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Retroactive Application of State Long-Arm Statutes

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NOTE

RETROACTIVE APPLICATION OF STATE LONG-ARM STATUTES

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Abstract

A precondition to a court's exercising any measure of authority over an individual or an entity is the court's establishment of personal jurisdiction. A court may exercise personal jurisdiction over a nonresident defendant only if the forum state provides a statutory basis for exercising jurisdiction over the nonresident and the exercise of jurisdiction satisfies the constitutional due process standard. Personal jurisdiction is one of the most commonly litigated issues today, due primarily to confusion over the constitutional standard.

Commentators and courts write extensively about the constitutional prerequisites for personal jurisdiction, but say little about state long-arm statutes. Perhaps this should not come as a surprise. Long-arm statutes are often similar from state to state. Their interpretation is usually dry and straightforward. The Due Process Clause enables courts and commentators to be creative. Nevertheless, long-arm statutes provide at least one issue that merits consideration: states differ on whether their respective long-arm statutes apply retroactively and in their reasoning. These differences can decide a case, lead to illogical results, and affect judicial efficiency. For those reasons, this Note surveys the current position of the states on long-arm statute retroactivity and examines differences in the states' reasoning. Hopefully the discussion serves as a useful summary of state law and provides helpful suggestions for future long-arm statute drafting and interpretation.

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INTRODUCTION

A court may subject a nonresident defendant to the court's jurisdiction only if the forum state provides a statutory basis for exercising jurisdiction over the nonresident and the exercise of jurisdiction satisfies the constitutional due process standard.[1] Most states codify multiple bases for jurisdiction over a nonresident in their respective "long-arm" statutes.[2] In response to court interpretations, the evolution of the constitutional standard, changes in technology, and globalization, states frequently amend or rewrite their long-arm statutes.[3] An amended long-arm statute raises the

1. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 (3d ed. 2002).

2. *See* statutes cited *infra* note 38.

3. *See, e.g.*, Petroleum Helicopters, Inc. v. Avco Corp., 513 So. 2d 1188, 1190–91 (La. 1987) (discussing three amendments to the Louisiana long-arm statute in less than twenty years); S. Pac. Transp. Co. v. Fox, 609 So. 2d 357, 360 & n.5 (Miss. 1992) (discussing four amendments to the Mississippi long-arm statute in less than thirty years); *see also* Act of June 14, 2013, ch. 164, 2013 FLA. LAWS ch. 2013-164, http://laws.flrules.org/2013/164 (allowing a contract forum selection clause as an additional basis for Florida long-arm jurisdiction, arguably to supersede the holding of *McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 544 (Fla. 1987)).

issue of retroactivity. Does the amended long-arm statute apply retroactively to all causes of action, or does the statute apply prospectively only? Describing a statute as retroactive or prospective in the personal jurisdiction context is something of an oversimplification because a long-arm statute could fix at one of four different moments: when the nonresident allegedly commits the jurisdiction-conferring act,[4] when the cause of action accrues,[5] when the nonresident defendant is served with process,[6] or when the nonresident defendant challenges personal jurisdiction.[7]

For example, suppose that a nonresident negligently constructs a building in Florida before Florida's long-arm statute enumerates committing a tort as a jurisdiction-conferring act. After the building's construction, Florida amends the long-arm statute to include committing a tort as a basis for jurisdiction. Later, the negligently constructed building collapses, injuring an occupant, who sues in Florida and serves the nonresident defendant with process outside of Florida. Does a court apply the long-arm statute in effect when the nonresident committed the jurisdiction-conferring act (i.e., when the nonresident built the building) or the long-arm statute in effect when the cause of action accrued (i.e., when the building collapsed)?[8] Suppose instead that Florida amends the long-arm statute after the nonresident is served with process but before the nonresident challenges personal jurisdiction. Can an amendment to the state's long-arm statute validate service that was ineffective when made?[9]

Courts frequently grappled with these questions in the 1960s and 1970s,

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4. *See, e.g.*, Pub. Gas Co. v. Weatherhead Co., 409 So. 2d 1026, 1027 (Fla. 1982) (applying the long-arm statute in effect when the nonresident defendant manufactured and distributed the product at issue rather than the statute in effect when the product injured the resident plaintiff).

5. *See, e.g.*, Deering Milliken Research Corp. v. Textured Fibres, Inc., 415 F.2d 875, 876–77 (4th Cir. 1969) (applying the long-arm statute in effect when the nonresident breached a contract despite the fact that the jurisdiction-conferring act was the making of a contract to be performed within the state).

6. *See, e.g.*, Kilbreath v. Rudy, 242 N.E.2d 658, 660 (Ohio 1968) (finding the Ohio long-arm statute to be remedial and declaring that "[l]aws of a remedial nature are applicable to any proceedings conducted after the adoption of such laws").

7. *See, e.g.*, *Petroleum Helicopters, Inc.*, 513 So. 2d at 1190, 1192 (applying a version of the Louisiana long-arm statute that was amended after the nonresident defendant challenged personal jurisdiction).

8. *See, e.g.*, *Pub. Gas Co.*, 409 So. 2d at 1027 (applying, under circumstances similar to the preceding hypothetical, the long-arm statute in effect when the nonresident defendant manufactured and distributed the product at issue).

9. In most circumstances, the answer to this question is "no." E.H. Schopler, Annotation, *Retrospective Operation of State Statutes or Rules of Court Conferring In Personam Jurisdiction over Nonresidents or Foreign Corporations on the Basis of Isolated Acts or Transactions*, 19 A.L.R.3d 138, 142–46 (1968). *But see* Rose v. Franchetti, 979 F.2d 81, 85–86 (7th Cir. 1992) (applying a version of the Illinois long-arm statute that was amended after the plaintiff served the nonresident defendant with process); *Petroleum Helicopters, Inc.*, 513 So. 2d at 1192 (reaching the same result under Louisiana law).

but the issue arises less frequently of late. From 1960 through 1980, courts addressed whether the long-arm statutes of at least twenty-four states applied retroactively.[10] Since 1980, *McBead Drilling Co. v. Kremco, Ltd*.[11] is the only reported case in which a state's highest court addressed long-arm statute retroactivity as an issue of first impression.[12] That fact might suggest that the issue is settled law across all of the states, but at least two states with single-act long-arm statutes have never directly addressed whether their statute applies retroactively,[13] and several states have not definitively fixed the point at which their long-arm statute applies.[14] Additionally, in several jurisdictions, the only reported decisions addressing long-arm statute retroactivity come from federal district courts and therefore leave this state law issue open to future interpretation.[15]

Given the dearth of modern commentary on the issue of long-arm statute retroactivity, this Note seeks to provide a cogent, up-to-date starting point for litigators researching the retroactivity of a particular state's long-arm statute. This Note also seeks to identify some of the fallacies relied upon by the minority of states that apply their long-arm statute prospectively only. To that end, Part I introduces personal jurisdiction law, long-arm statutes, the implied consent theory, and retroactivity analysis.

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10. Safeway Stores, Inc. v. Shwayder Bros., 384 S.W.2d 473, 476 (Ark. 1964); Hoen v. Dist. Court, 412 P.2d 428, 431 (Colo. 1966); Carvette v. Marion Power Shovel Co., 249 A.2d 58, 61 (Conn. 1968); Eudaily v. Harmon, 420 A.2d 1175, 1179–80 (Del. 1980); Gordon v. John Deere Co., 264 So. 2d 419, 420 (Fla. 1972); Bauer Int'l Corp. v. Cagle's, Inc., 171 S.E.2d 314, 317 (Ga. 1969); Krueger v. Rheem Mfg. Co., 149 N.W.2d 142, 148 (Iowa 1967); Woodring v. Hall, 438 P.2d 135, 143 (Kan. 1968); Rose v. E.W. Bliss Co., 516 S.W.2d 329, 330 (Ky. 1974); Hardy v. Rekab, Inc., 266 F. Supp. 508, 517 (D. Md. 1967); Kagan v. United Vacuum Appliance Corp., 260 N.E.2d 208, 211 (Mass. 1970); Hunt v. Nev. State Bank, 172 N.W.2d 292, 307 (Minn. 1969); Mladinich v. Kohn, 186 So. 2d 481, 483 (Miss. 1966); Scheidegger v. Greene, 451 S.W.2d 135, 139 (Mo. 1970); State *ex rel.* Johnson v. Dist. Court, 417 P.2d 109, 113 (Mont. 1966); Prop. Owners Ass'n at Suissevale, Inc. v. Sholley, 284 A.2d 915, 916–17 (N.H. 1971); Gray v. Armijo, 372 P.2d 821, 827 (N.M. 1962); Simonson v. Int'l Bank, 200 N.E.2d 427, 432 (N.Y. 1964); Keller v. Clark Equip. Co., 367 F. Supp. 1350, 1353 (D.N.D. 1973), *rev'd on other grounds*, 570 F.2d 778 (8th Cir. 1978); Kilbreath v. Rudy, 242 N.E.2d 658, 660–61 (Ohio 1968); Howard v. Allen, 368 F. Supp. 310, 316 (D.S.C. 1973); Myers v. U.S. Auto. Club, Inc., 281 F. Supp. 48, 52–53 (E.D. Tenn. 1968); Walke v. Dall., Inc., 161 S.E.2d 722, 725 (Va. 1968); Teague v. Damascus, 183 F. Supp. 446, 448–50 (E.D. Wash. 1960).

11. 509 So. 2d 429 (La. 1987).

12. *Id.*

13. See cases citing the relevant long-arm statutes in *West's Utah Code Annotated* and *West's Alaska Statutes Annotated.* UTAH CODE ANN. § 78B-3-205 (West 2012) (Utah long-arm statute); ALASKA STAT. ANN. § 09.05.015 (West 2012) (Alaska long-arm statute).

14. *See, e.g.*, J.C. Penney Co. v. Malouf Co., 196 S.E.2d 145, 147 (Ga. 1973) (holding that the applicable long-arm statute for a tort claim is the statute in effect upon the nonresident defendant's commission of the tort). Note that a tort is not "complete" until there is an injury but that "commission" suggests that the defendant's allegedly tortious acts are relevant. So, the correct measuring point in Georgia could be when the nonresident defendant does the wrongful act or when the cause of action accrues.

15. *See* federal district court cases cited *supra* note 10.

Part II begins by describing a few representative jurisdictions that apply their long-arm statute retroactively and then describes each state that applies its long-arm statute prospectively only. Part III illustrates the illogical and inefficient effect of prospective-only long-arm statutes. This Note concludes that universal retroactive application of long-arm statutes best conforms to common law retroactivity analysis and constitutional law.

