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# Impersonal Jurisdiction

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# IMPERSONAL JURISDICTION

Allan Erbsen\*

## ABSTRACT

*Constitutional law governing personal jurisdiction in state courts inspires fascination and consternation. Courts and commentators recognize the issue's importance, but cannot agree on the purpose that limits on personal jurisdiction serve, which clauses in the Constitution (if any) supply those limits, and whether current doctrine implementing those limits is coherent. This Article seeks to reorient the discussion by developing a framework for thinking about why and how the Constitution regulates personal jurisdiction. It concludes that principles animating the emerging field of horizontal federalism—the constitutional relationship between states—should guide jurisdictional rules and instigate sweeping reevaluation of modern jurisprudence. The Article proceeds in three steps: it strips away layers of history and doctrine to present a model for thinking about why constitutional limits on personal jurisdiction may be necessary, shows how the model places personal jurisdiction within a broader context of constitutional law governing horizontal federalism, and considers how analyzing personal jurisdiction within this context challenges pivotal assumptions underlying modern doctrine and canonical understandings of how civil procedure and constitutional law intersect. In particular, the Article questions two pillars of the Supreme Court's jurisprudence. First, it considers whether the Constitution makes Congress rather than the judiciary the primary institution for regulating jurisdiction in state courts, and thus whether the prospect of diversity jurisdiction and removal to federal court should preempt judicially created due process remedies against jurisdictional overreaching by state courts. Second, it challenges the coherence of the multifactored reasonableness test that courts use to implement due process limits on state authority. More generally, the Article creates a framework for thinking about personal jurisdiction that ties*

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*the subject into analogous debates about ostensibly distinct areas of constitutional law and provides a foundation for testing competing normative critiques of modern doctrine. The Article thus generates insights that can reshape a much maligned area of law that routinely confounds courts and scholars.*

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## INTRODUCTION

Each year, virtually every civil procedure professor in the United States poses a question to students that courts confront every day: how, if at all, does the Constitution limit state courts' authority to exercise personal jurisdiction in civil litigation? The answer can have enormous practical consequences. If jurisdiction is difficult to obtain, then prospective plaintiffs injured by distant wrongdoers may incur the debilitating burden of traveling to and litigating in a defendant's preferred forum. This burden could lead to fewer or less effective suits and thus undermine the regulatory objectives that such suits promote. But if jurisdiction is easy to obtain, then prospective defendants incur the risk of suit in states with which they have little contact or experience. This jurisdictional exposure could compromise their ability to mount effective defenses and induce excessive risk aversion to avoid being sued, possibly to the point of discouraging socially desirable behavior. And if jurisdictional rules are unclear one way or the other, litigants will waste resources fighting about issues collateral to the merits, while potential litigants will be unable to anticipate and plan for litigation expenses. A fair and efficient system for resolving civil disputes therefore requires clear and coherent rules governing personal jurisdiction. Unfortunately, the rules in the United States are neither clear nor coherent.

Deciphering the Supreme Court's personal jurisdiction jurisprudence requires navigating inconsistent precedents that obscure vexing constitutional questions behind catchphrases and buzzwords, such as "minimum contacts," "substantial justice," "fair warning," "purposeful availment," and "reasonableness."<sup>1</sup> These terms are pregnant with meaning but hollow in substance. Confusion is inevitable, and is evident in caselaw and scholarship that attempt to define outer limits for states' adjudicative authority. Even basic foundational questions are hotly contested despite more than two centuries of doctrinal evolution. For example, commentators cannot agree on the constitutional source of limits on state judicial authority, which in various contexts could be the Due Process Clause,<sup>2</sup> the Full Faith and Credit Clause,<sup>3</sup>

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<sup>1</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–78 (1985) (citations and internal quotation marks omitted).

<sup>2</sup> See John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 588 (1984); Charles W. Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 567 (2007).

<sup>3</sup> See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171–72 (2004); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 851–52 (1989); Sarah R. Cebik, "A Riddle Wrapped in a

the Commerce Clause,<sup>4</sup> a constellation of clauses regulating federalism,<sup>5</sup> or no clause.<sup>6</sup> Competing theories also abound about the purpose that limits on personal jurisdiction serve. Possibilities include ensuring that states exercise authority only over individuals who have manifested “consent,”<sup>7</sup> protecting defendants’ expectations and promoting predictability in forum selection,<sup>8</sup> imposing limits on states’ ability to wield “coercive power” absent a legitimate reason for doing so,<sup>9</sup> maximizing “utility,”<sup>10</sup> avoiding undue burdens that litigation in inconvenient fora may impose on parties,<sup>11</sup> allocating the duty of travel between plaintiffs and defendants,<sup>12</sup> and hybrids of these theories.<sup>13</sup> The Supreme Court has similarly been unable to articulate a stable method for addressing disputes about personal jurisdiction. Doctrine vacillates along multiple dyads: sometimes emphasizing state sovereignty and other times emphasizing individual rights,<sup>14</sup> sometimes focusing on a state’s power over

*Mystery Inside an Enigma*: *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 15.

<sup>4</sup> See Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 743 (1988); Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 390–91.

<sup>5</sup> See Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1590–91 (1992).

<sup>6</sup> See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 24–25 (1990).

<sup>7</sup> Trangsrud, *supra* note 3, at 853.

<sup>8</sup> See Charles W. Rhodes, *The Predictability Principle in Personal Jurisdiction: A Case Study on the Effects of a “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 241–42 (2005).

<sup>9</sup> Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987); see also A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 647 (2006); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 689 (1987).

<sup>10</sup> Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 230–31 (1998).

<sup>11</sup> See Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114–15 (1981).

<sup>12</sup> See Roy L. Brooks, *The Essential Purpose and Analytical Structure of Personal Jurisdiction Law*, 27 IND. L. REV. 361, 363–64 (1993); Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 601 (2001).

<sup>13</sup> See, e.g., Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 88 (1984) (proposing a fairness inquiry under constitutional standards and an assessment of the forum’s sovereign power via collateral attack under federal statutory or common law standards); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 3–4 (1984) (“This Article . . . propos[es] an approach that accommodates both the contacts-based and noncontacts-based tests under uniform jurisdictional standards. . . . Under this analysis . . . the ‘expectation’ or ‘benefit’ yardsticks . . . should be the ultimate measures of fairness to the parties.”).

<sup>14</sup> See *infra* Part I.B.4 and notes 261–62.

actors and other times on power arising from the local effects of their actions,<sup>15</sup> and sometimes relying on a rule's historical pedigree and other times discounting it.<sup>16</sup> Likewise, the Court has unhelpfully opined that the forum state's interests in providing a forum matter except when they don't,<sup>17</sup> that burdens on nonresident defendants are material except when they aren't,<sup>18</sup> and that the plaintiff's interest in finding a convenient forum is important except when it isn't.<sup>19</sup>

Constitutional law governing personal jurisdiction thus careens forward as an evolving tapestry of modern insights and anachronistic assumptions stitched together without a guiding vision. Not surprisingly, commentators by near "consensus"<sup>20</sup> routinely deride the resulting doctrine as "unacceptably confused and irrational,"<sup>21</sup> "convoluted and arcane,"<sup>22</sup> "in chaos,"<sup>23</sup> "half-baked,"<sup>24</sup> "precarious,"<sup>25</sup> and "plagued" by "ambiguity and incoherence."<sup>26</sup> A

<sup>15</sup> Compare *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (rejecting jurisdiction in state where injury occurred and stressing that defendants "carry on no activity whatsoever" in the forum), with *Calder v. Jones*, 465 U.S. 783, 789 (1984) ("California is the focal point both of the [out-of-state conduct] and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California.").

<sup>16</sup> Compare *Burnham v. Superior Court*, 495 U.S. 604, 621–22 (1990) (plurality opinion) (defending jurisdictional rule based on its historical "pedigree" and consistency with "tradition"), with *Shaffer v. Heitner*, 433 U.S. 186, 211–12 (1977) ("[H]istory must be considered . . . but it is not decisive." (citation omitted)).

<sup>17</sup> Compare *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."), with *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) (not considering Florida's interest in disposition of assets connected with estate of local decedent).

<sup>18</sup> Compare *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978) (holding that California could not compel East Coast resident to bear "burden" of traveling across the country to California), with *Calder*, 465 U.S. at 789–90 (holding that California could compel East Coast resident to travel across the country to California).

<sup>19</sup> Compare *McGee*, 355 U.S. at 223 (recognizing insurance policy beneficiary's interest in suing out-of-state insurer in convenient local forum), with *Kulko*, 436 U.S. at 100 n.15 (not considering mother's interest in suing father for child support in convenient local forum where children resided).

<sup>20</sup> Weinstein, *supra* note 3, at 171 ("Although the extensive body of commentary on federally imposed limitations of state court jurisdiction agrees on very little, the one point of consensus is that Supreme Court personal jurisdiction doctrine is deeply confused."). But see Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 856–57 (1987) (contending that personal jurisdiction doctrine is "consistent and coherent" despite the "ever shifting relationship" among its animating themes).

<sup>21</sup> Borchers, *supra* note 6, at 105.

<sup>22</sup> Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? *It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 53 (2004).

<sup>23</sup> Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625 (1991).

<sup>24</sup> Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027 (1995).

<sup>25</sup> Spencer, *supra* note 9, at 618.

new approach is clearly necessary. Yet scholars have been advocating reform for decades without making much collective headway; the many prior reconceptualization attempts have not settled the field. The persistence of disarray suggests that a fundamentally different type of approach is needed to break the gridlock.

This Article takes an innovative approach to conceptualizing personal jurisdiction by rethinking the subject from first principles without the distracting baggage of historically contingent assumptions about how the Constitution does or should apply. The goal is to offer a fresh perspective that can in turn provide a framework for reexamining modern doctrine and critiques of that doctrine. My premise is that one cannot identify which clauses of the Constitution regulate personal jurisdiction, the normative values that those clauses protect, and the ideal content of doctrine implementing those values unless one first asks more basic questions: why are personal jurisdiction problems difficult? What is it about a state's assertion of jurisdictional power over a person that requires creating constitutional law to protect the person's preference to avoid that power? Identifying the factors that make personal jurisdiction challenging is thus the first step to resolving those challenges.<sup>27</sup>

The Article concludes that questions about whether the Constitution limits personal jurisdiction in state court are difficult because they implicate the allocation of regulatory authority between coequal states in a federal system. The Supreme Court has occasionally framed the problem in these structural terms, but without developing the observation or taking it to its logical conclusion, and by relying on ill-defined conceptions of state power and

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<sup>26</sup> McMunigal, *supra* note 10, at 189; *see also* *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 909–11 (1980) (White, J., dissenting from denial of certiorari) (“The [disputed personal jurisdiction issue is] of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts . . . may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question.”).

<sup>27</sup> *See* Casad, *supra* note 5, at 1589–90 (observing that Supreme Court decisions analyzing personal jurisdiction “have not given us a coherent philosophical foundation for the constitutional restrictions they recognize. . . . It is not surprising that cases presenting the issue of amenability to personal jurisdiction under these confusing standards now make up a large share of reported state and federal decisions.” (footnotes omitted)); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 573 (1991) (“[A] coherent doctrine is not possible without first identifying the problem for which personal jurisdiction is the solution.”); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 100, 102 (1988) (“The suggestion that it is time for a thorough overhaul of the jurisprudence of jurisdiction is enormously compelling” in part because “we now have a body of rules without reasons.”).

individual liberty.<sup>28</sup> Yet contrary to conventional understanding, a state's ability to assert jurisdiction cannot depend on a free-floating conception of the state's power because the scope of any one state's power is a function of the other states' powers. The Constitution reserves jurisdictional authority to states in the aggregate without parsing between them,<sup>29</sup> and thus a state's exercise of jurisdiction raises a question about whether it is asserting power in a manner that is incompatible with the existence of equivalent powers in other states. Likewise, an individual's ability to resist jurisdiction cannot depend on a free-floating notion of liberty interests because those interests have no content without reference to the federal structure in which they operate. Liberty is a relational concept, and one cannot fully understand the relationship between a state and citizens of other states without understanding the web of relationships between individuals, states, and the national government. Assessing whether the Constitution tolerates jurisdiction in a particular state thus requires thinking about how the Constitution mediates between competing individual, state, and national interests that arise from the fragmentation of subnational sovereignty. These mediation mechanisms are aspects of what I call "horizontal federalism"—as distinct from vertical federalism, which is relevant to federal–state rather than state–state relationships.<sup>30</sup>

Conceptualizing constitutional limits on personal jurisdiction as a manifestation of horizontal federalism can substantially reform and refine modern doctrine. The constitutional law of personal jurisdiction is muddled in part because it is not moored to a coherent purpose and thus drifts on shifting intellectual currents. Situating personal jurisdiction within a horizontal federalism context reveals a set of analogous problems—such as efforts by states to tax out-of-state activities, apply local law to foreign transactions, and regulate interstate commerce—and implicates constitutional mechanisms for addressing those problems. Considering this constitutional architecture of horizontal federalism can alter our understanding of what jurisdictional limits should accomplish and the form that these limits should take.

The Article develops this argument in four stages: it defines the problem, explains why the problem is difficult, develops a framework for addressing the problem, and explores the implications of adopting that framework. Part I.A

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<sup>28</sup> See *infra* notes 261–62 (noting the Court's awkward reformulation of federalism concerns as liberty interests).

<sup>29</sup> U.S. CONST. amend. X.

<sup>30</sup> For a definition of horizontal federalism, see *infra* Part II.A.



highlights the salient constitutional issue by precisely defining the questions I address and reserving tangential matters for further study. This Part also suggests, contrary to current law, that treating the burden of litigating in an inconvenient forum as a question of venue may be more sensible than treating it as a question of jurisdiction. Burdens can arise even when defendants do not cross state borders, nothing about crossing state borders is inherently burdensome, and thus the inconvenience problem is collateral to the federalism concerns that should animate jurisdictional rules. Part I.B then distinguishes relatively “easy” and “hard” jurisdictional dilemmas, using the juxtaposition to identify factors that complicate jurisdictional analysis. This Part also employs an original approach of analyzing jurisdiction in federal court, where the Constitution arguably makes state borders irrelevant, to gain insights about how state borders limit jurisdiction in state court. Part II.A then shows how the factors that complicate jurisdictional analysis in state courts are the same factors that animate numerous horizontal federalism problems, while Part II.B explores the methodological benefits of using horizontal federalism principles to reevaluate personal jurisdiction doctrine. Part II also comments on how the academy’s compartmentalized approach to personal jurisdiction, which frames it as an aspect of civil procedure and conflict of laws, obscures its kinship with mainstream constitutional law and theory.

