 108 is rarely invoked by litigants as a separate source of amenability, possibly because of uncertainty over its status. Commentators, including drafters of the domestic relations long-arm law, are uncertain about the authority of the Rule. *E.g.*, Weintraub, *Texas Long-Arm Jurisdiction in Family Law Cases*, 32 Sw. L.J. 965, 974 (1978) (arguing that the rule is a separate long-arm statute); Carlson, *General Jurisdiction and the Exercise of In Personam Jurisdiction Under the Texas Long-Arm Statute*, 28 S. Tex. L. Rev. 307, 328-330 (1986) (same); Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH. L. REV. 159, 216-18 (1976) (indicating uncertainty about the issue). Because of this uncertainty and the treatment Rule 108 has received by cases I have placed Texas in the Type 2 category. However, if the recent Texas Supreme

would have repealed the old statutes and replaced them with the California or Rhode Island style statute that is now appended to the long-arm statute.

Discerning why these states acted this way is difficult. Again, legislative history is spotty. In Tennessee, for example, it consists of a short statement of the legislative sponsor to the effect that the legislators want the courts to have expanded jurisdiction.⁴¹ This is not very enlightening. However, it does appear that prior to the amendment, Tennessee courts interpreted the statute in a way that may have fallen short of due process.⁴² In Nebraska, the author of the long-arm statute notes the oddity but asserts that it was done deliberately to emphasize the legislature's intent to broaden the statute.⁴³

In Alabama, the change was accomplished through a committee revising the state's rules of civil procedure. With some reservations,⁴⁴ the commission decided that it merely was codifying established Alabama law.⁴⁵ However, its commentary noted that the issue was not entirely free from doubt and that the new catchall clause was intended to dispel any doubts on the subject.⁴⁶ Moreover, the statute was worded in such a way to make clear that the specific categories that remained were not a limitation on the catchall clause. Why were the categories kept? Apparently to guide the courts in areas that had already been found to satisfy due process.⁴⁷

In Oregon, courts have provided this explanation for the existence of the odd hybrid statute:

Subsections B. through K. of Rule 4 may appear to be redundant in view of

court case supporting the use of Rule 108 as a separate form of authority catches on, Texas would become a Type 3 state.

41. The Tennessee statute is TENN. CODE ANN. § 20-2-214(6) (1980). The legislative history is cited in *Gullett v. Qantas Airways Ltd.*, 417 F. Supp. 490, 493 (M.D. Tenn. 1975).

42. See *Gullett v. Qantas Airways, Ltd.*, 417 F. Supp. at 493, citing *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 377 (6th Cir. 1968). See also Note, *Developments in Civil Procedure*, 53 TENN. L. REV. 291, 294-95 (1985).

43. Kirst, *Nebraska's Modern Service of Process Statute*, 63 NEB. L. REV. 1, 20-21 (1983). In a letter to me Professor Kirst noted his authorship of the statute and reiterated that he wanted to insure that courts could not interpret the catchall amendment as overturning any basis of jurisdiction already found to exist under the previous version of the statute. Letter from Professor Roger W. Kirst to David Welkowitz (February 16, 1989). I am grateful to Professor Kirst for his kind response to my inquiry on this matter.

44. See ALA. R. CIV. PROC. 4 committee's comments.

45. *Id.*

46. *Id.*

47. See *Id.*

the subsection L. catchall provision, but they are not superfluous. Based as they are on facts which the United States Supreme Court has held to be adequate bases for jurisdiction, these more specific provisions serve to narrow the inquiry so that if a case falls within one of them, there is no need to litigate more involved issues of due process. . . . Once a plaintiff alleges facts bringing his or her case within a specific provision, that ordinarily will be the end of the matter. On the other hand, if resort to ORCP 4L. is necessary, then the limits of due process must be explored. (Footnote omitted)⁴⁸

However, this justification does not apply easily to all Type 3 statutes. Oregon's statute contains eleven specific categories plus the catchall. They are far more specific than the "transacting business" or "tortious act" sections of a typical statute.⁴⁹ The Alabama and Nebraska rationales appear to be more reasonable explanations for most Type 3 statutes. They eliminate any uncertainty about the reach of the statutes.

From the standpoint of federal court usage, the most interesting of these statutes is the one in South Dakota.⁵⁰ The "catchall" clause itself is not unusual. What is unusual is the clause right before it, which has federal implications. That section specifically allows personal jurisdiction over persons accused of violating state or federal antitrust laws.⁵¹ This is remarkable because subject matter jurisdiction in federal antitrust matters is exclusively federal.⁵² Moreover, for corporate defendants, there is nationwide service of process in such cases.⁵³ Thus, the long-arm statute only applies to individuals. For a state legislature to fill a gap that will apply only to federal courts is strange indeed.⁵⁴ However, this idiosyncrasy should not affect the interpretation of the statute. The catchall clause was passed in a separate statute, enacted after the specific clauses had been enacted.

One interesting twist is found in Iowa. Iowa has a Type 2 statute

48. *State ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 384, 657 P.2d 211, 211 (1982), *quoted in* *Regal Mfg. Co. v. Louisiana Glass, Inc.*, 83 Or. App. 463, 731 P.2d 1066, 1067 (1987).

49. They included sections relating to violations of Oregon securities law (Rule 4J), being an officer or director of an Oregon corporation (Rule 4G), performing services for plaintiff within Oregon at the specific request of a defendant (Rule 4E(2)), etc.

50. S.D. CODIFIED LAWS ANN. § 15-7-2 (1984).

51. S.D. CODIFIED LAWS ANN. § 15-7-2(13) (1984).

52. *See, e.g., Kurek v. Pleasure Driveway and Park Dist. of Peoria*, 583 F.2d 378, 379 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

53. 15 U.S.C. § 22 (1982). *See, e.g., Catrone v. Ogdan Suffolk Downs, Inc.*, 647 F. Supp. 850, 856 (D. Mass. 1986).

54. Legislative history, to the extent available, is unrevealing. Most likely, it was an attempt to allow jurisdiction over non-resident state antitrust violators, and the legislators added federal claims for completeness without considering the implications of their actions.

covering tortious acts of foreign corporations.⁵⁵ In addition, Rule 56.2 of the Iowa Rules of Civil Procedure contains a Type 1 clause.⁵⁶ In *Cross v. Lightolier, Inc.*⁵⁷ the plaintiff served defendant under the statute, not the rule. Unfortunately for plaintiff, the statute turned out to be more restrictive and the court refused to bail out plaintiff by looking to the rule as a possible basis of jurisdiction.⁵⁸

In Tennessee, the legislature has acted in a strange way that gives one pause as to the proper interpretation of its statute. A "catchall" clause was added to the Tennessee long-arm statute in 1972.⁵⁹ Yet in 1975 the legislature amended the statute to add *another* basis of jurisdiction—over a nonresident parent who had lived in Tennessee while married and then failed to pay child support.⁶⁰ In fact, this clause was further amended in 1978 to add failure to pay alimony to the jurisdictional bases.⁶¹ Since Tennessee has a California-style catchall clause the additional clause makes little sense. When the 1975 amendment was passed, one of its sponsors indicated that "most judges" in the state had not been willing to exercise jurisdiction in cases of non-resident parents being sued for support.⁶² If true,⁶³ it is rather puzzling in light of the all encompassing catchall clause. Furthermore, there was considerable controversy over adding "alimony" to the list. It was defeated in the Tennessee House of Representatives in the 1975 amendments⁶⁴ and was not universally supported in 1978.⁶⁵ One might

55. IOWA CODE ANN. § 617.3 (West Supp. 1989).

56. The rule allows assertion of jurisdiction over anyone with "the necessary minimum contact with the state of Iowa . . . in every case not contrary to the provisions of the constitution of the United States." IOWA RULES OF COURT 56.2 (1980).

57. 395 N.W.2d 844 (Iowa 1986).

58. 395 N.W.2d at 847-48.

59. TENN. CODE ANN. § 20-2-214(6) (1980).

60. TENN. CODE ANN. § 20-2-214(7) (1980).

61. *Id.*

62. This reference is found in the tapes of the legislative sessions during which the amendment was debated. See Discussion by Sen. White of amendments to HB 103 (substituted for SB 210), April 30, 1975 (tape # S-85). The senator also noted that "some authority" supported using the long-arm statute as it existed but did not specify that authority. *Id.*

63. No published case denying jurisdiction in these instances can be found. Recent cases tend to cite the "catch-all" clause for jurisdictional authority. See cases cited in note 66 *infra*.

64. Tapes of Tennessee House of Representatives sessions on HB 103, March 24, 1975 (tape # H-42).

65. The opposing legislators did not cite the existence of the catch-all clause. They opposed allowing their courts to have this jurisdiction, even though the catch-all clause seems to grant it in any case. Indeed, one senator indicated that he believed the Tennessee

argue that the legislature has implicitly limited the catchall clause, at least in domestic relations cases. But cases in the Tennessee courts after 1978 have read the statute expansively.⁶⁶

Notwithstanding the oddity of a hybrid statute containing specific categories and a catchall clause, the analysis of Type 3 statutes leads to results similar to Type 1 statutes. Those that use the California-style language⁶⁷ should permit the use of whatever due process standard is appropriate under the circumstances (i.e. fifth or fourteenth amendment).⁶⁸

The courts of these states bear this out. Following passage of the "catchall" amendments, the courts tend to regard their statutes much like Type 1 statutes.⁶⁹ The more specific clauses are still used by litigants (possibly by lawyers unaccustomed to the new statutes). Moreover, they still are discussed by the courts, often without any discussion of the catchall clauses.⁷⁰ But they seem to be regarded as simply examples of conduct that can trigger jurisdiction and not as limitations on the statute.⁷¹

There is one important difference between Type 3 and Type 1 statutes that conceivably could affect the outcome of some cases.

courts could only award alimony where personal service had been made within the state of Tennessee. See, e.g., Comments of Sen. Henry, Tapes of Senate sessions on SB 1684, February 9, 1978 (tape # S-32).