I. IMPLIED CONSENT THEORY AND APPROACHES TO RETROACTIVITY

A. *Introduction to Personal Jurisdiction Law*

A precondition to a court's exercising any measure of authority over an individual or entity is the establishment of jurisdiction over the person.[16] Personal jurisdiction is one of the most commonly litigated issues today, due primarily to confusion over the constitutional standard.[17] A court generally need not address whether it has personal jurisdiction over a plaintiff, because the plaintiff's filing a lawsuit in a court establishes that court's jurisdiction over the plaintiff.[18] Personal jurisdiction over a defendant, the involuntary participant in a typical lawsuit, empowers a court to compel the defendant's presence.[19] A court exercises such authority through service of process, but by what standard does a court allow a defendant to be served with process? Both federal and state courts exercise personal jurisdiction with reference to state personal jurisdiction law and constitutional due process.[20]

A state court's authority is coextensive with that of the state.[21] Before the fiction of corporate presence and the realities of modern transportation and commerce muddied the waters,[22] personal jurisdiction was inextricably tied to a state's territorial jurisdiction.[23] Personal jurisdiction over a nonresident could be established by serving the nonresident with process within the territorial boundaries of the state,[24] attaching in-state property

16. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878), *abrogated by* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945), *and* Shaffer v. Heitner, 433 U.S. 186 (1977).

17. Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995).

18. Adam v. Saenger, 303 U.S. 59, 67–68 (1938).

19. *See Pennoyer*, 95 U.S. at 722. Although it may seem strange to modern lawyers, at one time courts could physically force a civil defendant to appear in court. 6A C.J.S. *Arrest* § 90 (2013).

20. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); FED. R. CIV. P. 4(k)(1) (authorizing service to establish personal jurisdiction when the defendant would be subject to the state court's jurisdiction).

21. *Pennoyer*, 95 U.S. at 722.

22. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 316–19 (discussing the evolution of personal jurisdiction and concluding that "the boundary line . . . cannot be simply mechanical or quantitative").

23. *See Pennoyer*, 95 U.S. at 722.

24. A notable example of transient or "tag" jurisdiction is *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (allowing personal jurisdiction based on the defendant having been served with process while on an airplane in Arkansas airspace).

owned by the nonresident,[25] or by the nonresident's having manifested consent to the state's jurisdiction.[26] Although the U.S. Supreme Court in *Pennoyer v. Neff* began to describe personal jurisdiction limitations with reference to the Due Process Clause of the Fourteenth Amendment,[27] nineteenth and early twentieth century "courts continued to employ 'power,' 'presence,' and 'consent' in describing adjudicative authority."[28]

By the mid-twentieth century, technology and increasing interstate commerce had so thoroughly undermined a plaintiff's ability to secure a remedy under traditional personal jurisdiction law that the U.S. Supreme Court dramatically rewrote the constitutional personal jurisdiction standard in *International Shoe Co. v. Washington*.[29] *International Shoe* was groundbreaking for several reasons. First, the Court described a new due process test: personal jurisdiction over a nonresident requires "certain minimum contacts with" the forum state and must conform to "traditional notions of fair play and substantial justice."[30] Perhaps more relevant to this Note, *International Shoe* attempted to discard the fictional bases for personal jurisdiction that had developed over the preceding fifty years as power-based personal jurisdiction became increasingly unwieldy.[31]

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25. *Pennoyer*, 95 U.S. at 723.

26. *Id.* at 735 (explaining that a state may require certain nonresidents to appoint an in-state agent to receive service on their behalf as a condition of creating an association or making a contract). *Pennoyer* refers here to express consent. For a discussion of the early twentieth century theory of implied consent, see *infra* Section I.B.

27. *Pennoyer*, 95 U.S. at 733.

28. Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 396–97 & n.51 (2012).

29. 326 U.S. 310, 316 (1945); *see, e.g.*, Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 559 (1997) ("In the landmark case of *International Shoe Co v Washington*, decided in 1945, the Court radically rewrote [the personal jurisdiction] rules."). *Contra* Rhodes, *supra* note 28, at 390 ("The familiar story is that *International Shoe* is a 'pathmarking' or 'canonical' decision that wrought a fundamental change in the personal jurisdiction doctrine developed in the eighteenth and nineteenth centuries. However, as the following brief account of the development of American jurisdictional doctrine demonstrates, *International Shoe* was an evolution, not a transformation." (footnote omitted)).

30. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted); *see also id.* at 323 (Black, J., dissenting) ("[The majority] has announced vague Constitutional criteria applied for the first time to the issue before us.").

31. *Id.* at 316 (majority opinion) (describing the act from which a court would previously imply consent to jurisdiction as the basis for jurisdiction rather than the fictional consent itself); Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 574, 586 (1958) (noting, first, that although the personal jurisdiction rules before *International Shoe* "may be stated fairly succinctly, it should be noted that they were not to be applied with equal ease" and, second, that the "doctrine [was] in so bad a state of disrepair [that] the time had long since passed for the Supreme Court to" fix it); *see also* Rhodes, *supra* note 28, at 395 (describing the earlier, fictional bases for personal jurisdiction); *id.* at 406 ("*International Shoe* banished the fiction of implied consent."). *But see* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–88 (2011) (plurality opinion) (describing the minimum contacts test as determining whether a defendant "*submits to the judicial power* of an otherwise foreign

The new constitutional approach to personal jurisdiction over nonresidents was not self-executing.[32] To exercise this new long-arm jurisdiction, state courts must have a statutory basis for jurisdiction that comports with the *International Shoe* due process standard.[33] For the first ten years after *International Shoe*, states took a piecemeal approach, adopting statutes that authorized long-arm jurisdiction in isolated instances.[34] In 1955, Illinois adopted the first comprehensive long-arm statute, prompting many states to do the same.[35] Today, every state has either a comprehensive long-arm statute or a court rule to the same effect.[36]

State long-arm statutes generally belong to one of two categories: single-act statutes and "go to the limit" statutes.[37] As the name implies, single-act long-arm statutes list specific acts that subject a nonresident of the state to the jurisdiction of a court in that state as to any cause of action arising out of the enumerated acts.[38] Single-act statutes frequently incorporate older concepts such as "doing business" with newer bases for jurisdiction such as committing a tort and making or performing a contract in the forum state.[39] "Go to the limit" long-arm statutes, on the other hand,

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sovereign" (emphasis added)).

32. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 493 (2004).

33. *Id.*; *cf.* WRIGHT & MILLER, *supra* note 1, § 1068.

34. McFarland, *supra* note 32, at 493–94.

35. WRIGHT & MILLER, *supra* note 1, § 1068; McFarland, *supra* note 32, at 494–95.

36. McFarland, *supra* note 32, at 496–97. In addition to a comprehensive long-arm statute, many states codify other statutory bases for personal jurisdiction outside their long-arm statute. An example is nonresident motorist statutes, discussed in Section I.B *infra*.

37. *See* Schopler, *supra* note 9, at 140 n.4. As it stands, however, these two categories lack names uniformly used in the field of personal jurisdiction scholarship. *See, e.g.*, McFarland, *supra* note 32, at 496–97 (noting that the first category of long-arm statutes "have been called 'enumerated-acts' statutes, 'specific act' statutes, 'tailored' statutes, 'laundry-list' statutes, and 'one-act' statutes" and calling the second category "no-limits" statutes).

38. *See* ALASKA STAT. § 09.05.015 (2012) (listing acts that subject a nonresident to service outside of the state); COLO. REV. STAT. § 13-1-124 (2012) (same); CONN. GEN. STAT. § 52-59b(a) (2013) (same); DEL. CODE ANN. tit. 10, § 3104(c) (2013) (same); FLA. STAT. § 48.193 (2012) (same); GA. CODE ANN. § 9-10-91 (2012) (same); HAW. REV. STAT. § 634-35 (2012) (same); IDAHO CODE ANN. § 5-514 (2013) (same); 735 ILL. COMP. STAT. 5/2-209 (2012) (same); IOWA CODE § 617.3 (2013) (same); KY. REV. STAT. ANN. § 454.210 (West 2012) (same); MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (West 2012) (same); MASS. GEN. LAWS ch. 223A, § 3 (2012) (same); MICH. COMP. LAWS §§ 600.705, 600.715, 600.725, 600.735 (2013) (same); MINN. STAT. § 543.19 (2012) (same); MISS. CODE ANN. § 13-3-57 (2013) (same); MO. REV. STAT. § 506.500 (2012) (same); MONT. R. CIV. P. 4(a)–(b) (same); N.H. REV. STAT. ANN. § 510:4 (2013) (same); N.M. STAT. ANN. § 38-1-16 (2012) (same); N.Y. C.P.L.R. 302 (MCKINNEY 2013) (same); N.C. GEN. STAT. § 1-75.4 (2012) (same); N.D. R. CIV. P. 4(b) (same); OHIO REV. CODE ANN. § 2307.382 (2013) (same); S.C. CODE ANN. § 36-2-803 (2012) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2013) (same); UTAH CODE ANN. § 78B-3-205 (2013) (same); VA. CODE ANN. § 8.01-328.1 (2013) (same); WASH. REV. CODE § 4.28.185 (2012) (same); W. VA. CODE § 56-3-33 (2012) (same); WIS. STAT. ANN. § 801.05 (2013) (same).

39. *See* Schopler, *supra* note 9, at 140. *Compare* Int'l Shoe Co. v. Washington, 326 U.S. 310

bypass statutory enumeration and allow a court to exercise jurisdiction under any circumstances that satisfy the constitutional due process standard.[40] In addition, some single-act statutes have been interpreted to reflect the state legislature's intention that personal jurisdiction "go to the limit" of constitutional due process and are applied by the state's courts as "go to the limit" statutes.[41]

B. *Implied Consent Theory*

Single-act long-arm statutes[42] are often similar from state to state,[43] but an important language difference can inform the differing interpretations on retroactivity. Some long-arm statutes include implied consent language.[44] Implied consent language consists of a phrase such as "thereby submits himself to the jurisdiction of the courts of this state"[45] or "shall by

(1945) (doing business), *with* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (tort), *and* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (contract).