Finally, Part III illustrates the practical significance of situating personal jurisdiction within a horizontal federalism context by considering two potential implications: (1) that the Constitution regulates personal jurisdiction by empowering Congress to authorize removal of cases from state court to federal court, rather than by empowering courts to create individually enforceable rights that preclude jurisdiction; and (2) that the Court’s “reasonableness” test for assessing jurisdiction may be incoherent because it only partially and ineffectively addresses the values that a horizontal federalism approach suggests are relevant. This Part also notes that rethinking personal jurisdiction in light of horizontal federalism would reopen many other seemingly settled questions, such as whether limits on jurisdiction are waivable, or whether the purpose animating a defendant’s conduct or his subjective expectations about where he would be amenable to suit are relevant to assessing a forum’s jurisdiction. The Article’s suggested approach could therefore require completely overhauling modern doctrine.

The Article ends by encouraging further scholarship to explore the implications of treating personal jurisdiction as an aspect of horizontal federalism. By reconceptualizing the debate over why jurisdiction matters, the

Article creates a framework that commentators can employ to reevaluate the normative commitments and doctrinal nuances underlying an important yet perennially unstable area of constitutional law.

## I. REFRAMING THE PROBLEM OF PERSONAL JURISDICTION

This Part addresses a foundational question that often goes unasked: what is the problem that doctrines limiting state courts' personal jurisdiction attempt to solve? In other words, why should courts care enough about whatever is happening in cases where personal jurisdiction is questionable to bother crafting an applicable doctrine and elevating it to the status of constitutional law? This inquiry occurs at a high level of abstraction. In contrast, critiques of personal jurisdiction jurisprudence that propose various normative purposes for jurisdictional rules often concentrate on particular manifestations of jurisdictional dilemmas and prioritize a particular aspiration for doctrine addressing that dilemma.<sup>31</sup> The sheer variety of these plausible theories suggests the incompleteness of each as a normative foundation for rulemaking. A more normatively satisfying account must reveal the basic structure of personal jurisdiction problems in state court, which in turn would provide a context for analyzing competing theories about why those problems are important and how the Constitution should apply. The goal should not be to displace existing theories, but rather to provide a foundation for evaluating them. This Part therefore provides a framework for thinking about personal jurisdiction that can guide scholarship assessing which constitutional texts

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<sup>31</sup> See *supra* notes 2–6, 7–13 (noting competing theories of why and how the Constitution limits personal jurisdiction in state courts). A modern example is the large body of scholarship addressing personal jurisdiction over entities who act via the internet, which often seeks to tailor jurisdictional rules to the idiosyncrasies of cyberspace. See, e.g., Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, I. ¶ 6 (1997) (“[I]n order to fully appreciate the difficulties involved in applying current law to Internet jurisdiction, one must begin by considering the nature of the medium at issue.”); Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1486 (2006) (noting that the “geography-defying nature” of new communications technologies undermines jurisdictional doctrines premised on a defendant’s ability to control the geographic reach of its behavior). This need to adapt doctrinal standards to evolving social circumstances is a standard component of “common law process” and constitutional rulemaking. Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS 575, 577 n.7 (1998); see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) (observing that “new problems not envisioned by rules developed in another era” can “necessitate[]” departure from “well-established” precedents governing personal jurisdiction). However, my goal here is not to test the *adequacy* of modern doctrine, but rather to question the foundation upon which it is built. See *infra* Part II.B.

regulate personal jurisdiction, what goals these texts promote, and how best to implement these aspirations in practice.

The analysis in this Part is structured as a thought experiment to isolate the factors that make personal jurisdiction problems difficult, which in turn sets up Part II's explanation of how these factors fit within a broader context of constitutional law governing horizontal federalism. Section A hones the inquiry by defining precisely which types of cases and issues I think are relevant to defining the problem that personal jurisdiction doctrine addresses, while section B posits hypothetical scenarios to highlight the underappreciated manner in which horizontal federalism concerns lurk at the heart of this problem.

### A. *Isolating the Problem by Asking the Right Questions*

#### 1. *Narrowing the Issue*

An initial obstacle to analyzing personal jurisdiction is the concept's imprecision. The term "personal jurisdiction" can mean different things to different people in different contexts. An assertion that a court lacks "jurisdiction" over a person might be colloquial shorthand for an argument that the legislature never empowered the court to act in cases involving that person, that the court failed to follow required formalities governing service of process, that the person lacked adequate notice of the suit, or that the Constitution prohibits the state from requiring that particular person to appear in a particular court because of some quirk in the relationship between the person, the forum, and the disputed claim.<sup>32</sup> Whether the term "jurisdiction" can meaningfully encompass any or all of these concerns is debatable as a matter of legal semantics,<sup>33</sup> but semantics are irrelevant here because whatever

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<sup>32</sup> See *infra* text accompanying notes 40–58. The concept's informal breadth is also evident in the varying scope that treatises and casebooks accord to "personal jurisdiction" when using it as a heading. Compare STEPHEN C. YEAZELL, CIVIL PROCEDURE 61–173 (7th. ed. 2008) (chapter entitled "Personal Jurisdiction" covering notice and venue), and JOEL WM. FRIEDMAN ET AL., THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS 49–156 (2d ed. 2006) (chapter entitled "Adjudicative Power: Personal Jurisdiction" covering service and notice), and RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 117–306 (5th ed. 2006) (chapter entitled "Jurisdiction to Adjudicate" covering notice and venue), with RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS, at xii–xvii (5th ed. 2008) (different chapters for "Personal Jurisdiction," "Notice," and "Venue"), and RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH, at xviii (5th ed. 2009) (covering personal jurisdiction within a chapter on "Choosing the Forum").

<sup>33</sup> The concept that modern lawyers label as "personal jurisdiction" arguably is an amalgam of ideas that emerged over centuries from rules governing pleading, venue, and particular substantive claims. See Burnham

label we use should not deflect attention from the underlying constitutional problem.<sup>34</sup> Several variants of the “jurisdiction” label are available, including “adjudicative jurisdiction,”<sup>35</sup> “territorial jurisdiction,”<sup>36</sup> and “judicial jurisdiction.”<sup>37</sup> These terms encompass assertions of jurisdiction over people, non-human entities, and objects, and thus are too broad for this Article, which focuses on “personal” jurisdiction over people.<sup>38</sup> Given the potentially Zelig-like nature of “personal jurisdiction,” this subsection provides a precise account of what questions I am and am not trying to answer by posing a hypothetical litigation scenario and parsing issues that the scenario raises.

To pinpoint what I mean by personal jurisdiction, imagine a suit in a state court: a Plaintiff (*P*) who is a citizen<sup>39</sup> of State *X* sues a Defendant (*D*) who is a citizen of State *Y* in a Forum (*F*) within State *X*; in simpler notation:  $P_x$  v.  $D_y$  in  $F_x$ . The nature of the claim and its relationship to the forum will become important below, but we can set those variables aside for the moment. The goal here is merely to develop a foundation for thinking about why the

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v. Superior Court, 495 U.S. 604, 634 n.9 (1990) (Brennan, J., concurring in the judgment). For inquiries into the meaning of “jurisdiction” and the utility of parsing between jurisdictional and non-jurisdictional questions, see Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55 (2008); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613 (2003). Cf. *Bowles v. Russell*, 551 U.S. 205, 209 n.2 (2007) (acknowledging that the Court has occasionally been “careless” in labeling rules as jurisdictional).

<sup>34</sup> See Brian H. Bix, *Law and Language: How Words Mislead Us* (Univ. of Minn. Law School Legal Studies Research Paper Series, No. 09-22, 2009), available at <http://ssrn.com/abstract=1376366> (critiquing law’s tendency to endow labels with formal meanings that distort implementation of principles that labels obscure).

<sup>35</sup> ARTHUR T. VON MEHREN, *ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW* 21 (2007).

<sup>36</sup> Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981).

<sup>37</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (1971).

<sup>38</sup> See *infra* text accompanying notes 138–41 (justifying this focus).

<sup>39</sup> I use the word “citizen” to denote that a party has a connection with a particular state that arguably gives the state an interest in adjudicating suits involving the party, independent of the case’s facts. The Supreme Court has equated citizenship with domicile for jurisdictional purposes and treated domicile as a sufficient foundation for general jurisdiction. See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction . . .”); *id.* at 463 (“[T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.”); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85 (“The proper response of a citizen or resident who objects [to jurisdiction] is to invoke the State’s political process, the classic remedy where the State imposes burdens on its own members.”). Perhaps a relationship greater or less than citizenship or domicile would be a better indicia of meaningfulness, but that is a question for another article. Cf. AM. LAW INST. & INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* § 2.1.2 (2004), reprinted in 9 UNIFORM L. REV. 758, 762 (2004) (jurisdictional test uses term “habitual resident” rather than citizen).

Constitution might bar  $F_x$  from adjudicating the suit against  $D_y$  if  $D_y$  objects to “personal jurisdiction.”

Isolating the salient constitutional question requires assuming away several extraneous issues that are often confusingly lumped under the heading of jurisdiction. These issues are important and often merit scrutiny before a court can decide whether it can or should adjudicate a claim, but they involve inquiries that distract from the question on which I focus.

First, assume that  $F_x$  is an appropriate forum for the plaintiff’s claim under State  $X$ ’s law insofar as  $F_x$  possesses authority over the disputed subject and satisfies whatever criteria the state uses to assess venue. The state has thus decided that: (1) although there may be different types of courts within the state (small claims, chancery, etc.), the plaintiff has selected the right type of court for her claims; and (2) although courts of the type that she selected may exist in many regions of the state, she has selected a court in a location that the state deems appropriate. This assumption avoids questions about how a state should allocate authority among its courts, which distracts from the antecedent question of whether the Constitution limits the state’s discretion to make *any* forum available in suits against a particular defendant.<sup>40</sup> Moreover, state law may permit  $D_y$  to request transfer to a different venue within the state,<sup>41</sup> or permit  $F_x$  to abstain from exercising its subject matter jurisdiction.<sup>42</sup> But the Supreme Court has not interpreted the Constitution to regulate these discretionary decisions, which in any event do not implicate the constitutional issues relevant to what I am calling “personal jurisdiction.”<sup>43</sup>

Second, assume that  $F_x$  is not acting *ultra vires*—i.e., that if the court hears the suit, it does so consistently with: (1) state long-arm statutes defining the scope of the court’s adjudicative authority; and (2) state rules governing the forms and manner by which the court may acquire that authority through service of process and summons to appear on pain of default.<sup>44</sup> *Ultra vires*

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<sup>40</sup> Cf. *United States v. Morton*, 467 U.S. 822, 828 n.6 (1984) (noting that precedent has historically distinguished between “a court’s ‘competence’ and its jurisdiction over the parties”).

<sup>41</sup> See, e.g., NEB. REV. STAT. § 25-410 (2008) (amended 2010); N.H. REV. STAT. ANN. § 507:11 (1995).

<sup>42</sup> See, e.g., *Roman v. Liberty Univ.*, 75 Cal. Rptr. 3d 828, 837–39 (Ct. App. 2008) (affirming dismissal on forum non conveniens grounds in favor of a forum in another state).

<sup>43</sup> See *infra* Part I.A.2.

<sup>44</sup> Modern demands (or “summonses”) to appear in the forum have a coercive effect by threatening a default judgment if the defendant does not appear. See, e.g., FED. R. CIV. P. 4(a)(1). The default is enforceable within the state under general preclusion rules and in other states and federal courts under the Full Faith and Credit Act, see 28 U.S.C. § 1738 (2006), but may be collaterally attacked on jurisdictional grounds, see *infra* note 299; RESTATEMENT (SECOND) OF JUDGMENTS §§ 65–66 (1982). Foreign nations may also

behavior has historically been a reason for the Supreme Court to deem state court judgments unenforceable under the loose rubric of jurisdictional analysis.<sup>45</sup> The merit of these holdings hinges on questions about the proper relationship between state institutions (can the judiciary act without a legislative mandate?)<sup>46</sup> and the degree of ritual formality required in judicial proceedings (how precisely must the court perform the rites and incantations necessary to confer judicial power?),<sup>47</sup> which are interesting but irrelevant here. This Article considers how the Constitution limits the choices that a state may make about the powers that it wants to assert, and therefore assumes scenarios where the appropriate state institutions assert power consistently with state law.<sup>48</sup>

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choose to enforce the default (or not) under local law and comity principles because the U.S. is not a party to any treaty or convention requiring recognition of its judgments. See Mary Kay Kane & Roman E. Degnan, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 846–47 (1988). Summonses under English common law carried more drastic threats to induce appearance, including civil arrest, forfeiture of lands to the King, and the dreaded prospect of “outlawry” (which literally placed the defendant “outside” the law’s protection). See Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968) (discussing the evolution of English civil process).

<sup>45</sup> See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. (9 How.) 336, 350 (1850) (holding that state court lacked “jurisdiction” over nonresidents in part because it did not comply with “forms of law, prescribed by the legislature” governing service); *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 468, 470, 475 (1830) (deeming state judgment “void” and suggesting lack of “jurisdiction” because lower court attempted constructive service by publication without statutory authorization).

<sup>46</sup> See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (“[B]efore a court may exercise personal jurisdiction over a defendant, there must be . . . a basis for the defendant’s amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.”).

<sup>47</sup> See *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (holding that defective service voids default judgment even if defendant would not have had valid defense on the merits). Compare *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999) (noting that service must be “formal” but not defining that term), with *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 710 (1945) (“The requirements imposed by [due process] are not technical, nor is any particular form of procedure necessary.”). States vary in the extent to which they require strict compliance with rules governing service; in some, the end (actual notice) justifies defects in the means. See Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C.L. REV. 227, 242 n.108 (2000).

<sup>48</sup> The assumption that a state court’s compliance with state law evinces the state’s choice to open its courts is useful, but requires a tweak to address cases where state long-arm statutes incorporate a federal constitutional standard. Long-arm statutes in most states define specific circumstances—often in great detail—where the state’s courts will be open. See, e.g., FLA. STAT. ANN. § 48.193 (West 2006). However, statutes in seven states eschew detailed lists in favor of broad language (with subtle variations) extending personal jurisdiction “to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution,” which in effect opens state courts in all circumstances where the Constitution allows them to be open. ARK. CODE ANN. § 16-4-101(B) (1999); see also Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (presenting typology of state long-arm statutes). The existence of broad long-arm

Third, assume that  $F_x$  provides  $D_y$  with actual notice of the suit, which often is more notice than the Fourteenth Amendment's Due Process Clause requires.<sup>49</sup> Early Supreme Court decisions occasionally conflated inquiries into jurisdiction with inquiries into notice,<sup>50</sup> apparently because a defect in notice generally arose from a defect in service, which created a defect in judicial power.<sup>51</sup> However, modern jurisprudence correctly recognizes the distinction between asking if the Constitution authorizes proceedings that the defendant does not know about and asking if the Constitution authorizes proceedings that the defendant does know about but to which he nevertheless objects.<sup>52</sup> I focus on whether the Constitution enables defendants to resist state

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statutes incorporating constitutional standards alongside more specific statutes that rely on detailed descriptions of adjudicable cases raises a fact question about the intensity of state preferences: did a legislature that enacted a detailed statute have a greater interest in providing a forum for the listed categories of cases than a legislature that used a general constitutional standard without identifying specific categories that it wanted its courts to adjudicate? The answer to this question is likely unknowable—absent precise legislative history—because myriad factors influence the style and substance of legislative drafting. A decision to use a list instead of a general standard thus does not necessarily communicate any information about the intensity of a state's preferences with respect to particular matters included on the list or encompassed in the standard. *But see* *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978) (suggesting without analysis that not “enacting a special jurisdictional statute” evinces the absence of “particularized interest” in providing a forum). In any event, this question about preference intensity might be relevant when *implementing* jurisdictional tests that weigh state interests in providing a forum against individual interests in avoiding jurisdiction, but distracts from the general question of what *purpose* a jurisdictional inquiry serves. Accordingly, for simplicity's sake we can focus on cases where a state long-arm statute clearly authorizes jurisdiction over a defendant and thus expresses a state's choice to make a forum available. The fact that these choices might not always be clear or equivalently strong is an issue that future scholarship can assess in the context of analyzing how to weigh competing state and individual interests.