66. E.g., Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985); Miller v. Miller, No. 86-248 II, slip op. at 2 (Tenn. App. 1987); Shelby Mut. Ins. Co. v. Moore, 645 S.W.2d 242, 244 (Tenn. App. 1981); see Davenport v. State Farm Mut. Auto. Ins. Co., 756 S.W.2d 678, 684-85 (Tenn. 1988) (using the catchall to overrule prior cases that used a different statute to limit jurisdiction).

67. E.g., LA. REV. STAT. § 13:3201(B) (West. Supp. 1989).

68. Only three of the Type 3 states do not have California-style catchall clauses. In those states — Pennsylvania, Iowa and Maine — there is some reference to minimum contacts with the state or the fourteenth amendment in the statutes. The effect of the Maine statute is discussed *infra*. In Iowa and Pennsylvania there is no legislative history pointing one way or another as to the legislature's intent with respect to that language. Most likely, the situation in these states was the same as that in Rhode Island. The due process standard used when the statutes were passed was "minimum contacts with the state" for virtually any purpose about which the state would care. It is unlikely that state legislatures would analyze the situation carefully enough to realize that it might be possible for a federal court using the state statute to apply a different constitutional standard than that applied by the state courts. It is particularly unlikely to have been discussed when in fact federal courts generally are using the same constitutional standard as the state courts when using the state statute. See Welkowitz, *supra* note 8, at 11-18.

69. See e.g., Petroleum Helicopters, Inc. v. Avco Corp., 834 F.2d 510, 514 (5th Cir. 1987) (Louisiana); Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985).

70. E.g., Holden v. Holden, 374 Pa. Super. 184, 542 A.2d 557 (1988) (using the "tortious act" section of the statute); Barnhardt v. Madvig, 526 S.W.2d 106 (Tenn. 1975); Jay Pontiac, Inc. v. Whigham, 485 So.2d 1171, 1174 (Ala. Civ. App. 1986).

71. See cases cited in note 70, *supra*.

Some of the Type 3 statutes have "specific jurisdiction" language incorporated in them. In other words, a section of the long-arm statute states that the use of this statute is limited to claims that arise out of the contacts forming the basis of jurisdiction (i.e. specific jurisdiction).⁷² In effect, the statute contemplates assertion of jurisdiction whenever warranted by due process *as long as* the jurisdictional basis (which, under the present due process test, means the contacts) is related to the claim against the defendant. Type 1 statutes typically contain no such restriction. Thus, it would be possible for a Type 1 statute to include a form of general jurisdiction not provided for by a Type 3 statute.⁷³ Most states have other statutes permitting general jurisdiction as well.⁷⁴ But, although the applicable standards under those statutes may reach *current* due process limits⁷⁵ it is not clear what restrictions, if any, states might place on general jurisdiction if it were divorced from the contacts test. On the other hand, if the jurisdictional test is expanded, in most cases the jurisdictional nexus would have *some* relationship to the claim. For example, if a federal court used a test of "minimum contacts with the United States" for certain defendants, the contacts with the United States normally would include those on which the claim was based.⁷⁶ It would be an unusual case where a federal court would attempt to assert jurisdiction without any connection between the claim and this country. Nonetheless, if the fifth amendment test is minimum contacts with the United States, a requirement that the contacts be related to the claim could be a problem in certain cases. One possible example would be civil claims for injury or wrongful death by terrorists acting outside the country.⁷⁷ Another might be stock frauds commit-

72. *E.g.*, ME. REV. STAT. ANN. tit. 14, § 704-A(2) (1980); S.D. CODIFIED LAWS § 15-7-2 (1980); TENN. CODE ANN. § 20-2-214 (1980). *See* 42 PA. CONS. STAT. ANN. § 5322(b) (1981) (by implication, since it purports to supplement a general jurisdiction statute).

73. Under current due process tests it is said that specific jurisdiction requires fewer contacts than general jurisdiction. *See* Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82 (1980).

74. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5301(a) (1981); *see also* N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1978).

75. As defined in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

76. It is clear that not *all* of the statutorily required contacts need be related to the claim. Several states have a subsection in their statutes allowing jurisdiction where defendant commits a tortious act outside the state and he or she derives revenue from business activity within the state. *See* Unif. Interstate and International Procedure Act § 1.03(a)(4), 13 U.L.A. 361 (1986). Under those statutes, it is not necessary that the business activity be related to the claim, as long as the claim arises from the tort. *See* Comment to Unif. Interstate and International Procedure Act § 1.03, 13 U.L.A. at 363.

77. *Cf.* 18 U.S.C. § 2331 (Supp. 1987); *id.* § 1203 (both are criminal statutes relating to

ted by foreigners against Americans residing abroad.⁷⁸ However, if the jurisdictional test used measures the sufficiency of the interest of the government in bringing the defendant to this court,⁷⁹ then the connection between the claim and the jurisdictional acts is made.⁸⁰

Not surprisingly, federal courts in Type 3 states have not used fifth amendment standards even when they recognize the issue. For example, consider two recent admiralty cases decided in the federal courts of Maine. Maine has a Type 3 statute with a California style catchall clause.⁸¹ However, in these two cases, the courts held that, despite the fact that the fifth amendment might permit jurisdiction, the court was limited by the reach of the Maine statute to the fourteenth amendment standard.⁸² As discussed earlier, it is the author's position that where the only restraints on jurisdiction are those of the Constitution, it is the fifth, not the fourteenth amendment that applies.⁸³ Admittedly, the Maine statute contains prefatory language to the effect that the statute is to be used to go to the limits of the *fourteenth* amendment.⁸⁴ But the federal courts discussing this issue do not seem to have relied on this language. Thus they did not consider whether the language actually was intended as a limitation on the statute. Even if they had considered this language, it should not have led ineluctably to

prosecution of terrorists injuring American nationals outside this country). For a discussion of criminal jurisdiction over terrorists acting abroad, see generally *U.S. v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988).

78. In the latter case, the nationwide service provisions of the securities laws provide a federal basis for jurisdiction. 15 U.S.C. § 78aa (1982). This avoids the problem of using a state long-arm statute.

79. See *Welkowitz*, *supra* note 8, at 25-27.

80. It might be possible to argue that a terrorist attack aimed at Americans is "directed at" the United States, within the meaning of *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). A similar argument could be made for stock frauds if the target is American citizens living in the United States.

81. ME. REV. STAT. ANN. tit. 14, § 704-A (1980).

82. *Sparkowich v. American Steamship Owner's Mut. Protection & Indem. Assn.*, 687 F. Supp. 695, 698 (D. Me. 1988); *Merrill v. Zapata Gulf Marine Corp.*, 667 F. Supp. 37, 39-40 (D. Me. 1987).

83. *Welkowitz*, *supra* note 8, at 11-21. Interestingly, the Maine Supreme Court has refused a federal court's request to determine the length of the Maine long-arm statute on the grounds that this was purely a matter of federal constitutional law. *Ouellette v. Sturm, Ruger & Co., Inc.*, 466 A.2d 478, 480-81 (Me. 1983). Thus, the Maine court does not seem to believe that the limits on its statute are legislatively imposed.

84. ME. REV. STAT. ANN. tit. 14, § 704-A (1980) provides, in part: "This section . . . shall be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment." (Emphasis added)

a fourteenth amendment standard. The statute contains other introductory language apparently limiting its use to resident plaintiffs. However, the Maine courts have dismissed that language as prefatory and not controlling.⁸⁵ The fourteenth amendment language most likely was not intended to limit the reach of the statute. Like the language used in the Rhode Island statute, it appears to be a recognition of what the legislature considered the outer ceiling on the statute—namely, applicable federal law. To a state court, the applicable federal law is the fourteenth amendment. If the legislators considered its effect on federal courts at all, they would have found that most federal cases use the “minimum contacts with the state” standard even in federal question cases. It is unlikely that many legislators would have felt the need to probe further.

C. Type 2 Statutes

The most interesting and difficult group to analyze is the Type 2 statutes. These are the statutes that we learned about in law school—briefly, in most cases. They are “specific act” statutes. That is, they list a series of categories or acts that may form the basis of jurisdiction. They tend to be specific jurisdiction laws; the act forming the basis of jurisdiction must be the basis of the claim.⁸⁶ Further, they tend to look very much alike. Most are patterned after two models: the Illinois long-arm statute, passed in 1955,⁸⁷ and the Uniform Interstate and International Procedure Act,⁸⁸ which was modeled somewhat after the Illinois act.⁸⁹

Unfortunately, these similarities do not always lead to similar results. Courts in different states do not even interpret identical language identically.⁹⁰ However, in an effort to put order into this group, some categorization will be attempted.

85. See *Tyson v. Whitaker & Son, Inc.*, 407 A.2d 1, 3 n.5 (Me. 1979).

86. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.9 (1984), (citing von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1136, 1136-44 (1966)).

87. The original Illinois statute is reprinted in Casad, *supra* note 3, ¶4.01 at 4-3. See also Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 537.