40. *See* ALA. R. CIV. P. 4.2(b) (expressly allowing state courts to exercise jurisdiction over nonresidents under any circumstances consistent with the Due Process Clause); ARIZ. R. CIV. P. 4.2(a) (same); ARK. CODE ANN. § 16-4-101(b) (2012) (same); CAL. CIV. PROC. CODE § 410.10 (West 2013) (same); IND. R. TRIAL P. 4.4 (same); KAN. STAT. ANN. § 60-308(b)(1)(L) (2012) (same); LA. REV. STAT. ANN. § 13:3201(B) (2012) (same); ME. REV. STAT. tit. 14, § 704-A (2013) (same); NEB. REV. STAT. § 25-536 (2012) (same); NEV. REV. STAT. § 14.065 (2011) (same); N.J. R. SUPER. TAX SURR. CTS. CIV. R. 4:4-4 (same); OKLA. STAT. tit. 12, § 2004(F) (2012) (same); OR. R. CIV. P. 4(L) (same); 42 PA. CONS. STAT. § 5322 (2012) (same); R.I. GEN. LAWS § 9-5-33 (2011) (same); S.D. CODIFIED LAWS § 15-7-2(14) (2013) (same); TENN. CODE ANN. § 20-2-225 (2012) (same); VT. STAT. ANN. tit. 12, § 913 (2012) (same); WYO. STAT. ANN. § 5-1-107(a) (2012) (same). Several of the states listed in this footnote list specific acts that will subject a nonresident to their jurisdiction but also provide a "go to the limit" catchall provision in the statute. For simplicity, this Note includes such statutes in the "go to the limit" category.

41. *Compare, e.g.*, IDAHO CODE ANN. § 5-514 (2013) (listing specific acts that will subject a nonresident to Idaho jurisdiction), *with* Doggett v. Elecs. Corp. of Am., Combustion Control Div., 454 P.2d 63, 67 (Idaho 1969) (describing Idaho's single-act long-arm statute as going to the limit of the Due Process Clause). In the interest of consistency with statutory language, this Note attempts to treat these statutes as belonging to the single-act long-arm statute category.

42. Because a "go to the limit" long-arm statute need not be amended, retroactivity will rarely arise as an issue in "go to the limit" states. Also, a true "go to the limit" long-arm statute should always apply retroactively, because the U.S. Supreme Court has held that the Due Process Clause permits long-arm statute retroactivity. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957). So, with a few exceptions, this Note disregards "go to the limit" long-arm statutes.

43. *See* WRIGHT & MILLER, *supra* note 1, § 1068 ("The first truly comprehensive long-arm statute was enacted in Illinois and it has been copied or used as a model by a number of states." (footnotes omitted)). *Compare, e.g.*, CONN. GEN. STAT. § 52-59b (2013), *with* MINN. STAT. § 543.19 (2012).

44. Schopler, *supra* note 9, at 141.

45. *See* FLA. STAT. § 48.193 (2012) ("Any person . . . who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself . . . to the jurisdiction of the courts of this state . . . ."); *see also* COLO. REV. STAT. § 13-1-124 (2012) (substantially similar to Florida); DEL. CODE ANN. tit. 10, § 3104 (2012) (same); HAW. REV. STAT. § 634-35 (2012) (same); IDAHO CODE ANN. § 5-514 (2013) (same); 735 ILL. COMP. STAT. 5/2-209 (2012) (same); MO. REV.

such act or acts be deemed to be doing business" in the state[46] or other similar wording.[47] The modern long-arm statute came into being after *International Shoe* abandoned implied consent as a constitutional justification for personal jurisdiction.[48] So, the fact that many long-arm statutes continue to use implied consent language may be attributable to state legislators modeling the statutes after older nonresident motorist statutes rather than to any particular legislative intent.[49]

The concept of actual consent to personal jurisdiction dates back at least as far as *Pennoyer*,[50] but implied consent emerged in the early twentieth century as an answer to the development of the automobile.[51] Not having a sufficient statutory basis upon which to obtain jurisdiction over nonresidents who caused damage or injury while driving through a foreign state, state legislatures began to adopt nonresident motorist statutes.[52] The first generation of nonresident motorist statutes required nonresidents to register before driving in the state, which registration required the nonresident to expressly consent to a state official's serving as an agent for service of process on the nonresident's behalf.[53] The U.S. Supreme Court later permitted states to bypass the registration and express consent requirement and instead allowed states to infer a nonresident's consent from the nonresident's driving in the state.[54] In essence, implied consent theorizes that the basis for a court's jurisdiction over the defendant is not the defendant's *doing* an enumerated act—as modern single-act statutes provide—but the *effect* of the defendant's doing an enumerated act: an in-state agent is now authorized to receive service on the defendant's behalf.[55]

STAT. § 506.500 (2012) (same); N.H. REV. STAT. ANN. § 510:4 (2013) (same); N.M. STAT. ANN. § 38-1-16 (2012) (same); WASH. REV. CODE § 4.28.185 (2012) (same).

46. IOWA CODE § 617.3 (2013) ("[S]uch acts shall be deemed to be doing business in Iowa by such person for the purpose of service of process."); MISS. CODE ANN. § 13-3-57 (2013) (substantially similar to Iowa).

47. W. VA. CODE § 56-3-33 (2012) ("The engaging by a nonresident . . . in any one or more of the acts specified [in the long-arm statute] . . . shall be a signification of such nonresident's agreement that any such process against him . . . shall be of the same legal force and validity as though such nonresident were personally served . . . within this state.").

48. *See* WRIGHT & MILLER, *supra* note 1, § 1068.

49. *See, e.g.*, Krueger v. Rheem Mfg. Co., 149 N.W.2d 142, 147 (Iowa 1967).

50. 95 U.S. 714, 733 (1877) (disallowing substituted service of process on a nonresident with a few exceptions including "cases in which that mode of service may be considered to have been assented to in advance").

51. *See* Hess v. Pawloski, 274 U.S. 352, 356–57 (1927); *see also* Olberding v. Ill. Cent. R.R., 346 U.S. 338, 341 (1953) ("[Implied consent to personal jurisdiction] rests on the inroad which the automobile has made on the decision of *Pennoyer* . . . .").

52. James J. Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 UCLA L. REV. 198, 199 (1958).

53. *See* Kane v. New Jersey, 242 U.S. 160, 164 (1916).

54. *Hess*, 274 U.S. at 356–57.

55. *See, e.g.*, Carvette v. Marion Power Shovel Co., 249 A.2d 58, 61 (Conn. 1968) ("Some statutes, however, clearly provide that the performance of certain acts . . . is to be deemed an

Although today the acts themselves create a sufficient constitutional basis for a state to exercise jurisdiction over the person, more than a dozen states still use implied consent language in their long-arm statute.[56] Refusing to infer a defendant's consent to jurisdiction based on acts that were not yet enumerated when the defendant committed them, several implied consent states either currently interpret or have previously interpreted their long-arm statute to apply prospectively only.[57] Adhering to the legal fiction of consent, these courts reason that the enumeration of a jurisdiction-conferring act cannot retroactively establish that, by having previously committed the newly enumerated act, the defendant consented to jurisdiction.[58] Before elaborating on fictitious consent, this Note will briefly discuss how courts generally determine whether a law applies retroactively.

C. *Retroactivity Analysis*

Courts disfavor retroactively applicable laws.[59] As such, a court will not interpret a law as retroactive unless the legislature clearly intended that the law apply retroactively.[60] An exception to the clear legislative intent requirement, however, exists for procedural and remedial laws.[61] For procedural or remedial laws, a court reverses the aforementioned presumption and applies the law retroactively unless the legislature clearly intended for the law to apply prospectively only.[62] In the absence of express statutory language, retroactivity analysis first asks if the law affects substantive rights or procedure and then determines whether clear

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'implied consent' to the appointment of the local designated officer as its agent for the purpose of service of process."); Chrischilles v. Griswold, 150 N.W.2d 94, 101 (Iowa 1967) (noting the statute is based on implied consent). This distinction is still visible today in the divergent personal jurisdiction philosophies of Justices Kennedy and Ginsburg. *Compare* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (Kennedy, J.) (plurality opinion) ("The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."), *with id.* at 2799 (Ginsburg, J., dissenting) ("Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent . . . is unnecessary and unhelpful.").

56. *See supra* notes 45–47.

57. Schopler, *supra* note 9, at 142.

58. *See, e.g.*, *Carvette*, 249 A.2d at 61 ("[I]t is impossible retroactively to imply consent."); Krueger v. Rheem Mfg. Co., 149 N.W.2d 142, 147 (Iowa 1967) (similar language).

59. *E.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."); *id.* at 268 ("While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task.").

60. *Id.* at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.").

61. *See id.* at 273–75; *id*. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.").

62. 73 AM. JUR. 2D *Statutes* § 240 (2012).

legislative intent rebuts the applicable presumption.[63]

Substantive laws either modify or enhance a preexisting right or create a right where one did not exist.[64] Procedural laws, on the other hand, address the means by which one vindicates a preexisting right.[65] In the context of long-arm statutes, the loaded question exposes itself: does a nonresident defendant have the right to be free from the long-arm of a proposed forum state's jurisdiction? If so, a long-arm statute modifies the substantive right to be sued in one's home forum and presumptively applies prospectively only.[66] If, on the other hand, no substantive right is implicated, then a long-arm statute merely addresses the procedure by which a plaintiff vindicates a preexisting right to sue and the statute presumptively applies retroactively.[67]

The U.S. Supreme Court describes jurisdictional laws—including long-arm statutes—as procedural,[68] and most states agree.[69] The authority to

63. *See id.* at §§ 237, 240.

64. *See Landgraf*, 511 U.S. at 269–70 ("[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment.").

65. *Id.* at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.").

66. *See infra* Subsections II.B.1–2.

67. *See infra* Section II.A.

68. *Landgraf*, 511 U.S. at 274 ("Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" (citations omitted) (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916) and Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992))); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957) ("The [California long-arm] statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent.").

69. At least twenty-seven state long-arm statutes have been described as either remedial or procedural rather than substantive. Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231, 235 (9th Cir. 1969) (Hawaii law); Keller v. Clark Equip. Co., 367 F. Supp. 1350, 1353 (D.N.D. 1973), *rev'd on other grounds*, 570 F.2d 778 (8th Cir. 1978); Howard v. Allen, 368 F. Supp. 310, 316 (D.S.C. 1973); Fed. Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855, 857 (W.D.N.C. 1972); Hardy v. Rekab, Inc., 266 F. Supp. 508, 517 (D. Md. 1967); Chovan v. E.I. Du Pont De Nemours & Co., 217 F. Supp. 808, 811 (E.D. Mich. 1963); Lone Star Motor Imp., Inc. v. Citroen Cars Corp., 185 F. Supp. 48, 52 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961); Teague v. Damascus, 183 F. Supp. 446, 450 (E.D. Wash. 1960); Safeway Stores, Inc. v. Shwayder Bros., 384 S.W.2d 473, 476 (Ark. 1964); Hoen v. Dist. Court, 412 P.2d 428, 431 (Colo. 1966); Carvette v. Marion Power Shovel Co., 249 A.2d 58, 60 (Conn. 1968); Eudaily v. Harmon, 420 A.2d 1175, 1180 (Del. 1980); Nelson v. Miller, 143 N.E.2d 673, 676 (Ill. 1957); Woodring v. Hall, 438 P.2d 135, 143 (Kan. 1968); Rose v. E.W. Bliss Co., 516 S.W.2d 329, 330 (Ky. 1974); Petroleum Helicopters, Inc. v. Avco Corp., 513 So. 2d 1188, 1192 (La. 1987); Kagan v. United Vacuum Appliance Corp., 260 N.E.2d 208, 210–11 (Mass. 1970); Hunt v. Nev. State Bank, 172 N.W.2d 292, 304 (Minn. 1969); Mladinich v. Kohn, 186 So. 2d 481, 482 (Miss. 1966) (holding that the

define a right as substantive or procedural in the context of state law, however, belongs to the respective states.[70] Although most states use the same test to categorize a statute as procedural or substantive, the split between states arises partly because states answer the procedural–substantive question differently,[71] and on a state law issue, the state's answer controls.[72]

II. A SURVEY OF STATE APPROACHES TO RETROACTIVITY OF LONG-ARM STATUTES

A survey of state long-arm statutes and court interpretations of their meaning serves two (admittedly contradictory) purposes. First, litigators interested in contesting personal jurisdiction based on non-retroactivity of the relevant long-arm statute may appreciate the discussion.[73] Second, a thorough analysis may expose some of the weaknesses in interpreting a long-arm statute as applying prospectively only and therefore may provide support for anyone advocating for retroactive application. The survey begins with the federal approach and two states that interpret their long-arm statute to apply retroactively.