<sup>49</sup> Due process requires only a reasonable *attempt* at notice. *See* *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (“[W]e have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service.”); *see also* *Jones v. Flowers*, 547 U.S. 220, 226 (2006); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>50</sup> For example, in *Earle v. McVeigh* a state court in Union territory used various artifices to serve defendants who had fled behind Confederate lines and were thus unlikely to receive actual notice. *See* 91 U.S. 503, 506–08 (1875). The Supreme Court reversed the default judgment, observed that the state court had not complied with statutory formalities governing service, and stated that “[d]ue notice to the defendant is essential to the jurisdiction of all courts.” *Id.* at 503–04; *see also* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1111–12 (1994) (noting how nineteenth-century judges often blurred notice and jurisdiction); *cf.* *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815) (“[N]otice of the controversy is necessary in order to become a party . . .”).

<sup>51</sup> *See supra* note 45.

<sup>52</sup> *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (“Due process requires that the defendant be given adequate notice of the suit *and be subject* to the personal jurisdiction of the court.” (emphasis added) (citation omitted)). *But see* *Kulko*, 436 U.S. at 91 (“The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought . . .”).

judicial power, and thus we can set aside questions of what the state must do to put the defendant into a position where he knows that resistance is an option.

Fourth, assume that  $F_x$  offers the defendant an adequate opportunity to present defenses. This opportunity is an “essential” due process requirement,<sup>53</sup> but deciding whether the opportunity is constitutionally sufficient should be collateral to the jurisdictional inquiry. Determining if a court possesses jurisdiction requires asking if a defendant who prefers not to appear *must* appear (or instead suffer some consequence).<sup>54</sup> But determining whether a forum provides a reasonable opportunity to be heard requires asking, in essence, whether a defendant who is willing to appear *can* appear, and if so whether he would confront any inappropriate obstacles to mounting a defense.<sup>55</sup> The jurisdictional question about the defendant’s ability to avoid the forum thus arises prior to questions about what rights the defendant should possess once inside the forum and whether the forum can adequately protect those rights.<sup>56</sup> Both questions implicate the Constitution, but they operate independently,<sup>57</sup> serve different purposes, and should therefore entail distinct inquiries.<sup>58</sup>

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<sup>53</sup> Richards v. Jefferson County, 517 U.S. 793, 797 n.4 (1996).

<sup>54</sup> See *supra* note 44.

<sup>55</sup> See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” (citation and internal quotation marks omitted)); Tennessee v. Lane, 541 U.S. 509, 523 (1978) (“The Due Process Clause also requires the States to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings.” (citation omitted)); Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) (“The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

<sup>56</sup> The two inquiries seem to blur when litigating in the forum would be so burdensome that the opportunity to appear is illusory and the court’s jurisdiction is therefore in doubt. Nevertheless, as noted below in subsection 2 and at note 67, it remains useful to distinguish the constitutional question of the forum’s power over the defendant from the constitutional question of whether litigation in the forum would impose undue burdens.

<sup>57</sup> For example, if a Maine citizen sues another Maine citizen in Maine regarding a tortious assault in Maine, and serves process in Maine, then a Maine court would clearly have personal jurisdiction. Yet the Maine court could not then assert that its jurisdiction justifies muzzling the defendant and barring him from presenting a defense. Jurisdiction to adjudicate may confer one form of power, but not at the expense of unrelated constitutional rights.

<sup>58</sup> For related discussion of how inconvenience implicates due process, see *infra* Part I.A.2. The Due Process Clause also creates a related right to a “neutral” decisionmaker, Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972), although a “constitutionally intolerable probability of actual bias” would be difficult to establish in most cases that do not involve a clear conflict of interest or source of undue influence, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262 (2009). Thus, even the possibility that a forum would be biased against nonresident defendants might not justify rejecting personal jurisdiction if the Due Process Clause’s independent neutrality requirement is sufficient to address the problem. Moreover, the real issue in cases involving parochial bias is not that the Constitution bars a hostile forum from adjudicating suits against



Finally, assume that legal rules that could affect the outcome of litigation would be identical in all states because each state has adopted an identical uniform code, such that the expected result would be the same in every possible forum if a neutral decisionmaker conducted fair proceedings.<sup>59</sup> The Supreme Court has repeatedly held that constitutional limits on jurisdiction function independently from limits on choice of law,<sup>60</sup> but arguably has not always heeded the distinction.<sup>61</sup> Mooting the distinction by assuming equivalent outcome-determinative law has two benefits. *First*, positing outcome-neutrality permits more abstract consideration of jurisdictional issues by decoupling the questions of “which state should provide a forum” and “which party should win.” Once we have a general understanding of what principles shape the jurisdictional calculus, commentators can assess how that calculus should incorporate evidence showing that forum shopping by

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nonresidents, but rather that the Constitution bars the forum from being hostile. The preferable remedy for mistreatment is stopping the mistreatment (or possibly removal to federal court), but not blanket immunity from judicial process if the forum is otherwise entitled to adjudicate the case.

<sup>59</sup> If the proceedings were not conducted fairly, then a question would arise about the adequacy of the defendant’s opportunity to be heard. *See infra* note 68 and Part III.A (discussing availability of federal diversity jurisdiction as a remedy for possible unfairness in litigation involving nonresident defendants). Of course, even neutral fora applying the same rules could reach different results due to regional variations in the attitudes of judges and jurors. A plaintiff can factor his perception of these variances into his initial choice of forum and thus would benefit from jurisdictional rules that give him a wider range of choices. Nevertheless, it is difficult to see how this first-mover advantage rises to the level of a constitutional violation, especially given that a rule limiting a plaintiff’s range of choices could create the opposite problem by forcing the plaintiff to accept regional variations favoring the defendant. Moreover, if one thinks that the plaintiff’s first-mover advantage is a significant problem, limits on jurisdiction (which focus on state borders, *see infra* Part I.B.3) would be ill-suited to address it because the problem can arise even when a plaintiff chooses between fora within a single state: for example, between a rural court and an urban court, or between courts in different cities with distinct cultures. Tinkering with venue rules might therefore be a more appropriate mechanism for mitigating the advantages that a plaintiff obtains from choosing the forum. *See infra* Part I.A.2.

<sup>60</sup> The state’s ability to apply its law is neither a sufficient nor necessary condition for jurisdiction. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (state could not apply its law even though it could provide a forum); *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977) (state could not provide a forum even though it could apply its law).

<sup>61</sup> For example, in *Hanson v. Denckla* the Supreme Court confronted appeals from two inconsistent state court judgments: a Delaware court applied Delaware law against a Delaware defendant to award disputed funds to particular claimants, while a Florida court applied Florida law against the same Delaware defendant to award the same funds to different claimants. *See* 357 U.S. 235 (1958). The Court eliminated the conflict by holding that the Florida court lacked personal jurisdiction over the Delaware defendant. *See id.* at 251. The practical effect of this holding was to thwart the efforts of two sisters to appropriate family assets intended for a third sister’s children. *See id.* at 239–41. The unstated motive for the Court’s debatable jurisdictional analysis arguably may have been a sense that the Delaware judgment reached a better result than the Florida judgment, and thus the jurisdictional inquiry yielded to an equitable comparison of the states’ conflicting substantive laws. *Cf.* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 244 (“[The Court] reached the fair result . . . but by a line of analysis that in all charity and after mature reflection is impossible to follow . . .”).

plaintiffs can influence choice of law, and thereby influence litigation results.<sup>62</sup> Such evidence might be very relevant if we conclude that jurisdictional tests should consider the parties' and states' competing interests, but irrelevant if jurisdictional tests should focus solely on formal factors such as the defendant's domicile or presence in the forum. *Second*, the assumption of equivalent law avoids the federalism implications of choice of law analysis. If state laws differed,  $F_x$  would need to decide which applied. And if the forum state's law did not apply, a defendant could argue that the absence of legislative jurisdiction diminished or extinguished the forum's interest in asserting adjudicative jurisdiction. Likewise, if the forum state's law did apply, a plaintiff could contend that jurisdiction was therefore appropriate. Litigants often make variants of these arguments, which the Supreme Court has rejected by holding that constitutional limits on personal jurisdiction operate separately from constitutional limits on choice of law.<sup>63</sup> Scholars in turn have considered whether, when, and why states can exercise jurisdiction even if they cannot apply their law, or can have their law applied when they cannot exercise jurisdiction.<sup>64</sup> The discussion of federalism in this literature is

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<sup>62</sup> See Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 467 (1982) ("The new approaches to choice of law have in common a widely noted tendency to result in the application of forum law—in other words, of plaintiff's law."); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 192 (2000) ("The more choice-of-law rules vary among the states, and the more states favor application of their own law, the more significant the plaintiff's forum-selection privilege becomes."); Stuart E. Thiel, *Choice of Law and the Home Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291, 313–14 (2000) (empirical study confirming that modern choice of law theories tend to privilege forum law, but suggesting that the bias may not be as strong as commonly assumed). Forum shopping can also exploit different states' outcome-determinative procedural or institutional quirks (such as a faster docket or generous juries), which likewise may justify tweaking jurisdictional tests to protect the defendant's interests. See generally Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (discussing strategic choices underlying forum shopping).

<sup>63</sup> See *supra* note 60.

<sup>64</sup> See Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183 (1997); Earl M. Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice of Law*, 30 ARIZ. L. REV. 751 (1988); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); Courtland H. Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37 (1988); Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978); Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 583–95 (1991); Weinberg, *supra* note 27. Some scholars go further and deny on legal realist grounds that exercising jurisdiction and applying law are two different phenomena, contending that "[c]hoice of judicial jurisdiction is choice of law because choosing a jurisdiction chooses the legal regime that will select, interpret and apply the policies that will determine the result in the particular case." Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 255 (1991); cf. Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L.

salient to Part II's framework for thinking about personal jurisdiction,<sup>65</sup> but entails analysis of idiosyncratic components of conflicts doctrine that are tangential to the basic point of the Article. By assuming that all states have adopted the same uniform laws, we avoid the question of conflicts in legislative authority and can focus on conflicts in adjudicative authority.<sup>66</sup> This focus produces insights that commentators can then build upon to address situations where conflicts between state laws enhance or undermine state regulatory interests that influence the propriety of exercising personal jurisdiction.

## 2. *Distinguishing Limits on a State's Authority to Exercise Jurisdiction from Limits on a State's Authority to Compel Appearance in an Inconvenient Forum*

An additional assumption is necessary to avoid recurring distractions about the potential hardships that the exercise of personal jurisdiction can impose on defendants with little or no connection to the forum. The assumption is that litigating in  $F_x$  would not impose excessive burdens on the defendant. We can bracket what "excessive" means and posit that wherever the Constitution may draw the line between tolerably and intolerably burdensome fora,  $F_x$  is on the tolerable side.<sup>67</sup> For example, we can imagine that  $F_x$  is near the state's border

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REV. 411, 416–17 (2004) (noting that assertion of jurisdiction is a form of regulation because adjudication "is part of the way a state crafts a legal order" and affects behavior).

<sup>65</sup> See Hill, *supra* note 64, at 991 ("In each instance, the ultimate questions are the degree to which the Constitution tolerates hardship to persons, and the extent to which state interests are entitled to vindication.").

<sup>66</sup> See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) ("There can be no injury in applying [a state's] law if it is not in conflict with that of any other jurisdiction connected to th[e] suit.").

<sup>67</sup> Whether the forum is convenient probably does not implicate the right to an opportunity to be heard, which is a relatively weak right—it will rarely trump a state's interest in providing even an inconvenient forum so long as the state provides some semblance of a fair hearing. The opportunity to be heard in theory must be "meaningful." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). In practice, however, analysis tends to focus on the formal sufficiency of procedural opportunities rather than the functional consequences of granting opportunities to litigants who lack adequate resources to exploit them effectively. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32–33 (1981) (holding that due process did not require appointment of counsel for indigent mother in action to terminate her parental rights); cf. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) ("Even the United States Supreme Court seems to have suggested that the most basic procedural rights, notice and an opportunity to be heard, may be denied if the balance of interests does not favor them."); David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 137 (1999) ("One could argue that a meaningful opportunity to be heard demands that convenience be a part of that opportunity. Yet, it is unlikely that convenience was envisioned as a due process requirement." (footnote omitted)). *But cf.* Brooks, *supra* note 12, at 374 (noting that a defendant objecting to jurisdiction may have an interest in an "opportunity to be heard in a convenient forum, which is usually a forum in its state of residence").

and close to where the defendant resides or does business in an adjacent state. We are thus assuming that if personal jurisdiction in  $F_x$  offends the Constitution, it does so for some reason other than the forum's inconvenience.

The assumption of convenience serves two distinct purposes. First, the assumption helps to isolate non-convenience-based justifications for limiting personal jurisdiction, which is the first step toward critiquing those justifications. Second, reserving the question of convenience highlights the possibility that the burdens of litigating in a forum pose a set of constitutional problems that are distinct from problems that should be relevant to the idea of "jurisdiction." Indeed, the rights-based rhetoric that the Supreme Court uses in opinions assessing jurisdiction in burdensome fora does not fit easily alongside the systemic horizontal federalism arguments that must necessarily come into play when convenience is not an issue but the defendant nevertheless challenges the forum. This insight suggests that what we now call "personal jurisdiction" doctrine is really an amalgamation of two separate ideas that would benefit from independent analysis: one idea rooted in federalism about the limits of state power, and one idea rooted in due process principles about the rights of defendants to avoid debilitating burdens. I pursue this insight in the remainder of this subsection, but my conclusion does not depend on it: whether or not we label convenience issues as jurisdictional,<sup>68</sup> my goal in this Article is to consider what factors other than inconvenience, if any, can justify invoking the Constitution to deny a state's ability to provide a forum that it wants to provide.