88. Unif. Interstate and Int'l Procedure Act §1.03, 13 U.L.A. 361 (1986).

89. Comment to Unif. Interstate and Int'l Procedure Act § 1.03 at 362.

90. An example is the split in courts on the issue of whether a “tortious act” clause encompasses a paternity suit. Compare *Dept. of Health & Rehabilitative Serv. v. Wright*, 522 So. 2d 838, 840 (Fla. 1988) (no) with *Poindexter v. Willis*, 87 Ill. App. 2d 213, 231 N.E.2d 1, 3 (1967) (yes).

One logical dividing line would separate states where the courts have interpreted their statutes to go to the limits of due process from those that have not interpreted their statutes to go that far. For the most part, this is a feasible, though not very enlightening task.

Indeed, in almost every Type 2 state, court decisions have determined that the statute was intended to extend jurisdiction to the extent permitted by the due process clause.⁹¹ However, this surface homogeneity belies an amazing variety.⁹² To be sure, there are differences in the way different courts interpret the command of *International Shoe v. Washington*,⁹³ *Hanson v. Denckla*⁹⁴ and *World-Wide Volkswagen v. Woodson*.⁹⁵ But this is to be expected. Even with the refinements in doctrine that have occurred in the last decade, jurisdictional due process remains a vague area. Phrases like "purposeful availment" leave a great deal of room for interpretation. Not surprisingly, different courts may not solve similar problems identically when using such fuzzy standards. But this problem is one that a federal court can overcome as well. It seems universally recognized that federal law governs the due process standard.⁹⁶ Thus, it will be the vagueness of the federal stan-

91. Many cases are cited in the footnotes in this section. However, some additional examples are as follows: *Cowan v. First Ins. Co. of Haw.*, 608 P.2d 394, 399 (Haw. 1980); *Suymerasa v. Myers*, 420 N.E.2d 1334, 1340 (Ind. App. 1981); *Mohamed v. Michael*, 279 Md. 653, 370 A.2d 551, 553 (1977); *State of North Dakota v. Newberger*, 188 Mont. 323, 613 P.2d 1002, 1004 (1980); *Customwood Mfg. Co., Inc. v. Downey Constr. Co.*, 102 N.M. 56, 691 P.2d 57, 58 (1984); *Woodring v. Hall*, 200 Kan. 597, 602, 438 P.2d 135 (1968); *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Certain-Teed Prods. Corp. v. Second Jud. Dist. Ct.*, 87 Nev. 18, 479 P.2d 781, 784 (1971); *Doggett v. Electronics Corp. of Amer.*, 93 Idaho 26, 454 P.2d 63, 67 (1969); *Triplet v. R.M. Wade & Co.*, 261 S.C. 419, 200 S.E.2d 375 (1973); *State ex rel. Metal Serv. Center of Ga., Inc. v. Gaertner*, 677 S.W.2d 325, 327 (Mo. 1984); *Roy v. Transairco, Inc.*, 291 A.2d 605 (N.H. 1972); *Hummel v. Koehler*, 458 A.2d 1187, 1190 (App. D.C. 1983). Ohio seems unable to make up its mind: *compare* *Beacon Ins. Co. v. Highway Equip. Co.*, 1988 WL 122466 (Ohio App. 1988) (statute goes to due process limits) *with* *Ohio St. Tie & Timber, Inc. v. Paris Lumber Co.*, 456 N.E.2d 1309, 1312-13 (Ohio App. 1982) (citing an earlier case holding that the statute does not go to due process limits). Two notable exceptions are New York and Florida. *Galgay v. Bulletin Co.*, 504 F.2d 1062, 1066 (2d Cir. 1974) (discussing New York law); *Lavie v. Markscope Research Co.*, 71 Misc. 2d 373, 374, 336 N.Y.S.2d 97, 99 (Sup. Ct. 1972) (dicta); *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236, 241 (5th Cir.), *cert. denied*, 454 U.S. 816 (1981) (Florida law).

92. In this, as in the preceding sections, I have relied primarily on state court cases. Because long-arm jurisdiction by definition involves out of state parties, many jurisdictional cases are decided by federal courts sitting in diversity cases. but state cases are the authoritative view on the meaning of the state statutes.

93. 326 U.S. 310 (1945).

94. 357 U.S. 235 (1958).

95. 444 U.S. 286 (1980).

96. *E.g.*, *Leney v. Plum Grove Bank*, 670 F.2d 878, 880 (10th Cir. 1982); *Empire Abra-*

dard, not the limits of the state statute that will be the problem for a federal court. This is a problem of federal, not state law.

What makes Type 2 statutes so interesting, and difficult, to deal with is that the actions of the state courts and legislatures do not follow their words. The courts hold, or seem to hold, that the only limits on the long-arm statutes are those prescribed by due process. But the analysis used to solve individual cases is inconsistent with the broad statement. In short, there appear to be limits on the statutes apart from due process. The succeeding subsections will examine some of the ways that the statutes and the interpretations depart from due process limits and the implications for federal courts.

1. *The Limitations of State Law: Theory and Practice in General*

A threshold problem exists in some states. They seem unsure whether or not their statute goes to the limits of due process. For example, in Michigan several state and federal court decisions seemed to find that Michigan's statute goes to the limits of due process.⁹⁷ But in *Witbeck v. Bill Cody's Ranch Inn*,⁹⁸ in a cryptic footnote, the Michigan Supreme Court cast doubt on that conclusion.⁹⁹ In Puerto Rico, the federal courts had held that the local long-arm statute¹⁰⁰ went to the limits of due process.¹⁰¹ However, a recent federal case¹⁰² noted a hitherto unpublished decision of the Puerto Rico Supreme Court holding that the statute is not to be interpreted so expansively.¹⁰³

Beyond these problems, there are large conceptual problems. My

sive Equip. Corp. v. H. H. Watson, Inc., 567 F.2d 554, 556 n.1 (3d Cir. 1977); Data Disc, Inc. v. Systems Technology Assoc., Ltd., 557 F.2d 1280, 1286-87 n.3 (9th Cir. 1977).

97. *E.g.*, McGraw v. Parsons, 369 N.W.2d 251, 253 (Mich. App. 1985); Northern Ins. Co. of New York v. B. Elliott, Ltd., 323 N.W.2d 683, 685 (Mich. App. 1982); Hertzberg & Noveck v. Spoon, 681 F.2d 474, 478 (6th Cir. 1982); American Business Overseas v. Methods Research Prods., Inc., 593 F. Supp. 1, 3 (W.D. Mich. 1983).

98. 428 Mich. 659, 411 N.W.2d 439 (1987).

99. 411 N.W.2d at 442 n.3. *But see* Nixon v. Celotex Corp., 693 F. Supp. 547, 550-51 (W.D. Mich. 1988) (asserting, after *Witbeck*, that Michigan's statute goes to due process limits). Interestingly, Michigan has a separate statute conferring personal jurisdiction to decide issues of status that expressly goes to the limits of the Constitution. MICH. COMP. LAWS. ANN. § 600.775 (West 1981).

100. P.R. R. CIV. PROC. 4.7(a) (1968).

101. *E.g.*, Mangual v. General Battery Corp., 710 F.2d 15, 19 (1st Cir. 1983).

102. Banco Popular de Puerto Rico v. Greenblatt, 693 F. Supp. 1346 (D.P.R. 1988).

103. *Id.* at 1348, *citing*, Industrial Siderurgica, Inc. v. Thyssen Steel Caribbean, Inc. slip op. at 721,22, n.5(D.P.R. June 30, 1983).

premise in analyzing the state statutes and decisions interpreting them is as follows. If the statutes truly go to the limits of due process then they ought to be limited only by whatever that standard is at the moment. If, however, the statutory interpretation remains static while the due process limit changes, one would conclude that state law imposes a limitation on the statute in addition to federal constitutional restraints.

Except in one state, it appears that state courts have tried to mold the limitations of their long-arm statutes to conform to the recent series of jurisdictional cases from the Supreme Court.¹⁰⁴ However, their task was simplified by the fact that most of the Court's recent decisions have restricted, rather than expanded, jurisdiction.¹⁰⁵ Thus, state courts have not been faced with a new, more expansive due process test. But suppose the due process standard became more expansive. Did the states truly intend that their statutes could be used to assert jurisdiction in a situation where the conventional "minimum contacts within the forum state" standard is not met?¹⁰⁶

The answer to that question is difficult to determine. If state courts truly mean what they appear to be saying—*i.e.*, that their statutes go to the limits of due process—one would expect the discussion in the cases to be quite simple. One would expect that there would be little or no discussion of the long-arm statute, beyond a statement that it incorporates due process limits. Instead, the decision would turn solely on whether due process is satisfied. But in case after case, and state after state, something very different happens. State courts are using a two-pronged analysis. First, they determine whether the situation is covered by the long-arm statute.¹⁰⁷ Only then do they apply the due process standard. In

104. The exception seems to be Illinois, whose Supreme Court appears to have tired of the constant changes in due process philosophy. *Green v. Advance Ross Electronics Corp.*, 86 Ill.2d 431, 427 N.E.2d 1203 (1981). *But see* *Capital Associates Development Corp. v. James E. Roberts-Ohbayashi Corp.*, 138 Ill. App.3d 1031, 487 N.E.2d 7 (1st Dist. 1985).

105. *See, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987). *Cf.* *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (upholding jurisdiction against due process challenges).

106. As noted earlier this could happen in two ways. The Supreme Court could decide to change the fourteenth amendment standard. Alternatively, it could decide that the fifth amendment standard governing federal courts is not the same as the fourteenth amendment standard.