A. *Retroactive Long-Arm Statutes*

1. Federal Law

Federal law endorses retroactive application of jurisdictional laws. In *McGee v. International Life Insurance Co.*,[74] the U.S. Supreme Court heard a Texas insurer's challenge to the basis upon which a California court exercised personal jurisdiction over the insurer.[75] Often overshadowed by *McGee*'s minimum contacts analysis is *McGee*'s analysis of the insurer's alternative argument: exercising jurisdiction based on a long-arm statute that was enacted after the parties agreed to the insurance contract impaired the obligation of contract (i.e., affected a substantive

long-arm statute was remedial, but that it applied only prospectively due to legislative intent); Scheidegger v. Greene, 451 S.W.2d 135, 139 (Mo. 1970); State *ex rel.* Johnson v. Dist. Court, 417 P.2d 109, 113 (Mont. 1966); Prop. Owners Ass'n at Suissevale, Inc. v. Sholley, 284 A.2d 915, 916 (N.H. 1971); Gray v. Armijo, 372 P.2d 821, 827 (N.M. 1962); Simonson v. Int'l Bank, 200 N.E.2d 427, 431 (N.Y. 1964); Kilbreath v. Rudy, 242 N.E.2d 658, 660 (Ohio 1968); Walke v. Dall., Inc., 161 S.E.2d 722, 724–25 (Va. 1968); Steffen v. Little, 86 N.W.2d 622, 625–26 (Wis. 1957).

70. *See* Smith v. Regina Mfg. Corp., 396 F.2d 826, 828 (4th Cir. 1968) ("The answer to [questions of amenability to personal jurisdiction in a state] must be sought in [that state's statutes] and its highest court's interpretations of those statutes." (citation omitted)).

71. *See infra* Part II.

72. *See supra* note 70 and accompanying text.

73. To that end, a table is appended to this Note that may provide a useful starting point for more thorough research on the personal jurisdiction retroactivity law of a specific state.

74. 355 U.S. 220 (1957).

75. *Id.* at 221.

right).[76] *McGee* rejected the argument, succinctly declaring that "[t]he statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent."[77] *McGee* held (and the majority of states now agree)[78] that a personal jurisdiction law does not affect substantive rights and may therefore apply to any cause of action regardless of whether the cause of action arose before the law's enactment.[79]

2. Illinois

Before *McGee* clarified federal constitutional law on the issue of long-arm statute retroactivity, the Illinois Supreme Court correctly anticipated the U.S. Supreme Court's holding[80] and delivered one of the most influential state court opinions on long-arm statute retroactivity.[81] *Nelson v. Miller* involved a nonresident's challenging Illinois jurisdiction based on a tort that the nonresident had allegedly committed in 1954, one year before Illinois enacted its first comprehensive long-arm statute.[82] *Nelson* is unique both because of its influence on other states and because both the jurisdiction-conferring act and the action's filing preceded the long-arm statute's effective date.[83]

The Illinois Supreme Court faced federal constitutional and state law challenges to retroactive application of the long-arm statute.[84] The court described the issue in simple terms: The amendment to the long-arm statute "merely establishes a new *mode* of obtaining jurisdiction of the person of the defendant in order to secure *existing* rights, which are unaffected by this amendment."[85] The court's characterization disposed of

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76. *Id.* at 224.

77. *Id*.

78. *See infra* Appendix.

79. *See McGee*, 355 U.S. at 224.

80. *Compare* Nelson v. Miller, 143 N.E.2d 673, 676 (Ill. 1957) (decided June 17, 1957), *with McGee*, 355 U.S. at 224 (decided Dec. 16, 1957).

81. A Westlaw KeyCite of *Nelson* shows that cases in thirty-seven states (excluding Illinois) cite *Nelson*. At least four courts rely heavily on *Nelson*, holding that the relevant state long-arm statute applies retroactively. *See* Hoen v. Dist. Court, 412 P.2d 428, 431 (Colo. 1966); Gray v. Armijo, 372 P.2d 821, 826–27 (N.M. 1962); Teague v. Damascus, 183 F. Supp. 446, 448–49 (E.D.Wash.1960); Steffen v. Little, 86 N.W.2d 622, 628–29 (Wis. 1957). Much of *Nelson*'s influence owes to its status as the first state supreme court interpretation of the first state long-arm statute. *See* McFarland, *supra* note 32, at 499.

82. *Nelson*, 143 N.E.2d at 675.

83. *Id*. Service on the nonresident defendant, however, was not obtained until after the long-arm statute took effect. *Id.*

84. *Id*.

85. *Id.* at 676 (emphasis added) (quoting Ogdon v. Gianakos, 114 N.E.2d 686, 690 (1953)).

both the federal constitutional issue and the Illinois state law issue.[86] Retroactive application of a long-arm statute does not offend the Constitution because the amendments to the long-arm statute "do 'not extend either to destruction of an existing cause of action or to creation of a new liability for past events.'"[87] Similarly, Illinois's retroactivity analysis presumes that procedural laws apply retroactively.[88]

The court's analysis of long-arm statute retroactivity did not end with its characterization of the statute as procedural. Analogizing to nonresident motorist statutes, the Illinois Supreme Court disparaged implied consent doctrine:

> It was characteristic of our legal institutions, however, that the first approaches to a solution of the problem, both in the legislatures and in the courts, were made not in terms of a bold adjustment of legal concepts to a novel social problem, but in terms that purported to fit the new provisions into the established framework of jurisdictional concepts. The development progressed from actual consent to the exercise of jurisdiction by the appointment of an agent to accept service of process, to a fictional consent implied from the use of the highways.
>
> But it is now clear that the true basis for jurisdiction of the nonresident motorist is something other than consent.[89]

Nelson abandoned the implied consent theory despite the fact that the Illinois long-arm statute includes implied consent language.[90] Rather than contorting an outdated jurisdictional concept to fit into a modern context, *Nelson* ignored the implied consent language and applied common law retroactivity analysis.[91] Because the long-arm statute merely describes another method to validly serve a nonresident defendant, the long-arm statute regulates procedure and is presumptively retroactive.[92] In Illinois, implied consent language does not sufficiently indicate a contrary legislative intent to overcome the presumption in favor of retroactivity.[93]

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86. *Id.* at 675–76.

87. *Id.* at 675 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 554 (1949)).

88. *Ogdon*, 114 N.E.2d at 690.

89. *Nelson*, 143 N.E.2d at 677 (citations omitted).

90. *See id.* at 675 (quoting the amended long-arm statute: "[a nonresident person who does one of the listed acts] thereby submits said person . . . to the jurisdiction of the courts of this State"); *see also* 735 ILL. COMP. STAT. 5/2-209 (2012) (using nearly identical language).

91. *See Nelson*, 143 N.E.2d at 675–76.

92. *Id*.

93. *Id.* at 676 ("[W]e are satisfied that jurisdiction does not rest upon such a fictional consent.").

3. Connecticut

Like many states that apply their long-arm statute retroactively, Connecticut's long-arm statute does not include implied consent language.[94] In *Carvette v. Marion Power Shovel Co.*, the Connecticut Supreme Court held that the Connecticut long-arm statute affects only procedure and therefore is presumptively retroactive.[95] The Court found no evidence to suggest that the legislature intended that the statute apply prospectively only.[96] Instead, the Court read the Connecticut long-arm statute as providing a new forum in which a Connecticut resident could redress his preexisting, substantive rights against a nonresident.[97] Connecticut's approach to long-arm statute retroactivity, aided by a statute without implied consent language, is straightforward and mirrors that of the U.S. Supreme Court.[98]

B. *Prospective-Only Long-Arm Statutes*

Most long-arm statutes resemble either the Illinois or the Connecticut long-arm statute,[99] and most states also apply the common law presumptions on retroactivity.[100] This Section examines the states that nevertheless refuse to apply new or amended long-arm statutes retroactively.

1. Florida

Florida's original long-arm statute,[101] which supplemented Florida's "doing business" personal jurisdiction statute,[102] contained neutral language, which suggests that the Florida Legislature had not adopted the implied consent theory of personal jurisdiction.[103] Nevertheless, in *Gordon*

94. *See* CONN. GEN. STAT. § 52-59b (2013); KY. REV. STAT. ANN. § 454.210 (West 2012); MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (West 2013); MASS. GEN. LAWS ch. 223A, § 3 (2012); MICH. COMP. LAWS §§ 600.705, 600.715, 600.725, 600.735 (2013); MINN. STAT. § 543.19 (2012); N.Y. C.P.L.R. 302 (MCKINNEY 2013); N.C. GEN. STAT. § 1-75.4 (2012); N.D. R. CIV. P. 4(b); OHIO REV. CODE ANN. § 2307.382 (2013); S.C. CODE ANN. § 36-2-803 (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2013); VA. CODE ANN. § 8.01-328.1 (2012); WIS. STAT. § 801.05 (2012).

95. 249 A.2d 58, 60 (Conn. 1968).

96. *Id*. at 61.

97. *Id*. at 60.

98. *Compare* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957), *with Carvette*, 249 A.2d at 60.

99. *See supra* note 43 and accompanying text.

100. *See supra* Section I.C.