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<sup>68</sup> Martin Redish has suggested that the principal basis for rejecting a state's assertion of personal jurisdiction could be that the forum is inconvenient, and that other values that personal jurisdiction doctrine currently protects are either not constitutionally protected (at least by the Due Process Clause) or irrelevant to jurisdiction. See Redish, *supra* note 11, at 1137; cf. Redish, *supra* note 31, at 601 (rejecting the relevance of "interstate federalism" to jurisdictional analysis based on the premise that the sole source of relevant constitutional law is "procedural due process"). I agree with Professor Redish that convenience warrants independent constitutional scrutiny, but for the reasons noted in this section and the next Part would use a label other than "jurisdiction" (such as "venue") to encompass the convenience inquiry and would reframe personal jurisdiction doctrine to focus solely on whether and to what extent horizontal federalism concerns require limits on state authority. For further discussion on this point, see *infra* note 276.

The Supreme Court divides typical personal jurisdiction inquiries into two components: an assessment of minimum contacts and an assessment of fairness or reasonableness.<sup>69</sup> These components overlap in ways that undermine the Court's distinction between them,<sup>70</sup> but for present purposes we can accept the Court's general framework in order to focus on a specific element. The fairness/reasonableness component includes an assessment of whether the forum is convenient, in the broad sense of whether litigating in the forum would impose "burdens" that would hinder the defendant's ability to mount a defense.<sup>71</sup> If these hindrances are severe, the defendant could lose a winnable case, prevail at an inflated cost, or be leveraged into paying an excessive settlement.<sup>72</sup> Moreover, these risks might deter prospective defendants from acting in ways that could subject them to suits in burdensome fora, which

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<sup>69</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (citation omitted)); *id.* at 477 (linking second inquiry to "reasonableness of jurisdiction").

<sup>70</sup> The Court's fragmentation of the two inquiries is incoherent because distinguishing between minimum and sub-minimum contacts requires drawing a line, and knowing where to draw the line requires considering the subjective factors that animate the ostensibly distinct fairness inquiry. Indeed, the Court conceded as much when it acknowledged that the fairness/reasonableness factors can permit jurisdiction based on "a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477. What constitutes the "minimum" is therefore a function of what is fair, and thus the fairness and minimum contacts tests cannot be distinct. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (more directly linking the two inquiries by requiring "minimum contacts . . . such that" jurisdiction would be "fair").

<sup>71</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) ("A court [assessing personal jurisdiction] must consider the burden on the defendant . . ."); see also *Burger King*, 471 U.S. at 477 (jurisdiction may be "unreasonable" due to "the burden on the defendant" (citation and internal quotation marks omitted)); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("The purpose of this [minimum contacts] test, of course, is to protect a defendant from the travail of defending in a distant forum . . ."); *United States v. Morton*, 467 U.S. 822, 828 (1984) ("[P]ersonal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) ("The concept of minimum contacts . . . [in part] protects the defendant against the burdens of litigating in a distant or inconvenient forum."); *id.* at 292 ("The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'"); cf. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988) (citing *Asahi*, 480 U.S. at 114) (holding that requiring an Illinois corporation to consent to general jurisdiction in Ohio as a condition of doing business in Ohio would impose a "significant burden" and violate the Commerce Clause). *But cf.* *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526–27 (1988) ("[P]etitioner's challenge to the District Court's exercise of personal jurisdiction because he is immune from civil process should be characterized as the right not to be subject to a binding judgment of the court.").

<sup>72</sup> For a general discussion of how parties leverage resource asymmetries in settlement negotiations, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) ("[S]ettlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally.").

would be undesirable if the conduct has a net social benefit.<sup>73</sup> The Supreme Court accordingly has concluded that forcing a nonresident defendant to litigate in an excessively inconvenient forum can render personal jurisdiction unconstitutional.<sup>74</sup> The reverse is not true: a convenient forum may nevertheless lack jurisdiction.<sup>75</sup>

Treating a forum's convenience as a factor affecting jurisdiction creates needless distractions and muddled doctrine. A better approach may be to posit that inconvenience is constitutionally relevant, if at all, when it infringes potential constitutional limits on venue. Current doctrine does not treat venue as a constitutional problem, but the analysis in this subsection suggests a need to rethink that assumption.<sup>76</sup> A few brief observations support this possibility.

First, the burden on a U.S. citizen of litigating in a distant or unfamiliar U.S. forum in cases addressing events in the U.S. ordinarily will be insufficiently significant to merit constitutional scrutiny.<sup>77</sup> Defending a suit in an inconvenient forum imposes three kinds of costs on defendants relative to defending in a local forum: travel from the defendant's home to the forum (either by the defendant or by its witnesses), locating counsel in an unfamiliar

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<sup>73</sup> See *infra* note 79.

<sup>74</sup> See *supra* note 71 (citing sources).

<sup>75</sup> See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“[R]estrictions [on personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.” (citation omitted)).

<sup>76</sup> The distinction between “venue” and “personal jurisdiction” in state courts can be elusive because a challenge to each has the same effect: the plaintiff's chosen forum is unable to adjudicate the case. For my purposes, the principal distinction is simply that arguments challenging a forum's suitability based on a lack of “personal jurisdiction” must invoke the existence of a state border lying between the forum and some supposedly relevant actor or event, see *infra* Part I.B.3, while a challenge to venue need not. Historically, limits on venue have come from statutes or the common law rather than the Constitution. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.1, at 11 (4th ed. 2005). But this subsection suggests that arguments which the Supreme Court has used to justify constitutional limits on personal jurisdiction could apply to venue as well and may be more sensible when stripped of their emphasis on state borders.

<sup>77</sup> My focus on cases involving U.S. courts, U.S. citizens, and events in the U.S. reserves the more difficult question of whether foreign defendants may face inappropriately severe burdens when haled into state courts. See *infra* text accompanying notes 143–47 (explaining why I am excluding cases with an international dimension).

region, and monitoring counsel with whom it is not feasible to meet in person.<sup>78</sup> None of these post-filing<sup>79</sup> burdens is likely to be severe.

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<sup>78</sup> Plaintiffs and defendants may each face additional costs: if the forum is far from where relevant events occurred, the trial court may be required to dismiss the action because it cannot obtain jurisdiction over all indispensable parties, *see, e.g.,* *Dixon v. Cole*, 589 S.E.2d 94, 96 (Ga. 2003), or may be unable to compel witnesses to appear, *see* Ryan W. Scott, Note, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968, 984 (2004) (“Most states retain strict limits on the reach of the subpoena power, holding that subpoena service cannot reach nonparties found outside the state.”); Rhonda Wasserman, *The Subpoena Power: Pennoyer’s Last Vestige*, 74 MINN. L. REV. 37, 67 (1989). A forum’s inconvenience should pose less of an obstacle to discovery because “[e]ach of the fifty states and District of Columbia maintains its own statutes or rules governing the means by which parties can secure testimony and documents for use in out-of-state proceedings.” Franklin E. Fink, *The Name Behind the Screenname: Handling Information Requests Relating to Electronic Communications*, in SEVENTH ANNUAL INTERNET LAW INSTITUTE 953, 971 (PLI Patents, Copyrights, Trademarks & Literary Prop., Course Handbook Ser. No. 754, 2003). *See generally* UNIF. INTERSTATE DEPOSITIONS & DISCOVERY ACT (2008).

<sup>79</sup> The costs discussed in the text arise *after* a suit begins. Rules tolerating personal jurisdiction in inconvenient fora may also impose costs that arise *before* suit if an actor who fears that his conduct may generate litigation far from home decides to abstain from that conduct. *See* Stein, *supra* note 64, at 427. Behavioral modification could be worrisome in two scenarios: (1) if the value of the conduct to the actor exceeds its costs but for the inflated out-of-state litigation bill, then jurisdictional expenses would become the dispositive regulatory factor influencing behavior, thereby allowing the procedural tail to wag the substantive dog; or (2) if the state where the conduct occurs values that conduct, the chilling effect from the forum state’s assertion of jurisdiction would undermine the host state’s regulatory objectives. These *ex ante* costs do not alter my analysis for six reasons. First, the prospect of a chilling effect is remote given that the marginal costs of defending a suit in an inconvenient forum generally pale in comparison to the fixed costs of defending a suit in any forum. *See infra* note 85. If the threat of a suit is not sufficient to chill the defendant, the threat of an inconvenient suit is not likely to induce extra caution. If anything, there is a possibility that overly strict limits on jurisdiction based on convenience may create the opposite problem by inducing excessive risk taking: allowing a defendant to defeat jurisdiction in a distant forum shifts litigation costs to the plaintiff, who must then seek a forum that is less convenient for himself, and thus at the margins minimizes the defendant’s chance of being sued, or sued effectively, and enables it to be less cautious about the risks that it sends into other states. It is difficult to see how interpreting the Constitution to require this systemic reallocation of burdens in favor of risk taking rather than risk avoidance would be a great victory for federalism, at least absent evidence that suits in fora beyond the defendant’s comfort zone are disproportionately meritless. *See infra* text accompanying notes 99–111; Perdue, *supra* note 27, at 552. Second, the approach suggested in this subsection of allowing courts to invoke venue rules to reject the plaintiff’s choice of an inconvenient forum would mitigate whatever chilling current jurisdictional doctrine prevents by preserving the defendant’s opportunity to challenge the plaintiff’s forum choice. Third, if an actor cannot predict being sued in a burdensome forum, then there is no risk of a chilling effect. Fourth, if an actor can predict such a suit, then it can obtain insurance to cover the costs and would not need to curtail its behavior. *See infra* note 87. The actor may not know precisely where it will be sued, but all that matters is that it knows that it might be sued *somewhere* and that an insurer will bear the risk of whatever excessive costs the unknown forum will impose. Fifth, if insurance is available only at a burdensome (but still affordable) cost, there is arguably still no federalism problem because no chilling has occurred. A defendant might nevertheless complain that states should not possess power to adopt expansive jurisdictional rules that coerce nonresidents into buying costly insurance, but for the reasons noted in the next paragraph, this objection seems better addressed to the jurisdictional rule’s expansiveness rather than the forum’s inconvenience.

Defendants seldom need to travel in civil litigation because there is little for them to do: approximately 97% of civil cases never go to trial,<sup>80</sup> few hearings are worth attending for lay defendants,<sup>81</sup> and the defendant's (or witness's) deposition can occur where she lives even if the suit is pending in another state.<sup>82</sup> When travel is necessary, it can often be done quickly and inexpensively on a plethora of discount air carriers,<sup>83</sup> is unlikely to impose worrisome psychological burdens,<sup>84</sup> and in any event the out-of-pocket and

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Finally, given the analysis above, a problem arises in only one scenario: where doctrine permits states to assert jurisdiction based on tenuous local contacts over distant actors who can anticipate suit but cannot obtain insurance or otherwise protect themselves (such as by raising prices), and therefore chills such actors' socially desirable behavior. But even here, a rule that rejects jurisdiction based on the forum's convenience often would not avoid the chilling effect of expansive jurisdictional assertions. To see why, imagine that a plaintiff files an action in Portland, Oregon (near the Washington border), against a defendant who resides in Washington, and invokes an expansive jurisdictional theory based on conduct that occurred in Washington. The marginal burden on the Washington defendant of litigating in a nearby Oregon court instead of a Washington court presumably would be slight. A rule that precluded jurisdiction in inconvenient fora therefore would not help the defendant. Yet Oregon's assertion of jurisdiction could still have a chilling effect on *nonparties*. For example, an actor in New York similarly situated to the Washington defendant would realize that the expansive Oregon jurisdictional rule could apply to his own conduct in New York. The New Yorker would thus have to consider whether the risk of being sued in Oregon was worth the benefit of continuing his conduct, and might be chilled by the burdens associated with cross-country travel. The New Yorker might *hope* that an Oregon court would sustain a challenge to the forum's convenience but could not be *confident* of that possibility given the inquiry's fact-sensitive nature. The only certainty for the New Yorker would be the Oregon precedent endorsing jurisdiction over nonresidents with tenuous local contacts, so the New Yorker would know that he is amenable to suit without knowing whether he could escape jurisdiction by raising a convenience defense. Policing chilling effects by incorporating a convenience element into jurisdictional rules thus seems needlessly indirect: the actor in court making the chilling argument was not chilled (otherwise he would not have engaged in the conduct that led to the suit) and may not even have been inconvenienced, yet the actors who would be chilled are not present to oppose jurisdiction and could never be confident that their inconvenience defenses would succeed in future cases. A more direct approach to regulating chilling effects would thus be to prevent states from adopting excessively expansive jurisdictional rules and thereby putting outsiders in fear of suit.

<sup>80</sup> See LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (2008).

<sup>81</sup> See Borchers, *supra* note 6, at 95 ("The 'inconvenience' rationale depends upon the elaborate metaphor of a civil party temporarily relocating to the forum state to defend or pursue the case. In reality, civil litigation does not operate in this manner at all. . . . The only time a party is likely to travel is in the improbable event that the case goes to trial." (footnotes omitted)).

<sup>82</sup> See, e.g., CAL. CIV. PROC. CODE § 2026.010(a) (West 2005) (authorizing out-of-state depositions); *Travelers Ins. Co. v. Hindle*, 748 A.2d 256, 261 n.3 (R.I. 2000) ("We have held that requiring a nonresident defendant to be deposed in Rhode Island is in contravention of well-settled caselaw. . . ."). However, a *plaintiff* who chooses to sue in an inconvenient forum may be deposed in that forum. See 2010 CONNECTICUT PRACTICE BOOK § 13-29(b), at 199 (2010).

<sup>83</sup> See generally Spencer, *supra* note 9, at 632.

<sup>84</sup> See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 429-32 (2002) ("Both the literal and psychic burdens associated with out-of-state litigation changed as a result of the urban industrial revolution at the turn of the twentieth century. . . . Given such changes, it is possible that the psychic burden of foreign jurisdiction is less significant today because of our increased contact with foreign



lost-time costs will usually be “marginal” relative to the large fixed costs of litigating even in a convenient forum.<sup>85</sup> Moreover, if one assumes that plaintiffs only sue defendants whom they believe could pay an eventual judgment,<sup>86</sup> then the defendant likely has sufficient assets to defray travel costs or is indemnified by insurance and thus is not paying those costs.<sup>87</sup> Selecting and monitoring counsel also should not be a significant burden: the internet facilitates finding even a far-away lawyer,<sup>88</sup> insurance coverage often further facilitates mounting a defense in tort cases,<sup>89</sup> and monitoring a distant lawyer

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places.”). *But see* Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627, 637 (1991) (contending that “[i]n designing limitations on state court power, judges should take account of existing social understandings of federal space,” which includes psychological discomfort associated with crossing borders).

<sup>85</sup> Stein, *supra* note 64, at 427. Defense costs generally consist primarily of attorney and expert fees that the defendant would incur no matter where the action was filed. *See, e.g.,* Bernard Black et al., *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988–2004*, 10 AM. L. & ECON. REV. 185, 187, 213 (2008). The defendant can choose to pay one set of fees or two: one if he hires an in-forum lawyer, and two if he relies on his usual lawyer to supervise the unfamiliar in-forum lawyer. Fees may of course vary in different regional markets, but this variance is not necessarily burdensome or unfair: the inconvenient forum may be in a cheaper market, and if it is in the more expensive market, then the plaintiff must likewise bear the extra costs.