107. A small sampling: *Hust v. Northern Log, Inc.*, 297 N.W.2d 429, 431 (N.D. 1980); *Schofield v. Schofield*, 338 S.E.2d 132, 134 (N. Car. App. 1986); *Baker v. Baker*, No. 3753

that situation, what is a federal court to do?¹⁰⁸ And what does it say about the limits of the state statute?

There may be a reasonable explanation for this use of the statute. As is the case with Type 3 statutes, state courts just may be more comfortable using specific categories when possible. The categories of a typical Type 2 statute fit at least most situations in which jurisdiction is proper. Invoking the statute may avoid the need to discuss constitutional principles at length, at least in situations where jurisdiction obviously is proper. However, when state courts *restrict* jurisdiction based on the statute without discussing due process they may be permitting their statutes to fall short of due process limits.

Minnesota is consistent with the former analysis. Recent cases using its long-arm statute¹⁰⁹ do use the specific categories.¹¹⁰ However, when it appears that the case does not fit a statutory category the Minnesota courts are willing to see whether jurisdiction could be found if the only restriction is due process.¹¹¹ Thus, its courts are using the statute when possible, but will not be tied to it if doing so will unduly restrict jurisdiction. In this situation, one could conclude that a Minnesota federal court is not bound by the statutory restrictions, nor by a fourteenth amendment standard.

Other states do not follow this line of reasoning. Many state courts have dismissed actions *without* any discussion of due process, on the grounds that plaintiff has failed to show that defendant's actions are within the long-arm statute.¹¹² This is an indication that something other than due process limits the reach of these statutes.

That there is confusion about how to deal with the problem is

(Ohio App. 1989)(WESTLAW Allstates library); *Krell v. Carolina Bank*, 320 S.E.2d 491, 492-93 (S.C. App. 1984); *McAvoy v. District Court*, 757 P.2d 633 (Colo. 1988); *Lombard Bros., Inc. v. General Asset Mgmt. Co.*, 460 A.2d 481, 484-86 (Conn. 1983).

108. Sometimes federal courts take the easy route and convert the jurisdictional test into a one step analysis, even if that is not consonant with the state's approach. *Compare, e.g., Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987) (discussing Idaho law) with *Beco Corp. v. Roberts & Sons Constr. Co., Inc.*, 760 P.2d 1120, 1123 (Idaho 1988) (using a statutory analysis before the due process test); *see also Nixon v. Celotex Corp.*, 693 F. Supp. 547, 550-51 (W.D. Mich. 1988) (discussing Michigan law).

109. MINN. STAT. ANN. § 543.19 (West 1988).

110. *E.g., Viske v. Flaby*, 316 N.W.2d 276, 281 (Minn. 1982).

111. *Mahoney v. Mahoney*, 433 N.W.2d 115, 118 (Minn. Ct. App. 1988).

112. Some recent examples include *McClelland v. Doyle*, 772 S.W.2d 384, 386 (Mo. App. 1989); *Pepe v. Concord Ranch, Inc.*, No. 61921 (Del. 1989)(WESTLAW Allstates library); *Debreceni v. Bru-Jell Leasing Corp.*, 710 F. Supp. 15, 20 & n.12 (D. Mass. 1989); *Foxworth v. County of Arlington*, No. 15862 (D.D.C. 1989) (WESTLAW Allfeds library, DCT file).

exemplified by some recent cases dealing with the Texas long-arm statute.¹¹³ In *Hall v. Helicopteros Nacionales de Colombia*¹¹⁴ the Texas Supreme Court gave an expansive reading to its statute, seemingly eliminating the need for statutory analysis.¹¹⁵ In fact, the Fifth Circuit recently held that the statutory analysis could be collapsed into the constitutional analysis.¹¹⁶ However, a recent Texas appellate case relied solely on the statute to dismiss a suit involving the refusal of a divorced father to pay for certain medical expenses of his child.¹¹⁷ This is particularly puzzling because the Texas Family Code expressly permits jurisdiction in "a suit affecting the parent-child relationship" on any basis that would satisfy the federal constitution.¹¹⁸ Though this suit arguably does not come within the statute (it is about payment, rather than custody and is not about establishing paternity), its spirit certainly cries out for the use of an expansive analysis.¹¹⁹ Perhaps the case is an aberration. But it illustrates the difficulties in understanding what the state thinks its own statute means.

It may be that states regard the categories of their long-arm statutes as being the only possible categories permitted by due process. This would explain some of the problems described below as "restricted due process." A court that believed that due process only permitted certain categories of long-arm jurisdiction would require that the assertion of jurisdiction fit within one of those categories.

But this is an unsatisfying explanation. The history of long-arm jurisdiction since *International Shoe* is marked by the pliability of the minimum contacts standard in a variety of contexts. It is hard to accept the explanation that a belief in the all-encompassing nature of their statutory categories explains the case law very well. One would think that, at least recently, legislators and courts would know better. But perhaps that is a naive belief.

Another problem in determining the true limits of the statutes is

113. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986). See the discussion of the statute in note 40 *supra*.

114. 638 S.W.2d 870 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), *opinion withdrawn*, 677 S.W.2d 19 (1984).

115. 638 S.W.2d at 872; see *Southern Clay Prods., Inc. v. Guardian Royal Exchange Assurance, Ltd.*, 762 S.W.2d 927 (Tex. App. 1988).

116. *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 385 (5th Cir. 1989).

117. *Runnels v. Firestone*, 746 S.W.2d 845, 853 (Tex. App. 1988).

118. TEX. FAM. CODE ANN. § 11.051(4) (Vernon 1986).

119. Moreover, Rule 108 of the Texas Rules of Civil Procedure, discussed in note 40, *supra*, arguably provides for jurisdiction here as well.

the way state legislatures treat their statutes. In several states, the state legislature has amended the long-arm statute to add categories even after its courts have held that the statute goes to the limits of due process.¹²⁰ That is plainly inconsistent with the notion that the categories are irrelevant and that the statute reaches as far as is permissible.¹²¹

An interesting illustration of this is in North Dakota. Looking only at the case law, one would see a fair amount of consistency. From 1975, in *Hebron Brick Co. v. Robinson Brick and Tile Co.*,¹²² to the present the North Dakota courts have consistently held that the statute goes to the limits of due process.¹²³ However, the statutory categories have undergone some interesting shifts since 1975.

The original rule was modeled after the Uniform Act and contained a conventional set of categories. Effective January 1, 1976, a new section was added to the statute. This new section permitted North Dakota courts to assert jurisdiction over nonresidents,

[e]njoying any other status or capacity within this state, including cohabitation, or engaging in any other activity having such contact with this state that the exercise of personal jurisdiction over him does not offend against traditional notions of justice or fair play or the due process of law.¹²⁴

Two facets of the new section merit special attention. First, that the legislature felt a need to add "cohabitation within the state" to the jurisdictional acts is interesting. This addition was made despite the fact that in 1975, in *Hebron Brick*, the North Dakota Supreme Court held that the statute goes to due process limits.

120. *E.g.*, North Dakota: N.D. R. Civ. P. 4(b)(2)(H) (Supp. 1989), discussed in detail below; Massachusetts: MASS. GEN. L. ANN. ch. 223A, § 3(h) (West Supp. 1989) (added 1987) and § 3(g) (added 1976), "Automatic" Sprinkler Corp. of Amer. v. Seneca Foods Corp., 361 Mass. 441, 280 N.E.2d 423, 424 (1972); Utah: UTAH CODE ANN. § 78-27-24(7) (1987) (added 1983), *Ted R. Brown & Assoc., Inc. v. Carnes Corp.*, 611 P.2d 378, 380 (Utah 1980); Virginia: VA. CODE ANN. § 8.01-328.1(8)(iii) (Supp. 1989) (added 1988), *John G. Kolbe, Inc. v. Chromodern Chair Co.*, 211 Va. 736, 180 S.E.2d 664, 667 (1971).

121. However, the same thing happened in Tennessee even after a Type 3 clause was added without any evident effect on the interpretation of the statute. See discussion in text at note 66 *supra*.

122. 234 N.W.2d 250, 256 (N.D. 1975).

123. See, *e.g.*, *Lumber Mart, Inc. v. Haas Int'l Sales & Service, Inc.*, 269 N.W.2d 83, 86 (N.D. 1978); *Hust v. Northern Log, Inc.*, 297 N.W.2d 429, 431 (N.D. 1980); *United Accounts, Inc. v. Quackenbush*, 434 N.W.2d 567, 569 (N.D. 1989). Since at least 1980, it has been evident that North Dakota is what I call a "restricted due process" state. See *Hust v. Northern Log, Inc.*, 297 N.W.2d at 431; *United Accounts, Inc. v. Quackenbush*, 434 N.W.2d at 569. That is, its long-arm analysis requires a two step process, the first step being to find a category within which to put the case. See the discussion of restricted due process in subsection 2, below.

124. N.D. R. Civ. P. 4(H), as amended effective January 1, 1976.

Second, the remainder of the statute (starting with "engaging in any other activity") is so broad that it looks like a Type 3 catchall clause. However, effective January 1, 1979, the statute was amended again. The section quoted above (subdivision (H)) was split into two subsections. New subdivision (I) contained the cohabitation clause and added "sexual intercourse" to the list of jurisdictional acts. The due process of law phrase was removed from subdivision (H) and placed at the beginning of the statute in front of the list of jurisdictional categories. The "engaging in any other activity" language was placed in subdivision (I) but was now limited by the phrase "within this state."¹²⁵ However, both before and after these changes, the courts' interpretation of the statute remained the same; it goes to the limits of due process.¹²⁶ Just the addition of "sexual intercourse" to the list of jurisdictional acts seems to belie that conclusion, at least before the amendment. Moreover, the 1979 amendment appears to impose a limitation on the statute not found in the 1976 amendment—that the activity must occur within the state. Obviously, determining the meaning of such a statute will be a daunting task.