101. FLA. STAT. § 48.182 (1971) (repealed 1973).

102. FLA. STAT. § 48.181 (1971) (amended 1995).

103. In 1971, the long-arm statute read in relevant part: "Any nonresident person, firm, or corporation who . . . commits a wrongful act outside the state which causes injury . . . within this state may be personally served in any action or proceeding against the nonresident arising from any

v. John Deere Co.,[104] the Florida Supreme Court, on a certified question from the Fifth Circuit,[105] adopted the reasoning of a federal district court[106] and held that Florida's long-arm statute applied prospectively only.[107] The district court first described the substantive versus procedural–remedial test for retroactivity and then analogized to earlier Florida appellate decisions that addressed retroactivity in other situations.[108] The district court focused on the term "pre-existing remedy" to determine whether Florida's long-arm statute was remedial or substantive.[109] If the law created a new remedy, then the law affected a substantive right. If the law modified the rules for adjudicating a preexisting remedy, then the law was merely procedural or remedial in nature. The district court cited a Florida appellate case in which the Florida Legislature had expressly described a different state statute as remedial.[110] Supported by no reasoning, the district court declared that there was no preexisting remedy before the Florida Legislature enacted the long-arm statute.[111] In the absence of statutory language explicitly describing Florida's long-arm statute as remedial, and under the belief that the long-arm statute created a new substantive right, the district court was unwilling to apply the statute retroactively.[112]

Though the traditional approach would have been for the district court to independently determine whether the long-arm statute implicated a vested, substantive right,[113] the district court's decision to look for an express legislative determination is defensible. Federal courts tread lightly when addressing a state law issue of first impression.[114] *Gordon* stands out not because the district court decided the issue wrongly, but because the Florida Supreme Court subsequently adopted the district court's sparse reasoning without analyzing the retroactivity issue for itself.[115]

In 1973, the Florida Legislature replaced § 48.182 with § 48.193.[116] The legislature seems to have adopted the Florida Supreme Court's interpretation, because the legislature rewrote the statute to include implied

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such act . . . ." FLA. STAT. § 48.182 (1971) (repealed 1973).

104. 264 So. 2d 419 (Fla. 1972).

105. Gordon v. John Deere Co., 451 F.2d 234, 236 (5th Cir. 1971).

106. Gordon v. John Deere Co., 320 F. Supp. 293, 295–96 (N.D. Fla. 1970).

107. *Gordon*, 264 So. 2d at 420.

108. *Gordon*, 320 F. Supp. at 295–96.

109. *Id*.

110. *Id.* at 296.

111. *Id*. *Contra supra* Section II.A (discussing the U.S. Supreme Court and several states).

112. *Gordon*, 320 F. Supp. at 296.

113. *See supra* Section I.C.

114. *See, e.g.*, Boyd v. Bowman, 443 F.2d 848, 849 (5th Cir. 1971) (electing not to "pre-guess the Florida courts and dispose of th[e] controversy immediately . . . by trying to divine what the State law will be though the markers are nonexistent or indistinct").

115. Gordon v. John Deere Co., 264 So. 2d 419, 420 (Fla. 1972).

116. Act of June 13, 1973, ch. 73-179, 1973 Fla. Laws 364.

consent language.[117] Subsequent Florida Supreme Court interpretations of § 48.193 apply *Gordon* without noting the new implied consent language.[118]

2. Georgia

Like Florida, Georgia prohibits retroactive application of its long-arm statute based on a substantive rights theory.[119] Unlike Florida, Georgia's long-arm statute does not use implied consent language.[120] In *Bauer International Corp. v. Cagle's, Inc.*, the Georgia Supreme Court held that a 1968 amendment to the 1966 long-arm statute could not be applied to a cause of action that arose in 1967.[121] The court considered the somewhat murky language of the enacting legislation particularly indicative of a prospective-only legislative intent.[122] The court concluded that "the Georgia long arm statute does not merely afford a different remedy for a prior existing right, but affords a remedy against nonresidents where under the prior law none existed in this State."[123]

The Georgia Supreme Court referenced the appropriate rule in the very sentence that it misapplied the rule. Enabling an aggrieved party to sue in

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117. FLA. STAT. § 48.193 (2012) ("Any person . . . who . . . does any of the acts enumerated in this subsection thereby submits himself or herself . . . to the jurisdiction of the courts of this state . . . .").

118. *See, e.g.*, Fibreboard Corp. v. Kerness, 625 So. 2d 457, 459 (Fla. 1993); Conley v. Boyle Drug Co., 570 So. 2d 275, 288 (Fla. 1990). This Note does not suggest that the Florida Supreme Court must comment on the legislature's apparent agreement with the court's interpretation in *Gordon*. The legislature's implied consent language supplements the court's substantive rights reasoning and indicates its assent to the holding in *Gordon*. Interestingly, although the Florida Supreme Court adopted implied consent doctrine, the court elsewhere discounts express consent as a satisfactory basis for personal jurisdiction. McRae v. J.D./M.D., Inc., 511 So. 2d 540, 543–44 (Fla. 1987).

119. Bauer Int'l Corp. v. Cagle's, Inc., 171 S.E.2d 314, 317 (Ga. 1969).

120. GA. CODE ANN. § 9-10-91 (2012). The relevant language of the Georgia long-arm statute reads: "A court of this state may exercise personal jurisdiction over any nonresident . . . if . . . he or she . . . ." *Id.* The language of the statute when *Bauer International Corp.* was decided is substantially similar. 171 S.E.2d at 316.

121. *Bauer Int'l Corp.*, 171 S.E.2d at 316–17.

122. *Id*. at 317.

123. *Id*. at 317. The Georgia Supreme Court distinguished *Bauer International Corp.* in *Ballew v. Riggs*, 259 S.E.2d 482, 484 (Ga. 1979), holding that the 1977 amendment to the Georgia long-arm statute did not affect substantive rights. *Ballew* should not be viewed as implicitly overruling *Bauer International Corp.*, however, because *Ballew* was careful to distinguish long-arm statute amendments that add bases for jurisdiction (and therefore affect a substantive right) from those that ensure a defendant cannot oust jurisdiction after the cause of action accrues. *Id.* ("[T]he 1977 amendment to the Long Arm Statute merely provides an alternate means of service upon one who was a resident of Georgia at the time the cause of action arose and who subsequently moved to another state before service could be perfected in Georgia."). *Ballew* does however provide litigators in Georgia with a persuasive basis upon which to argue that the court should reverse its prospective-only rule.

Georgia does not afford the party a new substantive right; rather it provides a new forum in which to vindicate an existing substantive right.[124] The Georgia Supreme Court seemingly overlooked the fact that the aggrieved party had a preexisting right to sue, just not in Georgia.[125] In so doing, the Georgia Supreme Court wrongly imposed a geographic limitation on the scope of its substantive–procedural analysis. If Georgia law applies to a cause of action, but the suit cannot proceed in Georgia, the aggrieved party still has a preexisting right to sue.[126] Georgia's amended long-arm statute merely added a forum in which an aggrieved party could vindicate a preexisting right under Georgia law, and the court should have declared the statute procedural rather than substantive in nature.[127] Absent clear legislative intent to the contrary,[128] the Georgia long-arm statute should have been applied retroactively.

3. Mississippi

While the Florida and Georgia Supreme Courts emphasized substantive rights, the Mississippi Supreme Court cited legislative intent in interpreting Mississippi's long-arm statute to apply prospectively only. In *Mladinich v. Kohn*,[129] the Mississippi Supreme Court first squarely addressed whether the Mississippi long-arm statute applied retroactively.[130] The action involved a tort that was allegedly committed in 1962, two years before the long-arm statute authorized Mississippi jurisdiction over the nonresident defendant.[131] It is unclear, however, whether the Mississippi Supreme Court differentiated between retroactivity as to the nonresident defendant's conduct and retroactivity as to service of process.[132]

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124. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957) ("It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent."). Of course, Georgia enjoys the freedom to disagree with the Supreme Court in interpreting the Georgia long-arm statute, and canons of statutory construction remain viable only as long as a state's highest court continues to apply them to state law. *See supra* Section I.C. The Supreme Court's reasoning is merely persuasive in this context.

125. *Bauer Int'l Corp.*, 171 S.E.2d at 316 ("The asserted claim of the appellee was for goods sold and delivered to the appellant through 1967."); *id.* at 317 ("[The long-arm statute] affords a remedy against nonresidents where under the prior law none existed *in this State*." (emphasis added)).

126. *See, e.g.*, Rose v. Franchetti, 979 F.2d 81, 85 (7th Cir. 1992) ("Rules for personal jurisdiction do not regulate primary conduct. Massachusetts substantive law governs this dispute no matter where the litigation occurs . . . .").

127. *See McGee*, 355 U.S. at 224.

128. *See supra* note 124 and accompanying text.

129. 186 So. 2d 481 (Miss. 1966).

130. *Id.* at 481, 483–84.

131. *Id*. at 482.

132. *See id*. In *Snavely v. Nordskog Electric Vehicles "Marketeer*,*"* 947 F. Supp. 999, 1008 (S.D. Miss. 1995) the district court argued that *Mladinich* prevented retroactivity only when the long-arm statute is amended after service of process. Specifically, the *Snavely* court argued:

The court initially described the common maxim that, absent clear legislative intent, statutes are not to be applied retroactively unless they regulate only procedure.[133] Although the court identified the Mississippi long-arm statute as remedial,[134] the court explained that Mississippi does not except remedial laws from a presumption against retroactivity.[135] Mississippi requires clear legislative intent to apply any law (substantive or remedial) retroactively.[136] The court cited the statute's implied consent language, use of the future tense, and enactment clause as evidence that the legislature intended the long-arm statute to apply prospectively only.[137] Accordingly, Mississippi's long-arm statute,[138] unless amended to reflect a different legislative intent, applies prospectively only.[139]

While Mississippi's inclusion of remedial laws in the presumption against retroactivity is a minority approach,[140] it benefits from consistency.

> The *Mladinich* plaintiffs commenced their cause of action well before the 1964 amendment to [the Mississippi long-arm statute], and the new complaint, asserting the same factual allegations as their previous complaint, could not have [the] benefit of the amended statute since that would be tantamount to a retrospective application of the 1964 amendment.

Id. Accordingly, *Snavely* found that the 1991 amendment to the long-arm statute applied to the defendant based on the defendant's conduct in 1986, because the plaintiff served the defendant with process after the amendment's effective date. *Id.* at 1002–03, 1008. It is not clear that *Snavely* read *Mladinich* correctly. Although the *Mladinich* plaintiffs had originally filed suit (and hence served process) before the 1964 amendment became effective (July 1, 1964), the trial court "dismissed the suits for want of jurisdiction" and the Mississippi Supreme Court affirmed in a June 1, 1964 opinion. Mladinich v. Kohn, 164 So. 2d 785, 786–87 (Miss. 1964). It is thus likely, though not certain, that the *Mladinich* plaintiffs filed a new lawsuit (and hence served process again) after July 1, 1964. Some of the language in the two *Mladinich* opinions supports this proposition. *Mladinich*, 186 So. 2d at 481 ("The *predecessor* of this case is [the 1964 *Mladinich* opinion and] involved substantially the same factual allegations made in *the instant case*." (emphasis added)); *id.* at 482 ("The present actions . . . involved substantially the same charges for the same tort."); *Mladinich*, 164 So. 2d at 789 (noting that the new long-arm statute does not apply because it is not effective until one month from the date of the opinion). The ambiguity in *Mladinich* illustrates a point made *infra* Part III, that prospective-only application of long-arm statutes creates illogical results and confuses courts.