<sup>86</sup> *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (“Knowing that they can collect at best a fraction of the plaintiff’s claim even if they litigate and win, plaintiffs’ attorneys typically decline to litigate meritorious tort claims against uninsured or underinsured individuals.”). This assumption is less helpful when plaintiffs seek non-monetary judgments, as in child custody disputes, although even then the burdens on impecunious defendants arguably should not affect jurisdiction. *See infra* text accompanying notes 98–122.

<sup>87</sup> Defendants sometimes may have sufficient assets to pay the judgment but still be unable to bear significant defense costs. There is no empirical data about how often this scenario arises in cases where personal jurisdiction is a contestable issue (for example, where the defendant is a noncitizen being sued on a claim for which he lacks insurance coverage and yet possesses sufficient assets to make the suit worthwhile). If current insurance products turn out to be inadequate to cover the burdens that relaxed jurisdictional rules impose, and if litigants lament this fact, then presumably insurers will adapt to market preferences by offering enhanced coverage. Entities that can anticipate being sued in distant fora (even if they cannot anticipate precisely where) will thus have a proactive remedy for distance-related burdens. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (suggesting that “procuring insurance” can protect defendants from the burdens of litigating in distant fora).

<sup>88</sup> For examples of internet resources, *see* *Consumers’ Guide to Legal Help*, AMERICAN BAR ASSOCIATION, <http://www.abanet.org/legalservices/findlegalhelp/home.cfm> (last visited Aug. 16, 2010); LAWHELP, <http://www.lawhelp.org/> (last visited Aug. 16, 2010); MARTINDALE HUBBELL, <http://www.martindale.com/> (last visited Aug. 16, 2010). A local party presumably has advantages over an out-of-state party in locating a lawyer due to local referral networks (friends, family, co-workers, trade associations, etc.), although the rise of online social and business networking options may mitigate this asymmetry. *See* Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 445–50 (1992) (summarizing difficulties individual defendants have finding a lawyer, especially when securing representation in a distant contractual forum).

<sup>89</sup> *See generally* KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 3 (2008) (noting that insurers absorb at least 75% of “direct tort costs”). In

and casefile is possible from the comfort of one's home or office using the phone, e-mail, or even free internet video conferencing.<sup>90</sup> The consequential—as opposed to intrinsic<sup>91</sup>—harm of allowing states to adjudicate suits against nonresidents with limited local contacts thus seems less significant than doctrine suggests,<sup>92</sup> at least when the defendant resides within the U.S.<sup>93</sup> Fears of amorphous burdens stemming from litigation in exotic locales thus have an anachronistic flavor dating to an era when telephones had not yet replaced telegraphs and the horseless carriage was merely a dream. Litigating in a distant forum presumably would impose *some* burdens on defendants that may influence settlement dynamics (especially in nuisance suits),<sup>94</sup> but it is difficult to see how these marginal costs rise to the level of a constitutional violation.<sup>95</sup> Indeed, although the modern Supreme Court continues to invoke the “burden” of litigation in a “distant” forum as if it were a serious concern,<sup>96</sup> it recognizes that the concern may be outdated.<sup>97</sup> Its holdings also indicate ambivalence to

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addition to indemnifying covered litigation expenses, large insurers can access nationwide referral networks and have a repeat-player incentive to monitor counsel.

<sup>90</sup> See, e.g., SKYPE, <http://www.skype.com/> (last visited Aug. 16, 2010) (offering free video conferencing software that works with inexpensive cameras and computers).

<sup>91</sup> The remainder of this Article considers whether allowing a state to provide a forum could be constitutionally intolerable even if the forum is adequate and would protect the defendant's interest in mounting the most effective possible defense.

<sup>92</sup> But see Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 41–43 (1984) (contending that litigating in an inconvenient forum can impose significant costs, but not quantifying these costs or comparing them to the costs of litigating in a convenient forum).

<sup>93</sup> See *infra* text accompanying notes 143–47 (noting different considerations that apply to alien defendants and excluding such defendants from this Article's coverage).

<sup>94</sup> The theory behind nuisance suits is that a plaintiff can profit from even a meritless claim by threatening to impose significant litigation costs that the defendant can avoid by settling. See generally Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988). Choosing an inconvenient forum can increase the defendant's costs, and thus at the margins can induce settlements and increase the settlement value of claims.

<sup>95</sup> If marginal burdens on defendants were sufficient to violate the Due Process Clause then a wide range of orders in civil litigation presumably would require constitutional scrutiny, including decisions rejecting challenges to the sufficiency of pleadings, the scope of discovery, and the duration of trials. Even proponents of a broader role for federal law in state civil procedure do not embrace such a sweeping constitutionalization of rules affecting litigation expenses. See Leubsdorf, *supra* note 2, at 631–37 (suggesting that procedural rules increasing the costs of litigation may be unconstitutional, but focusing on the rights of indigent parties).

<sup>96</sup> See *supra* note 71 (citing sources).

<sup>97</sup> See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957) (“[A] trend . . . toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents” arises in part from innovations in “transportation and communication [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”).

its rhetoric about burdens by repeatedly requiring parties to fly across the country to defend themselves.<sup>98</sup>

Second, even if the burdens of litigating in a particular forum would be severe for the defendant, the burdens of not litigating in that forum would often be equally severe for the plaintiff. Jurisdictional dismissals redistribute burdens rather than eliminate them: refusing to force a defendant to travel *to* the forum can force the plaintiff to travel *from* the forum.<sup>99</sup> The plaintiff could of course abandon his claims rather than travel to a new forum. But likewise the defendant could abandon his defense rather than travel to the old forum. Trial courts adjudicating challenges to personal jurisdiction usually do not know if claims or defenses have merit,<sup>100</sup> and thus should be concerned about forcing either party to abandon a potential entitlement. Yet the doctrine's emphasis on limiting state power and protecting the defendant's "liberty"<sup>101</sup> tips the scales against plaintiffs.

Consider, for example, *Kulko v. Superior Court*, in which the Supreme Court held that California lacked jurisdiction over a mother's suit seeking child support from her ex-husband.<sup>102</sup> The couple had lived together in New York, but after the divorce the mother and the couple's two children eventually settled in California while the father remained in New York.<sup>103</sup> The father challenged personal jurisdiction in part because of the "burden and inconvenience" of defending himself in California.<sup>104</sup> The Court in turn expressed concern about the "substantial financial burden and personal strain

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<sup>98</sup> See, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (requiring defendant from New Jersey who was served while temporarily in California to return to California to litigate); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (requiring fast food restaurant franchisee from Michigan to defend suit in Florida); *Calder v. Jones*, 465 U.S. 783 (1984) (requiring newspaper reporter in Florida to defend suit in California); cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) ("The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years.").

<sup>99</sup> Forcing plaintiffs to travel may be less troubling in the rare instances when plaintiffs file in fora that are inconvenient for themselves, presumably to exploit a tactical advantage that the forum provides. *But cf.* *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 (1984) (upholding personal jurisdiction despite plaintiff's apparent effort to forum shop into state with which it had little connection but that would apply favorable statute of limitations).

<sup>100</sup> State law typically requires resolving objections to personal jurisdiction early in a case. See, e.g., TEX. R. CIV. PROC. 120a(2); 2010 CONNECTICUT PRACTICE BOOK § 10-30, at 169 (2010).

<sup>101</sup> See *infra* Part I.B.4.

<sup>102</sup> 436 U.S. 84 (1978).

<sup>103</sup> See *id.* at 87–88.

<sup>104</sup> *Id.* at 91.

of litigating a child-support suit in a forum 3,000 miles away” from home,<sup>105</sup> and noted that the mother was free to sue in New York.<sup>106</sup> Yet the Court did not acknowledge that just as California was 3,000 miles from the father’s home, New York was 3,000 miles from the mother’s home. Rejecting jurisdiction in California thus forced the mother to either abandon her claim for child support or file a new action and shoulder precisely the same burdens that the Court thought “basic considerations of fairness” prevented imposing on the father.<sup>107</sup> This seemingly arbitrary prioritization of the defendant’s convenience over the plaintiff’s convenience does not mean that the holding in *Kulko* was wrong, as there were other (debatable) grounds for the decision,<sup>108</sup> but indicates that the Court’s emphasis on the father’s burden told only half the story in a stilted way.<sup>109</sup> Indeed, reasonable minds can disagree with the Court about whether the Constitution considers it fairer for the parent raising two

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<sup>105</sup> *Id.* at 97.

<sup>106</sup> *See id.* at 95.

<sup>107</sup> *Id.* at 97. The Court did not offer any reason to believe that the mother would face less difficulty litigating in New York than the father would face in California. The mother had previously lived in New York, while the father had never lived in California, but there was no reason to think that the mother’s prior residence would have facilitated litigation after she moved away. The Court observed that the mother would be entitled to indemnification of her legal fees from the father, but only to the extent that she sought recovery of past-due payments, rather than a prospective modification of support obligations. *See id.* at 95 n.8.

<sup>108</sup> *See id.* at 100–01 (noting that the defendant “derives no personal or commercial benefit from his child’s presence in California”); *id.* at 97 (“[T]he instant action involves [a separation] agreement that was entered into with virtually no connection with the forum State.”). These rationales do not seem compelling. If the defendant was in fact legally responsible for his children’s well-being to the point where child support was required, then the protection that California provided to those children benefited the defendant by aiding him in the discharge of his parental obligations. *See* Roy L. Brooks, *Feminist Jurisdiction: Toward an Understanding of Feminist Procedure*, 43 U. KAN. L. REV. 317, 349–50 (1995) (critiquing the Court’s narrow view of the father’s connection to California).

<sup>109</sup> The Court justified its one-sided approach with the observation that “[i]t is [the defendant] who has remained in the State of the marital domicile, whereas it is [the plaintiff] who has moved across the continent.” *Kulko*, 436 U.S. at 97. This notion that the party who created the need for travel should be the one to do it has some intuitive appeal. However, there is another side to the story: the plaintiff was trying to move on with her life in the place she apparently deemed best for her children, and the defendant was thwarting that laudable goal by taking a case all the way to the Supreme Court (while simultaneously complaining about litigation costs) to delay paying child support that California clearly had an interest in obtaining. Nothing intrinsic to the idea of personal jurisdiction requires discounting this side of the story because a coherent system of jurisdictional limits can consider the plaintiff’s interests in accessing the forum. *See* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1053 (2006) (“[D]ue process actually does play a role in European jurisdictional thought, but its role is directly opposite to that played in the United States. While the Due Process Clause in the United States protects the defendant against the unjustified assertion of jurisdiction, the fair trial principle in European law protects the plaintiff against the unjustified denial of jurisdiction.”); *id.* at 1055 (“[I]t may or may not be the case that plaintiffs and defendants are both protected to the same degree in the U.S. and in Europe. But the way in which this balance is achieved is very different.”); VON MEHREN, *supra* note 35, at 163 (“The *actor sequitur forum rei* principle [positing that the plaintiff must go to the defendant’s forum] ultimately rests on a premise that is not tenable today.”).

children to travel 3,000 miles to collect child support than for the noncustodial parent to travel the same distance to explain why he should not have to pay. The thinly reasoned result in *Kulko*—as well as in similar decisions that seem to underweight plaintiffs' interests<sup>110</sup>—suggests that a more nuanced balancing inquiry might be necessary. I note later in this section that such an inquiry is feasible outside the bailiwick of personal jurisdiction doctrine.<sup>111</sup>

Third, factors that the Supreme Court views as justifying jurisdiction in a state do not mitigate the burdens of litigating in that state. For example, a defendant who lives 3,000 miles from the putative forum might nevertheless be subject to personal jurisdiction if he “purposefully” initiated contacts with the forum and could “reasonably anticipate” being sued there.<sup>112</sup> Yet neither of these factors would necessarily facilitate mounting a defense, and thus relying on them to justify jurisdiction merely places a fig leaf over the forum's inconvenience.<sup>113</sup> Spinning off analysis of burdens into a freestanding test unrelated to jurisdiction could help clarify that burdens are a distinct reason to question a forum's suitability despite the defendant's substantial contacts with the state. Alternatively, severing the burdens inquiry might cause courts to conclude that burdens are not constitutionally significant if the state has a good reason to permit adjudication. Either way, courts would evaluate burdens for their own sake rather than as ill-fitting pieces of the jurisdictional puzzle.<sup>114</sup>

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<sup>110</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (rejecting Oklahoma's jurisdiction over New York defendants in action arising from a fire in Oklahoma); *Hanson v. Denckla*, 357 U.S. 235 (1958) (rejecting Florida's jurisdiction over a Delaware defendant in an action concerning the disposition of assets connected to a Florida estate and the rights of the estate's beneficiaries who resided in Florida and who challenged the validity of actions with respect to a foreign trust that the decedent had taken while she was living in Florida).

<sup>111</sup> One could argue that personal jurisdiction doctrine is not broken—the problem instead is that decisions like *Kulko* implement it poorly. However, unsatisfactory outcomes seem inevitable under current law because the Court has merged the questions of state power and forum convenience into a single jurisdictional inquiry, despite the fact that the two components of that inquiry consider different factors and interests. Splitting the power and burden questions into distinct constitutional tests could enhance the precision and efficacy of each.

<sup>112</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

<sup>113</sup> Cf. *Perdue*, *supra* note 27, at 554–57 (noting in the context of antidiscrimination theories of jurisdiction that “[i]f the state's assertion of jurisdiction was intended to or has the effect of unduly burdening a foreigner, it is hard to see how that problem is cured by the fact that the defendant engaged in purposeful conduct directed at the state”).

<sup>114</sup> In practice, courts cannot assess burdens in a vacuum, and presumably would have to balance competing interests to ensure that the cost of adjudication is proportional to the justification for allowing it. The considerations that animate the current reasonableness inquiry would therefore still be relevant to some extent, although the test would have a more focused purpose. See *infra* Part III.B (critiquing reasonableness test); cf. *Redish*, *supra* note 11, at 1138–39 (contending that inconvenience should be the sole basis for rejecting a forum's assertion of jurisdiction, but noting that inconvenience must be balanced against competing factors to determine its significance); Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011,

Fourth, the burden associated with defending in a forum may not have any connection to whether the defendant resides in the forum state and thus is an odd variable to consider under the rubric of personal jurisdiction (which is linked to state borders) rather than venue (which is not). For example, Hawaii consists of several islands connected only by air travel.<sup>115</sup> The same convenience concerns that limit the ability of a court on one island to summon out-of-state defendants may therefore apply when the court summons defendants from other islands in the state.<sup>116</sup> Indeed, in some fora out-of-state defendants may have practical advantages over in-state defendants. For instance, Yuma, Arizona, is approximately five hundred miles closer to San Diego, California, than is Redding, California,<sup>117</sup> and traveling by train to New York City from out-of-state (Hoboken, New Jersey) can take eight minutes, compared to eight hours from in-state (Buffalo, New York).<sup>118</sup> There is no plausible reason for the Constitution to offer more protection to the out-of-state defendant who resides near the forum than the in-state defendant who resides far away if the protection is premised solely on the *burdens* of litigating in the forum.<sup>119</sup> The legal significance of the burden should depend on the magnitude of the burden rather than the fortuity of whether the defendant lives

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1015 (2010) (noting that defining a “procedural right” that exists in part because of its effect on litigation outcomes requires considering “how to make room for arguments of social cost without stripping the right of its force as a right”).