Perhaps this can be explained as another by-product of the belief that the long-arm categories are all-encompassing. When that belief is proven wrong—by other states taking a more aggressive approach to long-arm jurisdiction—then these states amend their statutes to conform to the new status quo.

There is more to the problem of Type 2 statutes than individual states' aberrations from what might otherwise appear to be the norm. There is a pattern that can be discerned here. The apparent deviations from the outer limits of due process often fall into cer-

125. The revised statute, N.D. R. Civ. P. 4(H) (as amended effective January 1, 1979), provides, in relevant part:

(2) PERSONAL JURISDICTION BASED UPON CONTACTS. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state that the exercise of personal jurisdiction over him does not offend against traditional notions of justice or fair play or the due process of law under one or more of the following circumstances: . . .

(H) enjoying any other legal status or capacity within this state; or

(I) engaging in any other activity, including cohabitation or sexual intercourse, within this state.

Subdivision (H) thus was reduced to giving jurisdiction over a legal status or capacity. That this was meant as a limiting factor is evident in the Explanatory Note. The Note says that the amendment *restricted* the "any activity" language in the former section (H) to legal status. North Dakota Court Rules, Explanatory Note to Rule 4 at 20 (West 1983).

126. See cases cited in note 120 *supra*.

tain definable analytical subcategories. One category is states that amend their statutes after their courts hold that the statute does go to the limits of due process. The next sections discuss two other such areas, representing some of the more pervasive deviations from the limits of due process.

2. "Restricted due process"

The situation in Massachusetts is illustrative of the analysis that is found in several states. The Supreme Judicial Court of Massachusetts has made it clear that one must find a category in the long-arm statute on which to base jurisdiction.¹²⁷ This would seem to restrict its statute to less than the due process limit. As noted earlier, creative litigants are constantly expanding the categories of possible jurisdictional acts. Limiting jurisdiction to the specific acts found in a statute (particularly one that has not been amended recently) may seriously restrict its reach. However, the same cases state that when a statutory basis is found, one can assert jurisdiction within that category to the limits of due process.¹²⁸ This is an obvious contradiction, but the courts state it without seeming to notice.

Similar analyses are found in cases in Arkansas. There, one commentator concluded that only one provision of the Arkansas long-arm statute—"transacting business in this State"—is "co-extensive with due process."¹²⁹ His analysis (borne out by my independent reading of the case law that existed at the time) is that Arkansas cases purporting to extend the statute to due process limits all involved the transacting business section.¹³⁰ Thus, he concludes that the remainder of the statute falls short of due process. However, after the publication of that article, the Arkansas Supreme Court extended this interpretation to other parts of the statute.¹³¹ Even then, the Court did not ignore the categories, but found that other categories went to the limits of due process.

For convenience, one may call such analysis "restricted due pro-

127. *E.g.*, *Morrill v. Tong*, 390 Mass. 120, 453 N.E.2d 1221, 1227 (1983); *Good Hope Ind., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 389 N.E.2d 76, 79-80 (1979).

128. 453 N.E.2d at 1228; 389 N.E.2d at 79-80. *See Gray v. O'Brien*, 777 F.2d 864, 866 (1st Cir. 1985) (noting that the statute goes to due process limits only within the listed categories).

129. *Watkins, The Arkansas Long-Arm Statute: Just How Long Is It?*, 40 *ARK. L. REV.* 21, 44 (1986).

130. *Id.* at 45-46.

131. *Kilcrease v. Butler*, 293 Ark. 454, 739 S.W.2d 139 (1987) (long-arm jurisdiction predicated on tortious injury within the state).

cess." The meaning of restricted due process is subject to many possible interpretations. It may mean nothing more than that *any* assertion of jurisdiction must be within due process limits. That is, even if there is a category to cover defendant's actions, due process considerations limit the state's ability to exert authority over the defendant. Thus, if the statute somehow could be used in a way that would fall outside due process, the constitution would reign it in. But obviously it is possible for a state to interpret its categories in a manner that falls short of due process. In that case, pointing to due process as a limiting factor would be incorrect, or at least misleading. Moreover, the tenor of the cases is that they perceive limits within the long-arm statute itself. The courts are making a statement that the long-arm statute cannot be ignored by jumping to a due process analysis in every jurisdictional case. Therefore, true restricted due process must mean something different.

One way to ascertain its meaning is to assume that fairness, or some other more lenient standard, replaced minimum contacts with the state as the touchstone of jurisdictional due process analysis. Then one would ask how that change affects states subscribing to restricted due process theory. The categories in a typical Type 2 statute are bound up with some sort of "contact" with the forum *state*. If the categories remain meaningful, then a fundamental change in due process analysis that divorces constitutionality from contacts makes it difficult to give a meaning to the categories that is co-terminous with the more lenient due process standard. If the categories in the statute are meaningful after the change, this may mean little more than that the statute does *not* go to the limits of due process, despite the courts' assertions to the contrary. The range of jurisdictional contacts permitted by the constitution does not fall entirely into the categories set forth in a long-arm statute. That is one of the reasons that several states either have abandoned categories or have added a catchall and created a Type 3 statute.

But the state could assert that, although its statute as a whole falls short of what due process would allow, restricted due process is more than a statement of the obvious. Under this interpretation, the due process test could be used to determine the appropriate parameters of any individual category. That has a surface appeal but leads to a problem. If the state defines the acts falling within the categories restrictively, is it legitimate to say that the category nevertheless goes to the limits of due process?

For instance, suppose a long-time resident of state A files a pa-

ternity suit in state A against a resident of state B. If the couple conceived the child in state A, it clearly would be constitutional to assert jurisdiction in state A. Moreover, it is at least arguable that such activity on the part of defendant is tortious.¹³² However, some states do not deem this to be within the "tortious act" provisions of their long-arm statutes. They reason that a refusal to pay child support in the absence of an admission or adjudication of paternity is not a tort.¹³³ Thus, to say that your "tortious act" provision goes to the limits of due process, as long as there is a "tortious act" is meaningless. It is no more than a state-imposed limitation on its long-arm statute.

However, if the state uses the due process test to assist in defining the meaning of "tortious act," then restricted due process analysis may have some meaning. Thus, a state could assert that one should first look to see whether the activity is a constitutionally permissible basis for jurisdiction while at the same time examining the long-arm categories. If the action is a constitutional basis of jurisdiction, the court should stretch as far as possible in determining whether the act comes within a long-arm category. To use the above example, if a paternity suit is colorably tortious, and if it would be constitutional to assert jurisdiction, then the long-arm statute should permit jurisdiction. Only when it is clear beyond doubt that this act is not within any category would the long-arm categories become a basis for rejecting jurisdiction.¹³⁴

This explanation of restricted due process may not help a federal court that wants to use a fifth amendment due process standard. The categories in a Type 2 statute ordinarily require some connection between the activity and the *state*. The most common categories of this type are "transacting business *in the state*" and committing a "tortious act *within the state*." Even if these categories coincide with the current outer limits of the fourteenth amendment, a fifth amendment standard may be more expansive.¹³⁵ For a federal court to justify using a more lenient standard requires making certain assumptions. Primarily, one would have to assume

132. See, e.g., *Poindexter v. Willis*, 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967).

133. E.g., *Department of Health & Rehabilitative Services v. Wright*, 522 So. 2d 838 (Fla. 1988).

134. Professor Currie suggests a somewhat similar analysis for the Illinois statute in his article. Currie, *supra* note 87 at 553.

135. See, e.g., *Gregorian v. Izvestia*, 871 F.2d 1515, 1530 (9th Cir. 1989) (using a standard of minimum contacts with the United States in an action under the Foreign Sovereign Immunities Act).

that, when the state legislature permitted jurisdiction over defendants who "transact business within the state" it really meant to permit jurisdiction over defendants who "transact business in a manner permitting the assertion of jurisdiction by the state consistent with the constitution." On the surface this argument seems similar to that made above with respect to the meaning of the Rhode Island statute. There is an important difference, however. Rhode Island clearly wanted to dispense with categories and do whatever was possible to broaden the bases of jurisdiction. States using restricted due process analysis have not dispensed with the categories and have not indicated as clearly a willingness to divorce their statutes from conduct connected with the state. If we say that "transacting business within the state" really means "transacting business in any manner that would permit jurisdiction" we must take care not to render the categories meaningless. Otherwise, a federal court would be rewriting the statute in a manner expressly rejected by the state courts.

There is serious question whether an interpretation of the categories that divorces them from contacts is consistent with legislative intent. Suppose in our paternity suit above, the courts of state A have permitted the assertion of jurisdiction where the child was conceived in state A. Now suppose in another case the child was conceived while the couple was on vacation in state C. Further assume that this was a one-night affair and the defendant had no other contacts with state A. Under those circumstances, it might be unconstitutional under the fourteenth amendment for the state A courts to assert jurisdiction over the defendant. However, assume the defendant is a Canadian citizen and has "minimum contacts" with the United States. Under other circumstances, courts have indicated that federal courts can assert jurisdiction over alien defendants meeting that standard.¹³⁶ One might well argue that a federal court in state A using restricted due process analysis should be permitted to assert jurisdiction in this case.¹³⁷ After all, the plaintiff (and presumably the child) live in state A and state A is as good a forum as any in the United States for this litigation. State A has an interest in protecting the child and state C has little interest except the possible prevention of fornication within its borders. Thus, it may not be fundamentally unfair to have the liti-

136. See, e.g., *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985) (case brought under the Securities Exchange Act).