133. *Mladinich*, 186 So. 2d at 483.

134. *Id.* at 482–83 ("[The long-arm statute] is remedial. It did not create a cause of action, but provided a method of obtaining in personam jurisdiction in Mississippi courts for a tort.").

135. *Id.* at 483.

136. *Id*.

137. *Id*.

138. MISS. CODE ANN. § 13-3-57 (2013).

139. *Mladinich*, 186 So. 2d at 484. *But see supra* note 132. Although the present long-arm statute no longer contains implied consent language, *see* § 13-3-57, it is still written in the future tense, *id.*, and the enacting clause of the most recent amendment also suggests prospective-only application. Act of April 12, 1991, 1991 Miss. Laws. ch. 573, § 142 ("[T]his act shall take effect and be in force from and after July 1, 1991.").

140. *See supra* Section I.C.

In removing the manipulable substantive–remedial element from retroactivity analysis, Mississippi courts look for clear legislative intent to reverse a general presumption against retroactivity.[141] The certainty of Mississippi's approach may well be illusory, however, because Mississippi courts continue to apply procedural laws retroactively.[142] As manipulable as the substantive–remedial distinction can be, the remedial–procedural distinction is even more difficult to delineate.[143] Also of note, the *Mladinich* test for retroactivity may have been implicitly overruled.[144] If Mississippi today presumes that remedial statutes apply retroactively absent contrary legislative intent, then characterizing the Mississippi long-arm statute as remedial should lead future Mississippi courts to apply the statute retroactively.

4. Iowa

Iowa also stands as one of the few holdouts against the overwhelming trend toward disregarding implied consent language and applying long-arm statutes retroactively.[145] In *Krueger v. Rheem Manufacturing. Co.*,[146] the Iowa Supreme Court held that Iowa's legislature had specifically adopted the fiction of implied consent and, in so doing, had evinced its intent that the long-arm statute apply prospectively only.[147] *Krueger* is distinct among long-arm statute retroactivity cases both because it is one of the few post-

141. *Mladinich*, 186 So. 2d at 483.

142. *See* Dep't of Human Servs. v. Shelnut, 772 So. 2d 1041, 1051 (Miss. 2000) ("Application of a statute which affects procedural . . . rights to causes arising prior to the statute's effective date but tried thereafter is not an impermissible retroactive application."); Oliphant v. Carthage Bank, 80 So. 2d 63, 72 (Miss. 1955) ("[W]hen proceedings are in process under a statute . . . and a new act is passed, modifying the statute under which the proceedings were begun, the new statute becomes integrated into and a part of the old statute as fully as if written therein from the very time the old statute was enacted.").

143. *See* Leslie Southwick, *Retroactivity, in General—Procedural Changes*, *in* 8 ENCYCLOPEDIA OF MISSISSIPPI LAW § 68:104 (Jeffrey Jackson & Mary Miller eds., 2012), *available at* Westlaw MSPRAC-ENC (noting the tendency of Mississippi courts to expand their definition of procedure to apply laws retroactively).

144. *See* Bell v. Mitchell, 592 So. 2d 528, 533 (Miss. 1991) ("Remedial statutes relating to remedies which do not take away vested rights but only operate in furtherance of the remedy do not come within the general rule against retrospective operation of statutes."). Despite a direct conflict in the two cases' description of the Mississippi approach to retroactivity of remedial statutes, *Bell* did not cite *Mladinich* and did not consider personal jurisdiction.

145. *Compare* Krueger v. Rheem Mfg. Co., 149 N.W.2d 142, 147–48 (Iowa 1967), *with* Teague v. Damascus, 183 F. Supp. 446, 447, 450 (E.D. Wash. 1960), Hoen v. Dist. Court, 412 P.2d 428, 429, 431 (Colo. 1966), Eudaily v. Harmon, 420 A.2d 1175, 1179 (Del. 1980), Nelson v. Miller, 143 N.E.2d 673, 675–76 (Ill. 1957), Scheidegger v. Greene, 451 S.W.2d 135, 139, 146 n.1 (Mo. 1970), Prop. Owners Ass'n at Suissevale, Inc. v. Sholley, 284 A.2d 915, 917 (N.H. 1971) (disregarding the implied consent language of New Hampshire's long-arm statute cited *supra* note 45), *and* Gray v. Armijo, 372 P.2d 821, 827 (N.M. 1962).

146. 149 N.W.2d 142.

147. *Id.* at 147–48.

McGee cases to base its prospective-only holding on implied consent and because it does so while soundly discrediting the notion that implied consent has a basis in constitutional law.

After a hot water heater exploded in their home, the *Krueger* plaintiffs sued the manufacturer and a subcomponent manufacturer for negligence.[148] The explosion occurred one year before Iowa's long-arm statute enabled Iowa courts to exercise personal jurisdiction over a nonresident corporation based on the corporation's committing a tort in Iowa.[149] The statute, which is substantially similar to today's Iowa long-arm statute,[150] was a substituted service statute that used the implied consent language: "shall be deemed to constitute the appointment of the secretary of state."[151] The court identified the statute as adhering to the implied consent theory, but did not consider the statute's implied consent language to immediately foreclose retroactive application.[152]

In *Krueger*, the Iowa Supreme Court considered the effect of *McGee* and *International Shoe* on implied consent doctrine.[153] The court agreed with Illinois and many other states that, under the U.S. Constitution, personal jurisdiction laws can be purely remedial and retroactively applicable.[154] The court noted, however, that state legislatures are not obligated to abandon the implied consent legal fiction as a matter of state law and that "[i]t is a legislative, not judicial, function to extend or enlarge jurisdiction over foreign corporations."[155] *Krueger* cited several state law cases in which a court interpreted a substituted service long-arm statute as affecting substantive rights.[156] According to *Krueger*, substituted service long-arm statutes (which include implied consent language) give nonresidents a choice of whether to consent to substitute service.[157] A court cannot deem a nonresident to have impliedly consented before the substituted service statute's enactment.[158] The court concluded that implied consent language in a substituted service statute indicates the legislature's intent that the long-arm statute apply prospectively only.[159]

By distinguishing the federal constitutional aspect of retroactivity analysis from the state law aspect, the Iowa Supreme Court gives

148. *Id.* at 143.

149. *Id*. at 143–44.

150. *Compare id.* (quoting Iowa's 1963 long-arm statute), *with* IOWA CODE § 617.3(2) (2013).

151. *Krueger*, 149 N.W.2d at 144 (emphasis omitted) (quoting Iowa's 1963 long-arm statute).

152. *See id.* at 147–48.

153. *Id.* at 145.

154. *Id.* at 147.

155. *Id.* (quoting Hill v. Elecs. Corp. of Am., 113 N.W.2d 313, 318 (Iowa 1962)) (internal quotation marks omitted).

156. *Id.* at 145.

157. *See id.* at 145–46.

158. *Id*. at 146.

159. *Id.* at 147.

credibility to its holding and casts some doubt on the many state courts that interpret their long-arm statute to apply retroactively in spite of implied consent language. Alternatively, one might consider *Krueger* to have given undue significance to the otherwise dying implied consent theory.[160] For example, the dissent in *Krueger* argued that "[i]f plaintiff had a cause of action against defendants prior to enactment of [the long-arm statute], then [the statute] simply served to accord him a new local forum. This is procedural."[161] The dissent observed quite succinctly that, whatever the legislative intent behind implied consent language, a procedural statute is presumed to operate retroactively absent unambiguous legislative intent to the contrary.[162] As this Note shows, and as the dissent argued, implied consent language is far from unambiguous.[163]

A subsequent decision by the Iowa Supreme Court held that the applicable long-arm statute fixes when the defendant commits the allegedly negligent acts rather than when the cause of action accrues.[164] Interestingly, Justice Stuart, who wrote for the majority in *Krueger*, dissented in the subsequent case, arguing that "the majority opinion gives more substance to the implied consent theory than it is entitled to."[165] Justice Stuart argued that an implied consent long-arm statute need not be interpreted as requiring affirmative conduct as the sole basis upon which to imply consent to jurisdiction.[166] Instead, Justice Stuart argued that because implied consent is a legal fiction, consent to jurisdiction can be implied at law by the accrual of a cause of action (in this case, the requisite injury to establish a tort based on past negligent acts).[167] Justice Stuart intended to imply the nonresident defendant's consent to Iowa jurisdiction based on the defendant's committing a negligent act before the long-arm statute's enactment that caused injury after the statute's enactment.[168] As Justice Stuart seemed to admit, implied consent theory is a statutory vestige of old personal jurisdiction law.[169] One wonders why he relied on the fiction

160. *See id.* at 148 (Rawlings, J., dissenting) ("Furthermore the agency concept employed by . . . the majority opinion, stemming from the designation of the Secretary of State as a process agent is, in my humble opinion, mere fiction.").

161. *Id.*

162. *See id.*

163. *Id.* ("There is nothing in the subject law which discloses the legislature intended it to be applied prospectively and not retrospectively.").

164. Chrischilles v. Griswold, 150 N.W.2d 94, 101 (Iowa 1967). Florida also applies the long-arm statute in effect when the defendant commits the alleged "wrongful acts." Conley v. Boyle Drug Co., 570 So. 2d 275, 288 (Fla. 1990).

165. *Chrischilles*, 150 N.W.2d at 102 (Stuart, J., dissenting).

166. *Id.*

167. *Id.* at 101–02.

168. *Id.*

169. *Id.* at 102 (implying consent from affirmative conduct by the defendant "would have been necessary when the United States Supreme Court held the fiction was [sic] implied consent was necessary to confer jurisdiction[, which] is no longer the case").

earlier that year in *Krueger*.[170]

5. Statutory Non-Retroactivity

While vague statutory language and the outmoded use of implied consent language forces many state courts to wrestle with retroactivity, West Virginia's long-arm statute forecloses most of the discussion by expressly disallowing retroactive application of its long-arm statute.[171] Idaho's long-arm statute expressly allows retroactivity but only as to the jurisdiction-conferring act of conceiving a child in the state.[172] Presumably, a court would interpret the Idaho statute as implicitly disallowing retroactive application for all other jurisdiction-conferring acts. The Idaho and West Virginia approach benefits from some clarity, but, because neither statute declares the moment at which the long-arm statute fixes, courts still have statutory gaps to fill.