<sup>115</sup> See *Hawaii Ferry Officials Cancel Plans to Resume Service*, N.Y. TIMES, Sept. 23, 2007, at N25 (reporting that the islands are not linked by ferries, which increases the burden of inter-island travel).

<sup>116</sup> See Earl M. Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 BYU L. REV. 1043, 1059 (“[T]he fourteenth amendment would be irrelevant to an Alaska court’s decision to force a resident of Juneau to defend a lawsuit in Nome in the dead of winter. This [doctrine] is totally inconsistent with a convenience-based theory of constraints on personal jurisdiction.”).

<sup>117</sup> These distance calculations rely on information from Google Maps. See GOOGLE MAPS, <http://maps.google.com/> (last visited Aug. 16, 2010).

<sup>118</sup> See *Schedule for Maple Leaf Train*, AMTRAK, <http://www.amtrak.com> (follow “Routes” hyperlink; then follow “Maple Leaf” hyperlink) (last visited Aug. 16, 2010); *Schedule for Train from Hoboken to Christopher Street*, THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, [www.panynj.gov/path](http://www.panynj.gov/path) (last visited Aug. 16, 2010); see also Lea Brilmayer, *Three Perennial Themes in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 561, 561–64 (1991) (noting the “borders versus distance” theme in discussions of jurisdiction); Stein, *supra* note 9, at 707–08.

<sup>119</sup> One can imagine an argument that a person who chooses to reside in a large state implicitly consents to appear in any court within that state and thus waives objections to burdensome venues. This argument has two fatal flaws. First, such consent is pure legal fiction, and like any other fiction needs some justifying rationale, which invites the very question (why should state borders matter in burdens analysis) that the fiction purports to answer. Second, if residence in a state constitutes consent to appear in any court within that state, then perhaps residence in the U.S. constitutes consent to appear in any court in the U.S. If so, then personal jurisdiction in state courts over U.S. residents is a nonissue; if not, we are back to the question we started with: why should state borders matter when addressing the scope of fictional consent to appear in burdensome fora?

on one or another side of a state border.<sup>120</sup> Yet that fortuity matters under current law because the Supreme Court has constitutionalized a “reasonableness” standard for assessing personal jurisdiction but has not developed similar constitutional standards for assessing a state’s allocation of venue among courts within its territory.<sup>121</sup> If the Constitution truly addresses the burdens that fish-out-of-water defendants face in unfamiliar locales, then constitutional doctrine should scrutinize burdens whenever a court attempts to compel a defendant’s appearance, even when jurisdiction clearly exists because the case involves in-state parties, in-state service, and in-state conduct. The current rule making burdens relevant when the issue is “jurisdiction” but not when the issue is “venue” is a pointless jurisprudence of labels.<sup>122</sup>

The possibility that constitutional concerns about litigation burdens may exist even when a state clearly has personal jurisdiction over a defendant suggests another avenue for assessing a forum’s convenience: the Constitution could be construed to limit a state’s discretion in assigning venue. For example, the Supreme Court could conclude that the Due Process Clause in some circumstances requires states to transfer venue or dismiss cases merely because the forum is too burdensome, regardless of whether the defendant’s contacts with the state permit jurisdiction.<sup>123</sup> This interpretation of due process would be no more atextual than the Court’s current interpretation; the Clause is as silent about venue as it is about jurisdiction. The nuanced multifaceted analysis that is typical of venue doctrines may also be well suited to the task of balancing the costs of litigation in a forum against competing state interests.<sup>124</sup>

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<sup>120</sup> See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1068.1 (3d ed. 2010) (“There is nothing inherently burdensome about crossing a state line.”); Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2925 (2009) (“[L]ogistical disadvantages [in civil litigation] vary by location, irrespective of state lines.”).

<sup>121</sup> Cf. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651–52 (1992) (stating in context of equal protection challenge to state venue statute that “we have no doubt that a State would act within its constitutional prerogatives if it were to give so much weight to the interests of plaintiffs as to allow them to sue in the counties of their choice under all circumstances”).

<sup>122</sup> The jurisdiction/venue distinction may have some appeal because burdens associated with inter- rather than intra-state travel are arguably more likely to disrupt interstate trade and therefore implicate Commerce Clause concerns. See *supra* note 79. However, this concern with protecting interstate commerce suggests a need to limit jurisdiction even in cases where the forum is convenient, see *supra* note 79, and therefore is not a reason to treat litigation burdens as a factor affecting jurisdiction rather than venue.

<sup>123</sup> A similar rule exists in Australia, which relies extensively on venue transfer rather than jurisdictional limits to allocate adjudicative authority among the territories within its federal system. See Peter Nygh, *Choice-of-Law Rules and Forum Shopping in Australia*, 46 S.C. L. REV. 899, 905–08 (1995) (discussing “cross-vesting” of territorial jurisdiction, nationwide service of process, and inter-territorial transfers).

<sup>124</sup> For example, forum non conveniens doctrine would have been well-suited to address the issue in *Kulko* about whether the mother or father should have incurred the burden of travel because it expressly

In contrast, personal jurisdiction doctrine seeks only to determine whether a forum is minimally appropriate based on factors that may have no connection to the burdens that litigation may impose, such as whether the defendant was served in the forum or targeted the forum.<sup>125</sup> Venue doctrine's malleability may of course be a reason not to constitutionalize it,<sup>126</sup> although it can hardly be more malleable than existing doctrine keyed to the concept of "fair play and substantial justice."<sup>127</sup> In any event, constitutionalizing venue decisions would permit courts to simplify jurisdictional analysis while also tempering its excesses; venue analysis would become a safety valve for when jurisdiction is technically proper but disproportionately burdensome.<sup>128</sup> There would of course be theoretical and practical obstacles to constitutionalizing venue: the idea is ahistorical, creating a second fuzzy constitutional limit on choice of forum may be unwise in light of experience with the first limit, and expanding defendants' arsenal of pre-merits arguments will create new opportunities for prolonging litigation.<sup>129</sup> Nevertheless, the idea merits further scrutiny in light of the conceptual problems discussed in this subsection regarding the use of personal jurisdiction doctrine as a means for policing the burdens of litigation.<sup>130</sup>

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considers the relative burdens that different fora would impose on the parties and the proper allocation of those burdens. See MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE 66–67 (2004).

<sup>125</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (Brennan, J., dissenting) ("The defendant has no constitutional entitlement to the best forum . . . . We need only determine whether the forum States in these cases satisfy the constitutional minimum.").

<sup>126</sup> See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–69 (1992) (discussing relative virtues of bright-line rules and fuzzy balancing tests for protecting constitutional rights). Even a more rigid test could be troubling if it relied primarily on weighing the parties' interests in particular fora. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004–05 (1987) (contending that balancing competing interests as a means of implementing constitutional texts can obscure the values animating those tests, produce "formulaic" results, or shade excessively into political policymaking).

<sup>127</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted); see also George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 367 (contending that modern personal jurisdiction doctrine's malleability emerged from legal realism's "rule skepticism" and criticism of prior jurisdictional rules that purported to operate in a "determinate fashion").

<sup>128</sup> Cf. *Hanson v. Denckla*, 357 U.S. 235, 259 (1958) (Black, J., dissenting) (contending that state interests could justify providing a forum unless "litigation" would "impose . . . a heavy and disproportionate burden on a nonresident defendant").

<sup>129</sup> Cf. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 795 (1985) (criticizing the "arbitrary" and "inconsistent" approach that emerges from concurrent application of distinct concepts, including venue and personal jurisdiction, governing the availability of a forum in civil litigation).

<sup>130</sup> For discussions of potential constitutional limits on venue, see Clermont, *supra* note 36, at 437–38 (proposing to merge venue and personal jurisdiction concepts into new due process inquiry focused on "forum



In any event, whether burdens should or should not influence jurisdictional analysis, the remainder of this Article assumes as a factual matter that the forum is not unduly burdensome. That assumption is unnecessary (but also harmless) if I am correct in positing that burdens are constitutionally relevant only to venue analysis. But even if burdens may be relevant when assessing jurisdiction, my assumption shifts the focus to the subset of jurisdictional dilemmas that may arise even when a forum is convenient.

### 3. *Framing the Defendant's Position*

The foregoing assumptions produce the following scenario: a court in one state has demanded that a citizen of another state answer a claim on pain of default; the demanding state's legislature has empowered the court to act and the court has acted consistently with this power; the defendant has learned about the suit through proper channels, would not encounter excessive burdens, and has an adequate opportunity to raise defenses; and allowing the case to proceed in the demanding state rather than in another state would not alter the applicable law. The question now becomes: if  $D_y$  wants to invoke the Constitution to challenge  $F_x$ 's "personal jurisdiction," what is left to complain about?

$D_y$ 's challenge to  $F_x$ 's personal jurisdiction involves an assertion of a preference coupled with a claim of entitlement.  $D_y$ 's ultimate preference presumably is not to be sued in any forum anywhere—no judicial accountability for one's actions generally is preferable to some accountability.<sup>131</sup> But if  $D_y$  realizes that he may be amenable to suit somewhere, we can assume a subsidiary preference to avoid a forum within State  $X$ . (Absent such a preference to avoid  $X$ ,  $D_y$  often would consent to jurisdiction in  $X$  rather than risk obtaining a dismissal in  $X$  and then being sued

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reasonableness"); Stanley E. Cox, *Jurisdiction, Venue, and Aggregation of Contacts: The Real Minimum Contacts and Federalism Questions Raised by Omni Capital, International v. Rudolf Wolff & Co.*, 42 ARK. L. REV. 211, 261–62 (1989) (proposing a "unified" rather than "compartmentalized" inquiry into venue, jurisdiction, and choice of law). Cf. Geoffrey C. Hazard, Jr., *Interstate Venue*, 74 NW. U. L. REV. 711, 720 (1979) (suggesting that the boundary between jurisdiction and venue is conceptually fluid); Juenger, *supra* note 24, at 1029 ("[D]isparate ideas of sovereignty and fairness . . . have coexisted uneasily in the realm of jurisdiction.").

<sup>131</sup> Some defendants may welcome the opportunity to litigate so that they can vindicate themselves in a public forum, but I suspect that most defendants who could invoke a blanket immunity from suit would not choose to waive immunity simply to have their day in court. Contrary statements by defendants welcoming the opportunity to "clear their name" or "prove their innocence" are likely bluster born of necessity rather than desire.

in a less preferred forum.)<sup>132</sup>  $D_y$ 's desire to avoid  $X$  might spring from an objection to being subject to the judicial power of a state with which he did not wish to be affiliated, or a preference for an alternative forum, or simply from recognizing the tactical advantage of moving the case away from  $P_x$ 's chosen forum.<sup>133</sup> Whatever the reason,  $D_y$  would prefer to litigate somewhere else, which raises the constitutional question of whether  $F_x$  may ignore that preference.

$D_y$ 's preference to avoid adjudication in  $X$  would encounter two contrary preferences. First,  $P_x$  chose to sue in  $X$  and thus presumably preferred  $X$  to all available alternatives.<sup>134</sup> Second,  $X$  chose to make  $F_x$  available to hear the suit and presumably would prefer not to be told without good reason that it lacked the authority to make that choice.  $X$  may not have cared if  $P_x$  had filed the action in  $Y$  instead of in  $X$ , but once  $P_x$  invoked the opportunity to file in  $X$ , then  $X$  had an interest in courts respecting the preference embodied in the creation of that opportunity.<sup>135</sup> In some instances  $X$  may have a competing and possibly stronger preference not to provide a forum if, for example, it recognizes another state's comparatively stronger interest in the dispute or endorses  $D_y$ 's desire to litigate elsewhere. But  $X$  can protect this interest by authorizing its courts to dismiss cases on forum non conveniens grounds despite the existence of jurisdiction.<sup>136</sup> Broad long-arm statutes can thus vindicate state interests in keeping courts open to a wide range of disputes, while nuanced venue statutes can vindicate state interests in closing courts based on closer scrutiny of specific cases. Accordingly, in our simple scenario involving a challenge to  $X$ 's jurisdiction, we can assume that  $P_x$ 's and  $X$ 's preferences are the opposite of  $D_y$ 's: they want  $F_x$  to be open for the suit (at least pending a venue inquiry), but  $D_y$  wants it to be closed.

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<sup>132</sup> Tactical considerations might sometimes cause a defendant to object to jurisdiction despite preferring the forum to all available alternatives if the defendant believes that dismissal in the preferred forum would terminate the case. For example, the defendant might be willing to gamble that the plaintiff would lack sufficient resources to file a second action, or that a second action would not survive a jurisdictional challenge.

<sup>133</sup> See Bassett, *supra* note 62 (discussing how parties select from among available fora and decide when to invoke available objections to a forum).

<sup>134</sup>  $P_x$ 's preference might be ill-considered or misinformed, but for simplicity we can assume that the preference is sincere and that a court would have no paternalistic basis for questioning it.

<sup>135</sup> State  $X$  may also have additional interests in providing a forum that vary in strength from case to case, such as facilitating access to compensatory remedies for local residents, removing barriers to litigation that might undermine deterrence, and cooperating with (rather than free-riding upon) nationwide efforts to create an efficient network of courts available to hear disputes involving actors or events in multiple states.

<sup>136</sup> See *supra* notes 123–24.

The critical question is whether the Constitution creates entitlements that support or resist any of  $P_x$ ,  $D_y$ , or  $X$ 's preferences. If the Constitution is indifferent to the competing preferences, then personal jurisdiction is not a doctrine of constitutional significance. State courts could still limit their own authority by relying on state law,<sup>137</sup> but the Constitution would not intervene. If instead the Constitution always favors respecting  $P_x$ 's or  $X$ 's preferences, then personal jurisdiction doctrine would have some constitutional status, but virtually no content; there would be no arguments for defendants to make and thus no reason for the issue to arise in litigation.

But what if, as current doctrine posits, the Constitution *sometimes* supports  $D_y$ 's preference to avoid  $F_x$ ? The question then becomes, when and why? The answer may differ depending on case-specific factors, so the relevant universe of cases requires careful definition. This subsection therefore identifies important traits of cases on which I will focus. The goal is to exclude cases that raise knotty doctrinal problems collateral to the central constitutional question. Once we have a coherent framework for thinking about core cases, additional scholarship can adapt it to outlier cases.