137. I recognize that fairness concerns may make it unlikely that even a federal court would try to assert jurisdiction in this case.

gation in A. (Indeed, state A may be closer to Canada than state C, where the child was conceived.) The question is whether one can reasonably assume that the state A long-arm statute can be read to permit jurisdiction in those circumstances. We have now severed all connections with state A, except plaintiff's residence.¹³⁸ It is not clear that state A, which refuses to ignore its long-arm categories, intended its statute to reach that far. That is the difficult problem of interpretation facing the federal court in state A.

The problems of a federal court are symptomatic of a general problem with this analysis. Although a due process test can tell you whether a particular activity falls within the constitutional limits for jurisdiction, it is not designed to test whether an activity falls within such state-defined categories as "torts," "doing business" and the like. Defining such terms is the key to the analysis, however. Due process tests cannot readily distinguish between tortious acts and other (constitutionally permissible) activities. Thus, restricted due process analysis may be no more than an exhortation not to be stingy when defining the limits of the categories. And it may not even be that, as the next section illustrates.

3. *Problems with Tortious Act Clauses*

The non-due process limits placed on state long-arm statutes are acutely obvious in the interpretations of state tortious act clauses. The earliest cases in this area showed a split between expansive and restrictive readings of these clauses. The major fights were over the meaning of "tortious act *within the state*." Early cases interpreting the Illinois statute gave an expansive reading to that statute's tortious act clause, particularly in products liability cases.¹³⁹ New York took a more limited view of the "within the state" language of its statutes. It required that the tortious *act*, not just the injury, occur in the state.¹⁴⁰ Naturally, this limited the usefulness of long-arm statutes in products liability cases. Many legislatures either amended their statutes to add a second tortious act clause or enacted statutes containing a clause specifically covering torts committed outside the state having an effect within the

138. One could stretch the example further by assuming that plaintiff moved to state A only weeks before filing suit.

139. *E.g.*, *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761, 763 (1961); *see Nelson v. Miller*, 143 N.E.2d 673, 674 (1957); *Currie, supra* note 87 at 538-46.

140. *Feathers v. McLucas*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 20-24, 209 N.E.2d 68, 77-79 (1965). *See Currie, supra* note 87 at 547-53.

state.¹⁴¹

Divining the meaning of a long-arm statute becomes even more difficult in a state that has two tortious act clauses—one for torts within the state and another for torts outside the state causing injury within the state.¹⁴² Often the latter clause has some additional limiting factors such as defendant must obtain substantial revenue from interstate commerce or from goods sold within the state.¹⁴³ With such statutes, neither tortious act clause alone coincides with the limits of due process in the “tortious act” area. It is hard to imagine how one would use restricted due process analysis to expand the contours of a clause that is limited by the existence of another clause within the same statute. Possibly one could read the two clauses together and apply the due process test to anything arguably within either clause, without being particular about which clause would cover the activity. However, this strains statutory interpretation and is inconsistent with the passage of a statute with two separate clauses. If the legislature intended them to be read in this way, it could easily have collapsed them into one clause.

Another limitation placed on tortious act clauses is the definition of a “tort.” A common problem in this area is paternity suits. As noted above, in subsection 2, there is a split in the courts about whether a failure to acknowledge paternity and to pay child support constitutes a tort.¹⁴⁴ Most states seem to agree that states can constitutionally assert jurisdiction in such cases, at least where conception took place in the state, and many have amended their statutes to so provide.¹⁴⁵ Thus, the definition of a “tort” can limit the statute beyond the mandate of due process.

A detailed discussion of all states’ tortious act clauses would fill

141. *E.g.*, N.Y. CIV. PRAC. L. & R. § 302(a)(3) (McKinney 1978); ARK. STAT. ANN. § 16-4-101 C.1.(d) (1987); GA. CODE ANN. § 9-10-91(3) (1982); KY. REV. STAT. ANN. § 454.210(2)(a)4 (Michie 1985). The Comments to the Uniform Act, which contains two tortious act clauses, note that its “tortious act within the state” section may not be as broad as that of states like Illinois. 13 U.L.A. at 363 (1986).

142. *See, e.g.*, Unif. Interstate and Int’l Procedure Act §§ 1.03(a)(3), (4), 13 U.L.A. 355, 362 (1986).

143. *E.g.*, N.Y. CIV. PRAC. L. & R. § 302(a)(3) (McKinney 1978); ARK. STAT. § 16-4-101 C.1.(d) (1987); GA. CODE ANN. § 9-10-91(3) (1982); KY. REV. STAT. ANN. § 454.210(2)(a)4 (Michie 1985); *see* ALASKA STAT. § 09.05.015(4) (1983).

144. *Compare* Poindexter v. Willis, 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967) with Department of Health & Rehabilitative Serv. v. Wright, 522 So.2d 838 (Fla. 1988).

145. *E.g.*, IDAHO CODE § 5-514(f) (Michie 1988); MD. CTS. & JUD. PROC. CODE ANN. § 6-103.2 (Supp. 1988) (this statute is separate from Maryland’s general long-arm statute); MO. REV. STAT. § 506.500(6) (Supp. 1989); UTAH CODE ANN. § 78-27-24(7) (1987); VA. CODE ANN. § 8.01-328.1(8)(iii) (Supp. 1989).

a large book.¹⁴⁶ However, a few notable examples will serve to illustrate the problems that federal (and state) courts face when using these statutes.

The experiences of Virginia and the District of Columbia are instructive. Both have Type 2 statutes patterned after the Uniform Interstate and International Procedure Act.¹⁴⁷ The Uniform Act contains two separate "tortious act" provisions. One permits jurisdiction where the tortious act (or omission) is committed "in this state."¹⁴⁸ The other allows jurisdiction over defendants who commit tortious acts outside the state if the injury occurs in the state *and* if the defendant maintains certain other contacts with the state as defined in the statute.¹⁴⁹ In both jurisdictions, in cases relying on the "transacting business" portion of the statute, the courts have held that jurisdiction is intended to be coextensive with due process.¹⁵⁰ However, in cases involving the "tortious act" provision the courts are much more circumspect in their evaluations.

In *Schleit v. Warren*,¹⁵¹ defendants in an abuse of process case claimed that they were not subject to jurisdiction in Virginia because they had committed no tortious act within Virginia. The district court noted in a footnote that "the Virginia long-arm statute has been construed to extend personal jurisdiction to the limits of due process."¹⁵² Nevertheless, the court conducted a thorough analysis of the statutory provision before finding that defendants had committed a tortious act within the state.¹⁵³ Only then did the court engage in a due process discussion. In *Early v. Travel Leisure Concepts, Inc.*,¹⁵⁴ the court found the same section of the Vir-

146. In fact, Professor Casad devotes considerable attention to the issue in his book. Casad, *supra* note 3, ¶4.02[2] and Chapter 7.

147. VA. CODE ANN. § 8.01-328.1(A) (Supp. 1989); D.C. CODE ANN. § 13-423(a) (1989). The Uniform Act is found at 13 U.L.A. 355 (1986).

148. Unif. Interstate and Int'l Procedure Act § 1.03(a)(3), 13 U.L.A. 361 (1986).

149. *Id.* § 1.03(a)(4). The other contacts are: regular doing or solicitation of business, deriving substantial revenue from goods used or consumed in the state or another persistent course of conduct in the state.

150. *E.g.*, *Danville Plywood Corp. v. Plain and Fancy Kitchens, Inc.*, 218 Va. 533, 238 S.E.2d 800, 802 (1977); *John G. Kolbe, Inc. v. Chromodern Chair Co.*, 211 Va. 736, 180 S.E.2d 664, 667 (1971) (interpreting prior statute); *Hummel v. Koehler*, 458 A.2d 1187, 1190 (App. D.C. 1983).

151. 693 F. Supp. 416 (E.D. Va. 1988).

152. 693 F. Supp. at 419 n.5. However, neither case cited by the court in the footnote involved the tortious act sections of the Virginia statute.

153. *Id.* at 419-21.

154. 669 F. Supp. 130 (E.D. Va. 1987).

ginia long-arm statute¹⁵⁵ inapplicable where the owners of a Jamaican hotel were impleaded by defendants in a case arising from a travel agency's alleged failure to warn of dangerous conditions at the hotel. The court held that no act "within the state" was committed by the third-party defendants. The court asserted that its conclusion "is underscored by [the] clearly manifested intent [of Virginia] to restrain the operations of the long-arm statute to the limits of due process."¹⁵⁶ It is hard to see why the court believed that its conclusion was bolstered by the statute being limited to due process. The court's statement views the legislative intent as a restraining, rather than broadening, influence. Given that due process is the outer limit to which a statute could go, that conclusion is an odd one.

In neither case, however, did the courts attempt to reconcile the contradiction between a statute that supposedly reaches due process limits and (i) their use of a possibly limiting statutory analysis and (ii) the existence of two tortious act clauses in the statute.

Another federal district court took the bolder step of stating that Virginia's long-arm statute "intentionally stops short of the outer limits of due process."¹⁵⁷ In this case, the court noted the existence of the two tortious act clauses, but opined that even the section permitting jurisdiction when the act was committed outside the state¹⁵⁸ would not apply. The court apparently believed that the restrictions in that section would not allow jurisdiction in the case before it.¹⁵⁹

In the District of Columbia the courts have been even more explicit about the limits of the District's long-arm statute. When interpreting the "tortious act" sections of the statute, courts have not used the expansive language found in the "transacting busi-

155. VA. CODE ANN. § 8.01-328.1(a)(3) (Supp. 1989).

156. 669 F. Supp. at 132 (citation omitted).