III. PROSPECTIVE-ONLY LONG-ARM STATUTES ARE ILLOGICAL AND INEFFICIENT

First, the practical effect of the preceding discussion: litigators in prospective-only states have, when applicable, a tremendous weapon for obtaining a dismissal.[173] Whenever a prospective-only state amends its long-arm statute, all preceding behavior is judged for jurisdictional purposes under the long-arm statute in effect at the measuring point.[174] Of the several situations in which this could prove useful, the most notable involves a cause of action that accrues in the present but stems from a defendant's conduct in the distant past. Products liability stands out as a frequently litigated cause of action that is often based on a defendant's conduct from years or even decades in the past.[175] In several prospective-only states, the applicable long-arm statute is not the one in effect when the cause of action accrues but the one in effect when the "wrongful conduct" takes place.[176] Because a defendant's behavior may subject him to jurisdiction under the present long-arm statute but not under the applicable

170. *See* Krueger v. Rheem Mfg. Co., 149 N.W.2d 142, 147 (Iowa 1967) (applying a more literal perspective of implied consent while discussing *Davis v. Jones*, 78 N.W.2d 6 (Iowa 1956)).

171. W. VA. CODE § 56-3-33(g) (2012).

172. IDAHO CODE ANN. § 5-514(f) (2013).

173. Even in retroactive states, litigators may still be able to argue that their nonresident client's reliance on an earlier jurisdictional law makes jurisdiction unfair. *See, e.g.*, Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 586 (2d Cir. 1965).

174. *See supra* Section II.B. This assumes, of course, that the amendment is not explicitly retroactive or changes the language of the statute sufficiently to give the courts good cause to apply the amended statute retroactively.

175. *See, e.g.*, Conley v. Boyle Drug Co., 570 So. 2d 275, 279 (Fla. 1990) (discussing, in a 1990 opinion, an injury that allegedly occurred between 1955 and 1956 to an unborn child).

176. *See, e.g.*, Pub. Gas Co. v. Weatherhead Co., 409 So. 2d 1026, 1027 (Fla. 1982); Chrischilles v. Griswold, 150 N.W.2d 94, 101 (Iowa 1967).

past long-arm statute,[177] prospective-only states afford litigators in these situations the opportunity to obtain a quick dismissal. Belated recognition of this usually inapplicable issue will result in a missed opportunity.[178] In spite of the opportunity that a prospective-only long-arm statute affords litigators, this Part argues that prospective-only long-arm statutes are illogical and inefficient.

A. *Prospective-Only Long-Arm Statutes Lead to Illogical Results*

In *Conley v. Boyle Drug Co.*,[179] after being diagnosed with cervical cancer, a Florida woman sued several drug companies on a market share liability theory.[180] The plaintiff alleged that her mother had used the synthetic estrogen drug DES in 1955 and 1956, while the plaintiff was in utero, and that the DES had caused the plaintiff's cancer.[181] More than twenty years after the plaintiff was exposed to DES, her cause of action accrued (upon her cancer diagnosis) and she sued.[182] The Florida Supreme Court held that the drug companies' submission to personal jurisdiction in Florida must be judged under the long-arm statute in effect when the allegedly defective DES was manufactured.[183] Applying the 1955 Florida "doing business" personal jurisdiction statute, the court dismissed two defendants.[184]

Although *Conley* was a fair application of existing Florida law, the idea that a court in 1990 would apply a jurisdictional law from the 1950s borders on the absurd, especially given the evolution of the constitutional due process standard over the intervening thirty-five years. Thus, the first reason for applying long-arm statutes retroactively: prospective-only application of long-arm statutes leads to illogical results.

In *Smith v. Trans-Siberian Orchestra*,[185] a federal district court in Florida refused to retroactively apply a Florida Supreme Court interpretation of the Florida long-arm statute on the theory that retroactively applying the interpretation would deprive the plaintiff of fair notice regarding which jurisdictional facts to allege.[186] This case provides several examples of the ways in which a fictional basis for denying long-arm statute retroactivity can create problems for a court. First, Florida

177. *See, e.g.*, Rose v. Franchetti, 979 F.2d 81, 84–85 (7th Cir. 1992) (considering retroactively applying an amended Illinois long-arm statute that, unlike the older statute, "fits [this] case nicely").

178. FED. R. CIV. P. 12(h)(1).

179. 570 So. 2d 275 (Fla. 1990).

180. *Id.* at 279.

181. *Id*.

182. *Id*.

183. *Id.* at 288.

184. *Id.* at 288–89.

185. 728 F. Supp. 2d 1315 (M.D. Fla. 2010).

186. *Id.* at 1322.

retroactively applies statutory interpretations unless the Florida Supreme Court specifically prescribes otherwise.[187] The *Gordon* prospective-only rule, which applies to *amendments* of the Florida long-arm statute,[188] should not have been applied to an *interpretation* of the Florida long-arm statute. Second, *Trans-Siberian Orchestra* cited the U.S. Supreme Court opinion in *Landgraf v. USI Film Products*[189] as supporting the notion that the plaintiff is entitled to fair warning of what to allege.[190] Fair warning in the personal jurisdiction context applies to defendants, however, not to plaintiffs.[191] *Trans-Siberian Orchestra* apparently confused the detriment that a plaintiff suffers in amending his complaint with the detriment that a defendant suffers when he is subjected to a court's jurisdiction without notice of the possible bases for jurisdiction. Regardless of the detriment, the U.S. Supreme Court distinguishes both pleading rules and jurisdictional rules from the non-retroactivity principle.[192] Attempting to faithfully apply Florida's rule against retroactive application of its long-arm statute, *Trans-Siberian Orchestra* shows that a rule based on a fiction can easily spiral into an illogical result.

In *House v. Hendley & Whittemore Co.*,[193] a products liability plaintiff attempted to assert personal jurisdiction in Iowa under the present long-arm statute based on the defendant's continuing failure to warn of a product defect.[194] The Iowa Supreme Court held that implied consent to jurisdiction requires that the defendant's affirmative conduct fit within the long-arm statute.[195] Because the defendant's only affirmative conduct (manufacture and distribution of the goods) took place before the long-arm statute was enacted, the defendant's omissions (which continued after the long-arm statute was enacted) did not establish the defendant's consent to Iowa jurisdiction.[196]

House's application of the prospective-only rule adheres so firmly to the implied consent fiction that it actually violates the plain language of the long-arm statute. If failing to warn of a defective product constitutes a tort in Iowa, then the plaintiff adequately alleged that the defendant "commit[ted] a tort in whole or in part in Iowa against a resident of

187. Fla. Forest & Park Serv. v. Strickland, 18 So. 2d 251, 253 (Fla. 1944).

188. *See supra* text accompanying notes 104–12.

189. 511 U.S. 244 (1994).

190. *Trans-Siberian Orchestra*, 728 F. Supp. 2d at 1322.

191. *See, e.g.*, Fibreboard Corp. v. Kerness, 625 So. 2d 457, 458 (Fla. 1993) (describing retroactive application of long-arm statutes as violating the requirement of fair notice because "no statute gave notice that [the *defendant*] might be called upon to *defend* an action in Florida" (emphasis added)).

192. *See Landgraf*, 511 U.S. at 275 nn.28–29.

193. 251 N.W.2d 490 (Iowa 1977).

194. *Id.* at 492.

195. *Id*.

196. *Id*.

Iowa."[197] Finding jurisdiction in the case would not require retroactive application because the defendant's ongoing failure to warn amounted to the continuing commission of a tort (at least in part) in Iowa against an Iowa resident. The Court, however, insisted that jurisdiction could only be predicated upon affirmative acts that indicate a defendant's consent.[198]

B. *Prospective-Only Long-Arm Statutes Merely Duplicate Constitutional Due Process Protections*

When *International Shoe* established the minimum contacts standard, the U.S. Supreme Court signaled a paradigm shift in personal jurisdiction law from territorial and power bases to a fairness measure.[199] In so doing, the Court discussed a nonresident defendant's amenability to suit[200] and later elaborated that a defendant expresses amenability by "purposefully avail[ing] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[201] Purposeful availment and amenability are similar to implied consent, but while implied consent relies on the fiction of a nonresident defendant's consenting to jurisdiction, purposeful availment examines the quality and quantity of a nonresident defendant's contact with a state to determine if the forum state can fairly exercise jurisdiction over the defendant.[202] This language shift is one of several necessary to transform personal jurisdiction law from power-focused to fairness-focused.[203]

The implied consent legal fiction has long outlived its usefulness.[204] Few corporations and even fewer citizens know what specific acts will subject them to out-of-state jurisdiction. Of those who know anything about out-of-state long-arm statutes, common sense suggests that only a small fraction (if that) order their behavior around the statutes.[205] Certainly

197. IOWA CODE § 617.3(2) (2013). The quoted language has remained the same since the 1960s. Krueger v. Rheem Mfg. Co., 149 N.W.2d 142, 143–44 (Iowa 1967).

198. *House*, 251 N.W.2d at 492.

199. Rhodes, *supra* note 28, at 400.

200. Hanson v. Denckla, 357 U.S. 235, 250–53 (1958).

201. *Id.* at 253 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

202. *See* Rhodes, *supra* note 28, at 406. *But see* Patrick J. Borchers, J. McIntyre Machinery, Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1264 (2011) ("Rather than attempting to recast minimum contacts as a proxy for state sovereignty, it would have been more intellectually honest if the plurality had said that it hoped to overrule *International Shoe* and return U.S. jurisdiction to *Pennoyer*-era notions of sovereignty and consent."); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 70–71 (2012) (describing Justice Kennedy's plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) as resurrecting implied consent).

203. *See* Rhodes, *supra* note 28, at 406.

204. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) ("[S]ome of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit . . . .").

205. *But see* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J.,

state law affects corporate and individual behavior, but it is impractical for either corporations or individuals to establish any contact with a state and try to avoid falling into one of the enumerated acts of the state's long-arm statute.[206] Because the vast majority of nonresident defendants act ignorant of a foreign state's jurisdictional rules, attaching unintended significance to a defendant's behavior embraces only a fictional version of justice. Amenability has adequately replaced implied consent.

In addition to amenability, the "fair play and substantial justice" element of personal jurisdiction due process analysis[207] negates the need for implied consent protection. If implied consent doctrine exists to protect a nonresident from being subjected to jurisdiction under unfair terms, then implied consent merely duplicates the protections of the fair play prong of due process analysis.[208] If an individual or corporation can show that he, she, or it acted in actual reliance on a previous long-arm statute, then a court should, in the interest of fair play, refuse to apply a long-arm statute retroactively.[209] This approach protects a nonresident's actual expectations without protecting fictional, implied expectations. The fair play and substantial justice prong of constitutional due process personal jurisdiction analysis sufficiently protects the interests that implied consent doctrine sought to protect.