First, assume that all defendants are natural persons, rather than entities such as corporations, associations, and sovereign institutions, or objects such as real or personal property.<sup>138</sup> This assumption avoids four problems. *First*, it eliminates the question of whether non-human entities have enforceable constitutional rights. The answer varies from clause to clause of the Constitution and arguably requires context-sensitive analysis.<sup>139</sup> *Second*, the

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<sup>137</sup> For example, courts might dismiss suits under the forum non conveniens doctrine, and states might enact statutes governing abstention in cases where long-arm statutes permit jurisdiction but where good cause exists for declining to exercise it. *See supra* notes 123–24.

<sup>138</sup> This assumption skews the relevant universe of cases because a seemingly large percentage of recent judicial opinions addressing personal jurisdiction involve corporate defendants or individuals being sued because of, and thus presumably indemnified by, their position in a corporation or similar business entity. *But see* *Rush v. Savchuk*, 444 U.S. 320 (1980) (addressing state court's jurisdiction over a suit by passenger against driver of a privately owned car). Nevertheless, this skewing does not affect my conclusions because none of my analysis depends on any unique characteristics of human defendants relative to entity defendants, such as their political rights, preferences, or relative sophistication and resources.

<sup>139</sup> The Due Process Clause protects corporations (to a debated extent), but Article IV's Privileges and Immunities Clause does not. *See* *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981) (“[T]he Privileges and Immunities Clause [of Article IV] is inapplicable to corporations . . . .”); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 81 (2008) (“The Article will also point to the absurdity of granting identical procedural protections to big corporations and individuals involved in similar civil lawsuits or facing similar criminal charges, in the name of abstract and uncritically accepted notions of fairness and due process.”). *See generally* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 168 (2008) (noting that “person” is a “chameleon word” that

assumption moots technical questions about where such incorporeal entities are present, where they are from, where they have been, and whether the state's role in their creation affects the constitutional weight of their preferences.<sup>140</sup> *Third*, it sidesteps questions about the overlap between personal jurisdiction doctrine and sovereign immunity doctrine.<sup>141</sup> *Finally*, it circumvents the morass of issues affecting “in rem” jurisdiction, which is entangled with centuries of jurisprudence governing state interests in the disposition of property.<sup>142</sup>

Second, the analysis assumes that all parties are U.S. citizens who are also citizens of a State, and that the parties are litigating about events that occurred

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encompasses or excludes corporations depending on context). For the Supreme Court's most recent effort to address corporate rights (here in the First Amendment political speech context), see *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>140</sup> See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.5, at 69 (5th ed. 2001) (“The concept of jurisdiction over a person, leading to an in personam judgment, runs immediately into difficulty if the defendant is a corporation rather than a ‘flesh and blood’ person. Since a corporation is not a physical entity, it cannot actually be present. Moreover, since the corporation is the creature of law, how can it have legal existence outside the state of its incorporation?”); Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004) (discussing whether jurisdiction may exist over a corporate parent based on forum contacts attributable to its subsidiary); cf. *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977) (“The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other.”).

<sup>141</sup> See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1574–75 (2002) (noting that in the Colonial Era, immunity doctrine arose from courts' inability to command the sovereign's appearance, which in effect precluded personal jurisdiction). Similar immunity questions based on interstate comity arise in suits in state court against officers of other states. See Tracey O. Appleton, Note, *The Line Between Liberty and Union: Exercising Personal Jurisdiction over Officials from Other States*, 107 COLUM. L. REV. 1944 (2007).

<sup>142</sup> See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312–13 (1950) (“Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own.”). The artifice of suing or attaching property (such as land or a chattel) rather than suing a person in theory should not alter jurisdictional analysis because “the purpose and effect” of the suit is “determining interests of persons.” RESTATEMENT (SECOND) OF JUDGMENTS § 6 cmt. a (1982). Modern law for this reason tends to “obliterate[]” the distinction between *in rem* and *in personam* actions. *Id.* § 5 cmt. b; see also *Shaffer*, 433 U.S. at 212 (“The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.”). Nevertheless, my conclusion that federalism concerns animate jurisdictional doctrine may require giving more weight to state interests in exercising jurisdiction when the defendant owns tangible property within the forum. See *Burnham v. Superior Court*, 495 U.S. 604, 620 (1990) (plurality opinion) (implying that owning property in the forum that is sufficiently “related” to the litigation may warrant jurisdiction); *Shaffer*, 433 U.S. at 217 (Powell, J., concurring) (noting that categorically allowing a state to provide a forum when the defendant owns land within the state would avoid uncertainty inherent in due process analysis); cf. Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 WASH. L. REV. 97, 126–37 (2000) (noting past and future complications for judicial attempts to determine the situs of intangible property used as a basis for *in rem* jurisdiction).

within and affected the U.S. This domestic focus eliminates several distractions, including: (1) the possibility that relevant constitutional provisions provide different rights to foreign citizens than U.S. citizens;<sup>143</sup> (2) the effect of foreign law limiting the enforcement of U.S. judgments rendered in violation of the foreign country's jurisdictional standards;<sup>144</sup> (3) the potential preemptive effect of federal law addressing foreign affairs, which complicates application of the "centralization" principle that I discuss in Part III.A;<sup>145</sup> (4) choice of law considerations that may affect the content of jurisdictional rules;<sup>146</sup> and (5) the general complexity associated with addressing two types of borders (state/state, national/international) rather than one. The Supreme Court also relies on a sixth factor to justify special treatment for cases involving foreign defendants: the "burden" that international travel imposes on defendants and the difficulties associated with litigating in a "foreign nation's judicial system."<sup>147</sup> But these are the types of concerns that subsection 2 contended should be addressed outside the "personal jurisdiction" framework.

Finally, I focus on civil cases rather than criminal cases, even though the jurisdictional question is similar in both contexts: whether the state's willingness to provide a forum justifies forcing a reluctant defendant to appear

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<sup>143</sup> See, e.g., Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 69 (2008) ("[I]t is well established that the Privileges and Immunities Clause [of Article IV] does not protect aliens."); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 2 (2006) (analyzing "uncritical assumption that the same due process considerations apply to alien defendants as to domestic defendants in the personal jurisdiction context").

<sup>144</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 cmt. e (1987) ("'Tag' jurisdiction, i.e., jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law."); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 328 (2008) ("[T]he exercise of transient jurisdiction over foreign defendants has always been rare, perhaps because service is more difficult to accomplish and, once accomplished, less likely to be followed by a judgment that is easily enforced abroad."); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 511 (2003) ("U.S. courts are fairly liberal in enforcing foreign judgments, but foreign courts are reluctant to enforce the decisions of U.S. courts. Many other countries find some of the grounds for jurisdiction in the United States exorbitant (particularly the notion of 'tag' jurisdiction based on a transient presence in the United States and general 'doing business' jurisdiction when the business transacted in the United States is not particularly related to the dispute).").

<sup>145</sup> See *infra* Part III.A; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (holding that federal "foreign relations policies" are relevant when analyzing state's assertion of personal jurisdiction over foreign defendant).

<sup>146</sup> See Andrew L. Strauss, *Beyond National Law: The Neglected Role of International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995) (contending that U.S. states should in some circumstances apply international law when deciding whether to exercise jurisdiction over alien defendants).

<sup>147</sup> *Asahi*, 480 U.S. at 114.

when the connection between the state and the defendant or his conduct is tenuous. However, five complications justify carving out criminal cases: (1) the Sixth Amendment's vicinage requirement, if incorporated against the states, would impose limits on venue that would not apply in civil cases;<sup>148</sup> (2) criminal jurisdiction is entangled with statutory interpretation questions because "the full faith and credit clause does not require one state to enforce the penal laws of another,"<sup>149</sup> and thus the scope of a state's jurisdiction over defendants in criminal cases is bound up with the scope of its substantive criminal law;<sup>150</sup> (3) jurisdictional doctrine in criminal cases relies on an extensive common law pedigree that evolved independently from doctrine in civil cases;<sup>151</sup> (4) the mechanisms that defendants can use to challenge jurisdiction differ in criminal and civil cases, which might affect the optimal content of jurisdictional rules: unlike defendants in civil cases who can choose to default rather than obey a summons and can then collaterally attack the judgment for lack of jurisdiction,<sup>152</sup> a criminal defendant is subject to arrest and extradition to the forum,<sup>153</sup> after which his presence in the forum will moot any jurisdictional defense;<sup>154</sup> and (5) criminal cases arguably raise unique and historically contingent questions about the proper role for the state in maintaining public order that may color assessment of how the Constitution prioritizes state and individual interests.<sup>155</sup>

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<sup>148</sup> See U.S. CONST. amend. VI (requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed"); WAYNE R. LAFAVE ET AL., 1 CRIMINAL PROCEDURE § 2.6(b) (3d ed. 2007) (noting that the Supreme Court has not incorporated the vicinage requirement against the states, although there is some disagreement on this point among lower courts). The Extradition Clause presents an additional interpretative complication by invoking the idea of a state having "Jurisdiction" over a "Crime." U.S. CONST. art. IV, § 2.

<sup>149</sup> *Williams v. North Carolina*, 317 U.S. 287, 294 n.6 (1942).

<sup>150</sup> *Cf. Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("[Criminal] acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.").

<sup>151</sup> See 4 LAFAVE, *supra* note 148, at § 16.4(c) (summarizing doctrine).

<sup>152</sup> See *infra* note 299.

<sup>153</sup> See *In re Vasquez*, 705 N.E.2d 606, 608–09 (Mass. 1999) (affirming denial of writ of habeas corpus sought by person seeking to avoid extradition to a state where he had never been present).

<sup>154</sup> See *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (holding that "due process" tolerates criminal jurisdiction over a defendant who is "present" in the forum, even if the defendant was kidnapped and brought to the forum by force); *Lascelles v. State*, 148 U.S. 537, 545–46 (1893) ("In the matter of interstate rendition . . . [the Constitution] imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned.").

<sup>155</sup> Unique "personal jurisdiction" defenses also arise in criminal cases following the defendant's extradition from a foreign country if the basis for the prosecution differs from the basis for the extradition. See, e.g., *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003) (discussing "doctrine of specialty").

The foregoing assumptions hone the relevant question: When, if at all, does the Constitution support an individual U.S. citizen's preference to avoid binding civil adjudication in the forum state despite the state's preference to provide a forum and the plaintiff's preference to use that forum?

*B. Identifying Why the Problem Is Difficult: State Borders and Federalism*

Courts have struggled for more than two hundred years to develop a coherent account of personal jurisdiction,<sup>156</sup> suggesting a need to engage the issue with eyes wide open to its complexities. This section will explore those complexities in three steps: by identifying cases that are relatively easy, introducing factors that add complexity, and comparing the hard and easy cases to isolate salient differences.<sup>157</sup> I argue that the key difference between the easy and hard cases is the special role that state borders play in hard cases, albeit in a non-intuitive way. The dispersion of relevant actors and events across state borders implicates constitutional concerns about the allocation of power between coequal states. A person's ability to resist jurisdiction in state court thus does not rest upon a free-standing right to avoid particular states,<sup>158</sup> but rather arises from a structural limit on state power founded on principles of horizontal federalism. Personal rights may still be relevant when defining the scope of a state's power, but federalism concerns dictate how we define and implement these rights.

Two new variables now join the *P, D, F* notation that I introduced above: Conduct (*C*), and Effect of Conduct (*E*), each expressed in terms of location (e.g.,  $C_x$  or  $E_y$ ). The *C* variable encompasses all activity related to the plaintiff's claims,<sup>159</sup> regardless of who engaged in that activity (i.e., it encompasses conduct by the defendant resisting jurisdiction, by co-defendants,

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<sup>156</sup> See *supra* notes 20–26.

<sup>157</sup> My conclusion that some cases are easier or harder than others has both descriptive and normative components. The easy cases are labeled as such because courts in practice have not viewed them as challenging, and the courts' approach is sufficiently plausible to warrant deference (at least for present purposes of constructing a framework to aid in analyzing and critiquing modern doctrine). Whether any constitutional question is ever truly "easy" is contestable, but concerns about the determinacy of authoritative texts are beyond the scope of this Article. For arguments that "easy" cases exist and can be distinguished from "hard" cases, see Kenneth Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

<sup>158</sup> See *infra* Part I.B.4 (discussing "liberty" interests relevant to jurisdiction).

<sup>159</sup> I discuss the significance of local conduct unrelated to plaintiffs' claims below. See *infra* text accompanying notes 164–77.

and by nonparties).<sup>160</sup> The *E* variable encompasses any effect of such activity. Neither variable considers whether the defendant's contacts with the forum were purposeful or expected, for two reasons. First, there is a strong argument that a defendant's purpose or subjective expectations about where conduct would occur or effects would materialize should be irrelevant when assessing jurisdiction.<sup>161</sup> Second, even if purposes or expectations should matter, adding variables to account for them—e.g., fragmenting the *E* variable into *PE* (purposeful effects) and *FE* (fortuitous effects)—would merely add complexity to the model without adding insight.<sup>162</sup>

An example indicates how *C* and *E* operate independently. Suppose that an Ohio citizen stands on the Iowa side of the Iowa/Nebraska border, shoots several people in Nebraska, and then flees to California. Meanwhile, by coincidence, a few miles away another Ohio citizen stands on the Nebraska side of the border, shoots several people in Iowa, and likewise flees to California. In the ensuing civil litigation, Iowa and Nebraska presumably would have plausible interests in adjudicating suits by victims in both cases even if service occurs in California: Iowa because of the location of the victims in one case and the shooter in the other, and Nebraska for the same reasons.<sup>163</sup> Jurisdiction in those states would be unavailable if one thinks that states can *never* reach across their borders to serve defendants who are not present in the state (as was once the rule).<sup>164</sup> But if states can *sometimes* reach across their

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<sup>160</sup> The rationale for including conduct by actors other than the defendant is that conduct within the state may give that state an interest in providing a forum regardless of who engaged in the conduct. For example, suppose that an Illinois citizen acting in Illinois sold a gun to a Wisconsin citizen who used the gun in Wisconsin. The shooter's conduct in Wisconsin might give Wisconsin a plausible interest in providing a forum capable of consolidating all suits by the victims of that conduct, including suits against the Illinois seller, even though the seller's conduct occurred exclusively in Illinois. The fact that the seller never acted in Wisconsin may mean that Wisconsin's interest is insufficient to justify jurisdiction when weighed against the seller's interest in avoiding the forum, but the point is that some balancing may be necessary given the shooter's local conduct.

<sup>161</sup> See *infra* notes 197, 366.

<sup>162</sup> See *infra* text accompanying notes 169–70 (discussing how the model can expand to account for additional variables without undermining its value).

<sup>163</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1971) (“[O]ne who intentionally shoots a bullet into a state is as subject to the judicial jurisdiction of the state as to causes of action arising from the effects of the shot as if he had actually fired the bullet in the state.”).