157. *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1088 (S.D.N.Y. 1984) (interpreting the Virginia statute).

158. VA. CODE ANN. § 8.01-328.1(a)(4) (Supp. 1989).

159. 580 F. Supp. at 1087. *Cf.* *First America First, Inc. v. National Assn. of Bank Women*, 802 F.2d 1511 (4th Cir. 1986) (upholding jurisdiction under the statutory section relating to torts committed outside the state). This latter case found that the defendant's "persistent" conduct (required under that section) could consist of continuous communications with its members in Virginia. *Id.* at 1515. In *Davis*, plaintiff did not attempt to use that section and the court's opinion was not the result of a careful analysis. However, if one truly believed that the statute was limited only by due process — which the *Davis* court did not — it would be sensible to attempt to examine other sections, even if plaintiff did not. This would avoid dismissal on a technicality in a situation where due process might permit the exercise of jurisdiction.

ness" cases. A leading example is *Margoles v. Johns*.¹⁶⁰ This was a slander action alleging that defendant telephoned people in the District and made slanderous statements about plaintiff. The calls were made from defendant's office in Wisconsin. Although the court determined that the injury took place in the District, it held that the long-arm statute did not reach this conduct. The court discussed various "tortious act" statutes in other states.¹⁶¹ Its opinion distinguished statutes that follow the Uniform Act (with dual tortious act clauses) from those, like the Illinois statute, with single tortious act clauses.¹⁶² It concluded that the broad reach of tortious act statutes exemplified by *Gray v. American Radiator & Standard Sanitary Corp.*¹⁶³ was not intended by the Uniform Act.¹⁶⁴ Thus, the court concluded that no tortious act was committed within the District. Finally, the court noted the oddity that case law in nearby states with nearly identical statutes—Maryland and Virginia¹⁶⁵—had struggled with, namely the reach of a statute that, in part, purports to go to the limits of due process but which has restrictive wording. On that issue, the court concluded that "the developing case law in both states supports the view that while that statement [the statute goes to the limits of due process] may prove true as to some of the subsections . . . , it does not as to others . . ." ¹⁶⁶ The *Margoles* decision has been followed by more recent cases interpreting the District's long-arm statute.¹⁶⁷

The District's statute has an added quirk that makes interpretation even more complicated. In 1983, the statute was amended to add a section permitting jurisdiction in cases involving a "marital or parent and child relationship in the District of Columbia."¹⁶⁸ The added section lists four specific subcategories of circumstances

160. 483 F.2d 1212 (D.C. Cir. 1973).

161. 483 F.2d at 1216-17.

162. *Id.*

163. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

164. 483 F.2d at 1216. The court cited comments from the Uniform Act noting that its reach may not be equivalent to that of *Gray*. *Id.* Furthermore, the court noted that the District's statute adds another restriction to the Uniform Act — that the *injury* occur within the state.

165. The District's statute was modeled after the statutes of those two states. *See* 483 F.2d at 1215.

166. 483 F.2d at 1221.

167. *E.g.*, *Crane v. Carr*, 814 F.2d 758, 762 (D.C. Cir. 1987); *Tavoulareas v. Comnas*, 720 F.2d 192, 194 (D.C. Cir. 1983). *See also* *Mouzavires v. Baxter*, 434 A.2d 988, 990-91 (D.C. Ct. App. 1981), *cert. denied*, 455 U.S. 1006 (1982) (*dicta*, noting with apparent approval the more restrictive reading of the "tortious act" clauses in the Maryland cases).

168. D.C. CODE ANN. § 13-423(a)(7) (1989), added by D.C. LAW 4-200, § 4.

under which jurisdiction in marital or parent/child cases can be had. There is then a fifth sub-subsection which reads as follows:

(E) Notwithstanding the provisions of subparagraphs (A) through (D), the court may exercise personal jurisdiction if there is any basis consistent with the United States Constitution for the exercise of personal jurisdiction.¹⁶⁹

Arguably this language recognizes that other sections of the statute do not reach the limits of due process. Or, it may be only a recognition that the statute as a whole fails to reach all possible jurisdictional contacts. It raises the possibility that a federal court might even use two constitutional standards when testing this statute. If the "transacting business" or other sections of the statute incorporate a fourteenth amendment standard, that would have to be used to test assertions under those subsections. However, in view of the expansive language in subsection (a)(7)(E) a fifth amendment standard seems appropriate in cases using that part of the statute.¹⁷⁰ And a third standard—a purely statutory one—would be followed in tortious act cases where the statute obviously falls short of due process limits.

Other states with similar dual tortious act sections take conflicting positions. In Delaware, the Supreme Court has determined that the entire statute, including the tortious act provisions, should be "broadly construed to confer jurisdiction to the maximum extent possible under the due process clause."¹⁷¹ In Georgia, an appellate court, in *Flint v. Gust*,¹⁷² expressed the belief that the extra factors contained in the subsection regarding tortious acts committed outside the state are required by due process and that the statute

169. D.C. CODE ANN. § 13-423(a)(7)(E) (1989). This section of the District statute was added as an amendment to the District's adoption of the Uniform Child Custody Jurisdiction Act of 1982. Transcript of Legislative Session of the Council of the District of Columbia, Nov. 16, 1982 at 54-55. This statute apparently was to be based on a comparable Texas statute. *Id.* Texas has similar language in a special statute — not part of its long-arm statute — relating only to cases "affecting the parent-child relationship." TEX. FAM. CODE ANN. § 11.051(4) (Vernon 1986).

170. However, because marital and parent/child cases raise issues that are uniquely local in character, it would be unusual for a federal court to find the necessary federal interest to apply a less restrictive standard under the fifth amendment permitting jurisdiction where the state court would not do so.

171. *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986) (citations omitted). Oddly, the Delaware Supreme Court has stated that its statute is patterned after the Illinois law, which has only a single tortious act section. *Mid-Atlantic Machine & Fabric, Inc. v. Chesapeake Shipbuilding, Inc.*, 492 A.2d 250 (Del. 1985). But a more recent lower court decision correctly noted that the origin of the statute is the Uniform Act. *International Playtex, Inc. v. B. & E. Machinery Co.*, 1987 WL 17178 (Del. Super. 1987) (not reported officially).

172. 351 S.E.2d 95 (Ga. App. 1986), *rev'd*, 257 Ga. 129, 356 S.E.2d 513 (1987).

therefore does nothing more than express the legislature's desire to go to those limits.¹⁷³ If *Gray v. American Radiator* is still good law, however, the extra contacts in the Georgia statute would not be constitutionally necessary.¹⁷⁴ The appellate opinion in *Flint* seemingly wrote out the additional factors. It was subsequently reversed by the Georgia Supreme Court, which directed the lower court to apply the statute as written.¹⁷⁵ On remand, the court of appeals opined that, because an earlier decision giving the statute a broad reading had not been overruled by the Supreme Court's opinion in *Flint*, "clarification of the Supreme Court's position on this important issue will have to await a future litigation."¹⁷⁶

Tortious act clauses are very vulnerable to being limited by more than due process. Dual tortious act clause statutes are even more vulnerable. In the first place, widely differing views on the meaning of "tort" or "tortious" may impose limits greater than those set by due process. Where a statute requires extra contacts—such as substantial revenue being derived from interstate commerce—restrictive readings can be expected to occur. This is not a major problem, except where the state court also asserts that the statute goes to the limits of due process. Although such statutes may reach the *current* limits of due process, it would take a tortured reading to make them fit a much more lenient due process standard. This makes ascertaining the true meaning of the statute difficult. If state courts really want to use their statutes in a more restrictive manner, it behooves the courts to say that explicitly, rather than obscuring the issue by saying that the statute reaches the limits of due process, and then interpreting it in a way that falls short of due process.

173. *Flint v. Gust*, 351 S.E.2d 95, 97 (Ga. App. 1986), *rev'd*, 257 Ga. 129, 356 S.E.2d 513 (1987).

174. Some doubt on the continued viability of *Gray* was cast by Part II-A of the Supreme Court's opinion in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) (requiring that the defendant's acts be directed at the state). However, four Justices dissented from that portion of the opinion, and a fifth, Justice Stevens, appeared to side with the dissenters. See *id.* at 116 (opinion of Brennan, J., concurring and dissenting); *id.* at 122 (opinion of Stevens, J.).

175. 257 Ga. 129, 356 S.E.2d 513 (1987).

176. *Flint v. Gust*, 184 Ga. App. 242, 361 S.E.2d 722, 723 (1987). See also *Stacy v. Hilton Head Seafood Co.*, 688 F. Supp. 599, 604 n.4 (S.D. Ga. 1988). Interestingly, a recent federal case, *Quikrette Cos. v. Nomix Corp.*, 705 F. Supp. 568 (N.D. Ga. 1989), stated that it did not regard *Flint* as restricting the Georgia statute to less than due process limits. 705 F. Supp. at 571 n.2.