C. *Long-Arm Statutes Are Remedial*

Long-arm statutes are remedial. As several aforementioned cases discuss, personal jurisdiction laws merely adjust the manner in which one adjudicates a substantive right.[210] That a state's long-arm statute enables a nonresident to be sued in that state does not affect whether there is a substantive basis upon which to sue.[211] A nonresident tortfeasor is subject to suit for his offense regardless of whether the suit ultimately lies in North Carolina or North Dakota. Long-arm statutes merely add a forum in which a defendant can be sued.

On the other hand, the U.S. Supreme Court's inclusion of a due process

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dissenting) (suggesting that the foreign defendant engaged a U.S. distributor to ship its machines within the United States in order to avoid products liability litigation in the United States).

206. *See* Rose v. Franchetti, 979 F.2d 81, 85 (7th Cir. 1992) ("[The nonresident defendant] does not contend that in selling to a buyer from Illinois he relied on a belief that Illinois courts would lack personal jurisdiction.").

207. *Int'l Shoe*, 326 U.S. at 316.

208. *See id.* at 316–17.

209. Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 586 (2d Cir. 1965) ("[I]n the absence of such a showing [of reliance on a prior long-arm statute], the limited retroactivity prescribed . . . for these procedural provisions does not violate due process.").

210. *See supra* Section II.A.

211. *See, e.g.*, *Rose*, 979 F.2d at 85 ("Rules for personal jurisdiction do not regulate primary conduct. Massachusetts substantive law governs this dispute no matter where the litigation occurs . . . .").

requirement implies that there are rights at stake in the exercise of personal jurisdiction over a nonresident.[212] Because of the Court's consistent holding that jurisdictional statutes are not substantive and should be applied retroactively,[213] the due process requirement in the exercise of personal jurisdiction over a nonresident protects a litigant's procedural (not substantive) rights.[214] The right to a presumption against retroactive application of a long-arm statute is not among them.[215] Any additional limitation on a state's personal jurisdiction over a nonresident is self-imposed.

D. *Prospective-Only Long-Arm Statutes Waste Judicial Resources*

In addition to the waste of considering a jurisdictional challenge based on a defendant's fictional rights, prospective-only long-arm statutes will inevitably force courts to consider the constitutionality of outdated, superseded long-arm statute provisions. For example, *J. McIntyre Machinery, Ltd. v. Nicastro* may have signaled an impending shift in the U.S. Supreme Court's approach to personal jurisdiction.[216] In light of the plurality opinion in that case, some long-arm statute provisions may exceed the redefined limits of the Due Process Clause.[217] In response to *J. McIntyre*, offending provisions may be removed from a future version of the long-arm statute. In prospective-only states, however, any cause of action that arises from acts that precede passage of the new long-arm statute will be adjudicated under the current, constitutionally questionable long-arm statute.[218] Despite the legislature's effort to avoid constitutional scrutiny, courts will have to evaluate the constitutionality of superseded long-arm statutes, thereby undermining the remedial purpose of amending a long-arm statute. In effect, the old long-arm statute echoes into the future, haunting judges for years to come.

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212. *E.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) ("Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty,' for *due process* protects the individual's *right* to be subject only to lawful power." (emphasis added) (quoting Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982))).

213. *E.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994).

214. *E.g.*, Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., 593 F.3d 1249, 1259 (11th Cir. 2010).

215. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957).

216. *See* Rhodes, *supra* note 28, at 422 ("Both Justices Kennedy's and Breyer's opinions [in *J. McIntyre*] therefore revived aspects of nineteenth and early twentieth century jurisdictional doctrine expressly disavowed by *International Shoe*.").

217. *See, e.g.*, FLA. STAT. § 48.193(1)(f) (2012) (authorizing personal jurisdiction under circumstances similar to the stream of commerce theory disallowed in *J. McIntyre*).

218. *See generally supra* Section II.B.

CONCLUSION

While the majority of states with single-act long-arm statutes apply amendments and new versions of their long-arm statutes retroactively, at least six states do not. Because state courts control the interpretation of state law, it would be overly simplistic to characterize state courts as wrong to interpret their long-arm statutes as prospective only. This Note argues, however, that refusing to apply a long-arm statute retroactively reflects bad policy supported by bad logic.

In addition to occasionally forcing courts to apply dated jurisdictional laws to modern causes of action, prospective-only long-arm statutes impose upon courts the difficult task of fixing the point at which a particular long-arm statute applies. Prospective-only long-arm statutes can create sideshow trials on jurisdictional facts and can confuse courts about the scope of the prospective-only principle. Prospective-only application of long-arm statutes finds support neither from the Due Process Clause of the U.S. Constitution nor from common law retroactivity analysis. Most states that refuse to apply their long-arm statutes retroactively do so either because they cling to the discredited implied consent fiction or because they deviate from the consensus distinction between substance and procedure. With a possible exception under the Due Process Clause for cases in which a nonresident defendant in fact relies on the enumerated acts of an older single-act long-arm statute, universal retroactive application of state long-arm statutes best conforms to the modern understanding of personal jurisdiction law.

APPENDIX

Table: Retroactivity of Single-Act Long-Arm Statutes

	Long-Arm Statute.	Implied Consent Language?	Retroactive or Prospective Only?	Case on point.
AK	ALASKA STAT. § 09.05.015 (2012).	No.	Unknown.	N/A.
CO	COLO. REV. STAT. § 13-1-124 (2012).	Yes.	Retroactive.	Hoen v. Dist. Court, 412 P.2d 428 (Colo. 1966).
CT	CONN. GEN. STAT. § 52-59b (2013).	No.	Retroactive.	Carvette v. Marion Power Shovel Co., 249 A.2d 58 (Conn. 1968).
DE	DEL. CODE. ANN. tit. 10, § 3104 (2013).	Yes.	Retroactive.	Eudaily v. Harmon, 420 A.2d 1175 (Del. 1980).
FL	FLA. STAT. § 48.193 (2012).	Yes.	Prospective Only.	Gordon v. John Deere Co., 264 So. 2d 419 (Fla.1972).
GA	GA. CODE ANN. § 9-10-91 (2012).	No.	Prospective Only.	Bauer Int'l Corp. v. Cagle's, Inc., 171 S.E.2d 314 (Ga. 1969).
HI	HAW. REV. STAT. § 634-35 (2012).	Yes.	Retroactive.	Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969) (applying Hawaii law).

ID	IDAHO CODE ANN. § 5-514 (2013).	Yes.	Probably Prospective Only.	Long-arm statute expressly allows retroactivity as to the act of conceiving a child in Idaho, suggesting that the statute is not retroactive in any other context.
IL	735 ILL. COMP. STAT. 5/2-209 (2012).	Yes.	Retroactive.	Nelson v. Miller, 143 N.E.2d 673 (Ill. 1957).
IA	IOWA CODE § 617.3 (2013).	Yes.	Prospective Only.	Krueger v. Rheem Mfg. Co., 149 N.W.2d 142 (Iowa 1967).
KY	KY. REV. STAT. ANN. § 454.210 (West 2012).	No.	Retroactive.	Rose v. E.W. Bliss Co., 516 S.W.2d 329 (Ky. 1974).
MD	MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (West 2012)	No.	Retroactive.	Hardy v. Rekab, Inc., 266 F. Supp. 508 (D. Md. 1967).
MA	MASS. GEN. LAWS ch. 223A, § 3 (2012).	No.	Retroactive.	Kagan v. United Vacuum Appliance Corp., 260 N.E.2d 208 (Mass. 1970).
MI	MICH. COMP. LAWS §§ 600.705, 600.715, 600.725, 600.735 (2013).	No.	Retroactive.	Chovan v. E.I. Du Pont De Nemours & Co., 217 F. Supp. 808 (E.D. Mich. 1963).

MN	MINN. STAT. § 543.19 (2012).	No.	Retroactive.	Hunt v. Nev. State Bank, 172 N.W.2d 292 (Minn. 1969).
MS	MISS. CODE ANN. § 13-3-57 (2013).	Yes.	Prospective Only.	Mladinich v. Kohn, 186 So. 2d 481 (Miss. 1966).
MO	MO. REV. STAT. § 506.500 (2012).	Yes.	Retroactive.	Scheidegger v. Greene, 451 S.W.2d 135 (Mo. 1970).
MT	MONT. R. CIV. P. 4.	No.	Retroactive.	State *ex rel.* Johnson v. Dist. Court, 417 P.2d 109 (Mont. 1966).
NH	N.H. REV. STAT. ANN. § 510:4 (2013).	Yes.	Retroactive.	Prop. Owners Ass'n at Suissevale, Inc. v. Sholley, 284 A.2d 915 (N.H. 1971).
NM	N.M. STAT. ANN. § 38-1-16 (2012).	Yes.	Retroactive.	Gray v. Armijo, 372 P.2d 821 (N.M. 1962).
NY	N.Y. C.P.L.R. 302 (McKinney 2013).	No.	Retroactive.	Simonson v. Int'l Bank, 200 N.E.2d 427 (N.Y. 1964).
NC	N.C. GEN. STAT. § 1-75.4 (2012).	No.	Retroactive.	Fed. Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972).
ND	N.D.R. CIV. P. 4(b).	No.	Retroactive.	Keller v. Clark Equip. Co., 367 F. Supp. 1350 (D.N.D. 1973), *rev'd on other grounds*, 570 F.2d 778 (8th Cir. 1978).

OH	OHIO REV. CODE ANN. § 2307.382 (2013).	No.	Retroactive.	Kilbreath v. Rudy, 242 N.E.2d 658 (Ohio 1968).
SC	S.C. CODE ANN. § 36-2-803 (2012).	No.	Retroactive.	Howard v. Allen, 368 F. Supp. 310 (D.S.C. 1973).
TX	TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2013).	No.	Retroactive.	Lone Star Motor Imp., Inc. v. Citroen Cars Corp., 185 F. Supp. 48 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961).
UT	UTAH CODE ANN. § 78B-3-205 (2013).	No.	Unknown.	N/A
VA	VA. CODE ANN. § 8.01-328.1 (2013).	No.	Retroactive.	Walke v. Dall., Inc., 161 S.E.2d 722 (Va. 1968).
WA	WASH. REV. CODE § 4.28.185 (2012).	Yes.	Retroactive.	Teague v. Damascus, 183 F. Supp. 446 (E.D. Wash. 1960).
WV	W. VA. CODE § 56-3-33 (2012).	Yes.	Prospective Only.	Long-arm statute expressly applies prospectively only.
WI	WIS. STAT. § 801.05 (2013).	No.	Retroactive.	Steffen v. Little, 86 N.W.2d 622 (Wis. 1957).