4. *Illinois—Losing Patience With Shifting Due Process Standards*

For years, Illinois had been viewed as a state whose Type 2 statute truly went to the limits of due process. In *Nelson v. Miller*¹⁷⁷ and *Gray v. American Radiator and Standard Sanitary Corp.*¹⁷⁸ the Illinois Supreme Court all but abandoned any serious use of the categories contained in the long-arm statute.¹⁷⁹ Recently, however, Illinois has done an apparent about face. In *Green v. Advance Ross Electronics Corp.*¹⁸⁰ and *Cook Associates, Inc. v. Lexington United Corporation*¹⁸¹ the Illinois Supreme Court firmly reinstated the use of the long-arm categories. In *Green*, in language reaffirmed by *Cook*, the Court stated that it did not interpret the earlier *Nelson* decision as signaling the abandonment of the long-arm categories. Further, the Court stated that "A statute worded in the way ours is should have a fixed meaning without regard to changing concepts of due process. . . ."¹⁸² In light of this, the Seventh Circuit recently stated that Illinois no longer interprets its statute to go to the limits of due process.¹⁸³ However, the lower Illinois courts have not been unanimous in adopting this interpretation of *Green* and *Cook*.¹⁸⁴

It is not clear what the Illinois Supreme Court had in mind when it prescribed a "fixed meaning" for its statute. Perhaps it wanted to create a body of law that would give more guidance to practitioners and judges than is given by the "minimum contacts" standard. One still could assume that the statute reaches the *current* limits of due process. Under that theory, a state court decision that a particular fact pattern does not satisfy the statute would imply that the facts also contravene due process. However, a series of such decisions would create a body of precedent on which practi-

177. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

178. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

179. See, e.g., *Morton v. Environmental Land Systems, Ltd.*, 370 N.E.2d 1106, 1109-10 (Ill. App. 1977). This is tempered somewhat by the fact that the Illinois statute was amended in 1964 to add a category relating to marital dissolutions. See ILL. ANN. STAT. ch. 110 ¶2-209(5) (Supp. 1989).

180. 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

181. 87 Ill. 2d 190, 429 N.E.2d 847 (1981).

182. 427 N.E.2d at 1206; 429 N.E.2d at 850.

183. *Small v. Sheba Investors, Inc.*, 811 F.2d 1163, 1164-65 (7th Cir. 1987).

184. E.g., *Capital Associates Devel. Corp. v. James E. Roberts-Ohbayashi Corp.*, 487 N.E.2d 7, 11 (Ill. App. 1985) (court, citing *Nelson v. Miller*, says the statute does go to the limits of due process notwithstanding *Green*).

tioners could rely.¹⁸⁵

5. *Using Type 2 Statutes in Federal Court*

Federal courts must tread carefully when using Type 2 statutes. As a result of the Supreme Court's decision in *Omni Capital* federal courts must respect the limits placed by states on their long-arm statutes. As discussed above, ascertaining those limits is not always easy. Moreover, federal courts often use state statutes in situations for which the statutes presumably were not designed—i.e. federal questions.¹⁸⁶ But some general conclusions can be drawn from the case law.

First, it is evident that the broad statements in some cases that a state long-arm statute goes to the "limits of due process" are not true. Limiting jurisdiction to enumerated categories inevitably leads to omissions, unless the categories are very broadly construed. Indeed, in places like Maryland, Virginia and the District of Columbia it is clear that the "tortious act" clauses of the long-arm statute have been interpreted to contain restrictions not mandated by due process. In diversity cases, these restrictions should not prove to be a major problem for application by federal courts. To the extent that the fact patterns in federal courts mimic previously decided cases in state court, the federal court simply abides by the restrictions.¹⁸⁷ In states with certification processes, federal courts could benefit by having the state Supreme Court clarify the limits of the statute. Most diversity cases do not involve large federal interests; federal courts need not worry too much about unduly restricting their authority to resolve disputes in this area.¹⁸⁸

Federal question cases pose a more difficult problem. Because they seldom arise in state court, there is less likelihood of the same fact pattern having been examined by state courts. Naturally,

185. See generally Comment, *Illinois Long Arm Jurisdiction: The Implications of a "Fixed Meaning"*, 32 DE PAUL L. REV. 635, 653-62 (1983).

186. Although state courts have the ability to hear many federal claims, the availability of removal and the exclusivity of federal jurisdiction in some areas limits the actual number of such cases litigated in the state courts. This problem was discussed in Welkowitz, *supra* note 8 at 49-51.

187. This simple framework may not work in all cases. Because long-arm jurisdiction by definition involves out of state parties, many such cases will end up in federal court if they lack an in-state defendant. Thus, federal courts may end up with fact patterns not seen in state courts because most of the long-arm cases are in federal courts.

188. Major disasters which result in complex, multistate litigation may be an exception. See generally Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PENN. L. REV. 7 (1986).

there may be analogous situations to draw on—many states have substantive statutes that duplicate federal ones.¹⁸⁹ Many federal statutory violations can be labeled as “torts” and treated under tortious act clauses, while still others may constitute “transacting business” or there may be elements of both present. On the other hand, there are federal interests at stake in these cases that the state legislature probably did not consider when enacting its long-arm statute. And the state may have created its statutory restrictions because it believed that it had no other choice. This may explain the “within the state” limits on the jurisdictional acts in most Type 2 statutes. States attempting to legislate to the limits of their constitutional power would see minimum contacts *with the state* as the limit.

States may be less generous about stretching their statutes when the connection between the defendant and the state is tenuous and more so when the plaintiff's connection with the state is recent. An example would be a paternity suit filed by a mother who has recently moved to the state. States may want to discourage suits to prevent overcrowding of their courts or possibly to appease local special interests. Those concerns—particularly regarding overcrowding of state courts—do not translate well when imposed on federal courts. Nevertheless, under *Omni Capital* the federal courts must decide where to draw the line between state law limits and limits imposed only by the Constitution.¹⁹⁰

To deal with the problem federal courts could be lenient with more creative uses of the state long-arm statute. The “transacting business” clauses of the statutes are especially suited for this. The commentary to the Uniform Act demonstrates that this clause was meant to liberalize personal jurisdiction.¹⁹¹ It would not trample on state interests to do so—the state has little interest in restricting federal court jurisdiction in federal question cases. And it does pay due regard for the state law as required by Rule 4.¹⁹²

189. *E.g.*, ILL. ANN. STAT. ch. 38, § 60-3(2) (Smith-Hurd Supp. 1989) (antitrust - same language as the Sherman Antitrust Act); GA. STAT. § 10-1-441 et. seq. (1989) (trademark - similar to the Lanham Act); FLA. STAT. ANN. § 517.301 (West 1989) (Securities law - with language tracking the Securities Exchange Act of 1934).

190. With the latter, the federal court is free to make its own decision on limits, unfettered by the limits of state law.

191. Comment to Uniform Interstate and International Procedure Act § 1.03, 13 U.L.A. 362 (1986) (“This provision should be given the same expansive interpretation that was intended by the draftsmen of the Illinois Act and has been given by the courts of that state.”).

192. Rule 4 says that the federal court may assert jurisdiction “under the circum-

All of this may seem simple, but there is a delicate and difficult balancing act being performed here. On the one hand, it is desirable to accommodate federal interests, particularly in federal question cases. On the other hand, a federal court cannot simply rewrite a state statute to fit its needs. Finding the right balance is not a simple task. The situation cries out for a reasoned Congressional solution.¹⁹³

V. CONCLUSION

It is no surprise that courts have not been able to draw clear lines in jurisdictional analysis. What is surprising is the inability of courts to draw a line between statutory and constitutional analysis. As we have seen, a few states (Type 1) have given up the charade and passed statutes that throw jurisdictional analysis entirely to the constitution. A few others (Type 3 states) have moved generally in that direction, while at least pretending to keep their ties to specific statutory descriptions. Most states (Type 2) have maintained a formal tie to categories of jurisdictional acts, while professing to stretch those categories as far as the constitution will allow. But, when pressed, this latter profession proves to be an illusion. These states remain as tied to the wording of the statute as to the limits of the constitution.

Perhaps this is because it is easier to measure jurisdiction by reference to these categories. Categories give an alternative to the uncertainty of constitutional decisionmaking. It lessens the number of appeals, because state statutory decisions cannot be appealed to the Supreme Court. And categories are something that will remain certain, unless the *state* supreme court or the legislature changes them. Decisions on due process limits, on the other hand (particularly those made by state courts), are not subject to state control and can change as the Supreme Court changes.

Unfortunately the *methods* used by states to analyze their statutes have some untoward consequences. By proclaiming their stat-

stances" provided in the state law. Since state law does not speak directly to the circumstances involved in a federal question case (with the possible exception of South Dakota's statute) reading the statute more leniently in a case where the state has no analogous law is not inappropriate. After all, Rule 4 can properly be read to be using state law as federal law, in much the same way that state statutes of limitations are adopted. But where the circumstances anticipated by state law simply do not fit precisely with federal law, the federal courts ought to be able to interpret the law to fit the circumstances most rationally.

193. The Advisory Committee on Rules has proposed amendments to Rule 4 that would create a federal amenability standard. F. Supp. Advance Sheets, Oct. 30, 1989, CLIV at CXC-CXCI.

utes to be as broad as the constitution allows, while still maintaining fealty to the words of the statute, uncertainty is promoted. Among interstate actors it becomes difficult to predict when they may be subject to the courts of any particular forum, even when the statute seems to be specific. Among scholars it may evoke some skepticism about the honesty of the courts' decision making. And in federal courts it creates both confusion and unfairness. The federal court problem may in the end be the easiest to solve. If Rule 4 is amended to provide a general federal long-arm standard, federal courts will no longer be bound by the state statutes. But it remains for the states to decide just how far they really want to reach for jurisdiction and whether they want to cut the traditional ties to categories. There is some movement, though halting, in the direction of loosening the ties. At a minimum, it would be useful if the states would confront the problem and make a decision one way or the other.