<sup>164</sup> See *Pennoy v. Neff*, 95 U.S. 714, 720 (1878). This Article assumes that the *Pennoy* rule is appropriately interred, and thus that the relevant question is not *if* states can compel out-of-state defendants to appear in personal actions despite the lack of local service, but rather *when* they may do so. For a discussion of the many flaws in *Pennoy*'s application of a strict territorial limit on state authority, see Hazard, *supra* note 61, at 271 (“Appraised by contemporary critical standards for assessing logic and policy in judicial decision, *Pennoy v. Neff* arouses dismay and even despair.”).



borders, then the above hypothetical presents a compelling example of when such reaching would be appropriate. Indeed, long-arm jurisdiction would be toothless if states could not protect their residents from deadly harms aimed into the forum from immediately outside the forum, or if states could not force violent wrongdoers to return to the scene of their violent acts. The defendants' flights to California thus do not seem to present a strong basis for resisting Iowa's and Nebraska's jurisdictional demands,<sup>165</sup> and unsurprisingly the Supreme Court has endorsed jurisdiction in analogous circumstances.<sup>166</sup> That conclusion reveals an important insight: either local conduct or local effects of conduct may justify personal jurisdiction. Unless states may never compel noncitizen defendants to appear in local fora, a state has a plausible interest in providing a forum simply because someone within its borders was injured, even though the wrongdoer was elsewhere, or simply because the wrongdoer was within its borders, even though the victims were elsewhere. Whether these plausible interests are *sufficient* to confer jurisdiction may hinge on additional case-specific facts (such as what the defendant intended to do and where he expected the consequences to arise),<sup>167</sup> but for now we can treat them as *relevant*.<sup>168</sup>

The  $C_x$  and  $E_x$  notations incorporate two intentional and justifiable oversimplifications: they ignore differences between various types of conduct and effects, and they assume that conduct is centralized in a single state and affects only one state. Reality obviously is more complex. However, that complexity is merely a distraction for present purposes. To see why, suppose

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<sup>165</sup> Extradition is an analogue to long-arm jurisdiction in the criminal context. See U.S. CONST. art. IV, § 2.

<sup>166</sup> See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that personal jurisdiction in state court over nonresident was appropriate when defendant "aimed" "effects" of extraterritorial conduct into forum); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773–74 (1984) (stressing defendant's conduct in forum—circulating magazines—as basis for jurisdiction); cf. *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 500 (1971) (stating in dicta that Ohio would "have a claim as compelling as any that can be made" for asserting personal jurisdiction over entity from Michigan whose out-of-state conduct caused "disastrous effects" in Ohio).

<sup>167</sup> For example, consider three variants of the shooting hypothetical that involved conduct in Nebraska, effects in Iowa, and an assertion of jurisdiction in Iowa: (1) the original hypo, in which the shooter aimed at targets in Iowa; (2) a variant in which the shooter aimed at a pedestrian in Nebraska, missed, and hit someone in Iowa; and (3) a variant in which the shooter was cleaning his gun, failed to unload it, and accidentally shot someone in Iowa. The key differences between the three variants are whether the shooter committed an intentionally wrongful act (yes in 1 and 2, no in 3) and whether he expected harm to occur in the forum (yes in 1, no in 2 and 3). Current doctrine makes these differences relevant, although that doctrine is debatable. See *infra* notes 197, 366.

<sup>168</sup> See Stein, *supra* note 64, at 420 (linking state interests in providing fora to interests in remedying local injuries and deterring local conduct, but contending that remedial interests alone cannot justify jurisdiction).

that the Constitution weighed different types of conduct and effects differently in the jurisdictional calculus. For example, a local death might confer a greater state interest in providing a forum than a local toe-stubbing, and the occurrence of an intentional tort in the forum might be a stronger basis for jurisdiction than the occurrence of a negligent omission in the forum. A different variable can represent each discrete subtype of conduct or effect:  $C1$ ,  $C2$ ,  $E1$ ,  $E2$ , etc. Additional precision would be available by using different variables for different types of actors. Thus, increasingly cumbersome nomenclature such as  $C107$  might signify “negligent act by the defendant involving a vehicle,” while  $C108$  could signify “negligent act involving a vehicle by someone other than the defendant.” The number of potential variables is limited only by one’s imagination and patience. Further suppose that in cases presenting difficult jurisdictional questions  $C$  and  $E$  can each occur in multiple states to varying degrees, such that “ $E5_{x9/y3}$ ” might signify that a particular effect occurred in both  $X$  and  $Y$ , but on a scale of 1–10 was relatively more intense in  $X$  than in  $Y$ . An accurate representation of jurisdictional issues in a suit using this notation would quickly look inscrutably and cruelly complex; for example,  $C6_{x5/z2}$   $C207_{w9/y5}$   $C309_{x3}$   $C577_{x1/y3/z9}$   $E102_{x3/y4}$   $E223_{B3/y9}$   $E399_{x5/z6}$   $E795_{x9/y2}$ . This jumble of variables tells us what we could have surmised by common sense: determining which states possess jurisdiction can be difficult and fact-dependant to the point of resisting formulaic representation. If we want to learn why jurisdictional questions are difficult, simpler assumptions would be useful. I therefore aggregate the many types of potentially relevant conduct and effects into single  $C$  and  $E$  variables and assume that  $C$  and  $E$  are each concentrated in a single state. This stylized test case helps reveal a useful framework for thinking about personal jurisdiction.<sup>169</sup> With the framework in place, future work can consider how to apply the framework to more complex fact patterns (although a helpful implication of my analysis in Part III is that even complex fact patterns may be amenable to a more streamlined jurisdictional inquiry than current law requires).<sup>170</sup>

### 1. *Relatively Easy Cases*

With the new notation, we can imagine a case where the jurisdictional question is easy:  $P_x$  v.  $D_x$  in  $F_x$  re  $C_x$   $E_x$ . Here, all parties are citizens of the

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<sup>169</sup> See *infra* Part II.

<sup>170</sup> I therefore do not contend that courts should treat all local conduct and local effects identically when assessing jurisdiction. Instead, I contend that the locations of conduct and effects matter while reserving the question of how much they matter under various circumstances.

forum, all conduct occurred in the forum, and all effects of that conduct were felt in the forum. There is no modern theory that would make the exercise of personal jurisdiction over  $D_x$  by  $F_x$  unconstitutional even if  $D_x$  were served outside of  $X$ , and even the abandoned *Pennoyer* theory would have permitted jurisdiction based on extraterritorial service of an absent citizen.<sup>171</sup> Indeed, the consensus in favor of local jurisdiction over local actors and actions is so strong that the outcome is usually taken for granted.<sup>172</sup> Even if we modify the scenario to make the plaintiff a citizen of  $Y$  rather than  $X$ , jurisdiction would still be appropriate because the Constitution does not prevent states from opening their courts to foreign plaintiffs, and in some cases may require them to do so.<sup>173</sup>

This easy case is interesting because the possible existence of local borders between  $D$ ,  $F$ ,  $C$ , and  $E$  is irrelevant for constitutional purposes.  $F$  might not be in the same city in which  $D$  resides, and both cities might be in a different county than where  $C$  occurred and  $E$  was experienced. Yet the Supreme Court has never considered local borders relevant if state law does not make them relevant; there is thus no constitutional constraint on intrastate venue.<sup>174</sup> (The lack of attention to intrastate borders is troubling given the burdens that intrastate travel may impose in vast states, which as noted above may be a reason to constitutionalize venue doctrine.)<sup>175</sup>

A second potentially easy case produces a different insight about the relevant factors in constitutional analysis of jurisdiction: the Constitution seems to require a relationship between the forum and either the action or the defendant. Imagine  $P_y$  v.  $D_y$  in  $F_x$  re  $C_y$   $E_y$ .<sup>176</sup> In this scenario, the forum state

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<sup>171</sup> See *supra* note 39.

<sup>172</sup> See *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (“Barrow, Alaska, is farther from Juneau than Indianapolis is from Alexandria, and travel from Barrow to Juneau is *much* harder than is travel from Indianapolis to Alexandria (there are no highways and no scheduled air service from Barrow to anywhere), yet no one doubts that the Constitution permits Alaska to require any of its citizens to answer a complaint filed in Juneau . . .”).

<sup>173</sup> Out-of-state citizens may have a right under Article IV’s Privileges and Immunities Clause to access state courts on the same general terms as in-state citizens, but this right of access does not preclude nondiscriminatory application of the forum non conveniens doctrine. See *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387 (1929); *Burnham v. Superior Court*, 495 U.S. 604, 638 (1990) (Brennan, J., concurring) (“Subject only to the doctrine of forum non conveniens, an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens.”).

<sup>174</sup> See *supra* notes 116, 172.

<sup>175</sup> See *supra* Part I.A.2.

<sup>176</sup> Such a suit is unlikely, but possible given plaintiffs’ incentives to forum shop. *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772 (1984) (upholding jurisdiction in New Hampshire over libel suit by New York resident against California-based publisher; the libel allegedly had an effect in the forum because the

has no connection with any aspect of the case beyond  $P$ 's decision to sue in  $F_x$ : the defendant did not do anything in the state and did not affect the state or anyone in it.<sup>177</sup> Unless there is an unusual feature of the case creating a special reason that  $P_y$  should be able to sue in  $F_x$ ,<sup>178</sup>  $P_y$  and  $X$  could at best contend that states should be able to provide a forum for any aggrieved person who demands a judicial remedy. Yet that argument would be available in every case where state law opened the forum door and the plaintiff walked through it. If the argument were sufficient, then the Constitution would not limit personal jurisdiction at all. The goal here is to ask what constitutional limits on personal jurisdiction would look like if they exist. So we should assume, as the Supreme Court does, that a state's mere desire to provide a forum is not constitutionally sufficient.<sup>179</sup> Under this assumption, the Constitution would require an additional connection between the state and the defendant or the action, which would mean that for jurisdiction in  $F_x$  to be constitutional, at least one of the following conditions must apply:  $P_x$ ,  $D_x$ ,  $C_{x>0}$ ,  $E_{x>0}$ , or  $S_x$ , where  $S$  is a special factor justifying jurisdiction despite the absence of a local

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plaintiff edited a magazine that was sold there); *Rush v. Savchuk*, 444 U.S. 320, 322–23, 332–33 (1980) (invalidating Minnesota's assertion of jurisdiction in case addressing accident in Indiana that involved two Indiana residents; one of the Indiana residents later moved to Minnesota and filed suit).

<sup>177</sup> In the hypothetical case all relevant actors and events have a connection with  $Y$ , but  $X$ 's interest in adjudicating would be just as weak if contacts were diffused among other states, e.g.,  $P_y$  v.  $D_z$  in  $F_x$  re  $C_z E_y$ . Adding  $Z$  to the mix does nothing to strengthen  $X$ 's assertion of authority to adjudicate because the existence of jurisdiction presumably hinges on the forum's contacts with the suit without regard to the relative strength of other states' assertions of jurisdictional competence. *Cf.* *Calder v. Jones*, 465 U.S. 783, 788 (1984) (personal jurisdiction is appropriate in "any State" with sufficient "minimum contacts" to dispute). *But see infra* Part III.B (noting that a "comity" approach to jurisdiction might aspire to identify the best forum for a case rather than minimally adequate fora, and that the modern "reasonableness" inquiry may covertly incorporate a comparative assessment of whether jurisdiction would be appropriate in each available forum).

We could modify the hypothetical to posit that the defendant intended to cause harm in the forum, but that assumption would not change the analysis. For example, suppose that an Ohio citizen builds a bomb in Ohio for the purpose of demolishing a target in Indiana and expects to be sued in Indiana after his bomb explodes, although he does not want to be sued and would not consent to the suit. The bomb explodes prematurely while still in Ohio, injuring an Ohio resident who for some reason decides to sue in Indiana. The suit would take the form  $P_y$  v.  $D_y$  in  $F_x$  re  $C_y E_y$ , where  $Y$  is Ohio and  $X$  is Indiana. It is difficult to see how the defendant's thwarted purpose of causing harm in Indiana and expectation of being sued in Indiana would justify jurisdiction in Indiana if no conduct occurred there, no effects were felt there, and the defendant did not consent to jurisdiction.

<sup>178</sup> *See infra* notes 181–88.

<sup>179</sup> *See Rush*, 444 U.S. at 332 (rejecting argument that "plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated"). *But cf. Calder*, 465 U.S. at 788 (stating that plaintiff's contacts with forum "may be so manifold as to permit jurisdiction when it would not exist in their absence").

party and the apparent lack of any connection between the state and the disputed events.<sup>180</sup>

*S* factors present complications that we can safely set aside. The Supreme Court has identified only three *S* factors (without using that term) that permit personal jurisdiction in cases where it would otherwise be inappropriate due to the lack of a local party, conduct, or effect: the defendant's physical presence in the forum at the time of service,<sup>181</sup> the defendant's consent to jurisdiction in the forum,<sup>182</sup> and the defendant's "continuous and systematic" contacts with the forum that are unrelated to the action (and thus not covered by the *C* and *E* variables above).<sup>183</sup> An *S* factor would also have some role in civil cases extending the criminal law concept of "universal jurisdiction," which posits that all nations may prosecute certain types of actors—such as war criminals and pirates—no matter where they are from, where they acted, or whom they harmed.<sup>184</sup> In practice, however, the "pure" view of this position is often diluted to permit jurisdiction only when the forum has some connection to the parties or disputed events,<sup>185</sup> and the concept has made little headway in civil

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<sup>180</sup> I revisit this assumption in Part III.A, which considers whether Congress rather than the judiciary should determine when states may assert jurisdiction.

<sup>181</sup> See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion).

<sup>182</sup> The precise type of act or omission needed to manifest consent is an open question, but there is no doubt that consent can confer jurisdiction that would otherwise be unavailable. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982). Analyzing modern doctrine from a horizontal federalism perspective arguably requires rethinking whether consent is a sufficient basis for jurisdiction in cases implicating extraterritorial interests. See *infra* note 365.

<sup>183</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984).

<sup>184</sup> THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28–29 (Stephen Macedo ed., 2001); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 44 (2007) (defining universal jurisdiction as "jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State"); cf. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 91–92 (2004) ("I ground the claim of universal jurisdiction not in an argument that all states have an interest in repressing crimes against humanity, but in the claim that all individual persons do. I label this the *vigilante jurisdiction*[.] . . . [which implies] that criminals against humanity are anyone's fair target. . . . [V]igilante jurisdiction [should be delegated] to any officially constituted tribunal, national or international, that satisfies the requirements of natural justice.").

<sup>185</sup> M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 44 (Stephen Macedo ed., 2004) ("[T]here are only a few cases known to scholars in which pure universal jurisdiction—in other words, without any link to the sovereignty or territoriality of the enforcing state—has been applied."); Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 496–97 (2007) ("Spain has recognized its universal jurisdiction to prosecute entirely foreign atrocity crimes. . . . However, the appropriate scope of universal jurisdiction law is a matter of ongoing debate. Spain's high courts clashed on whether international law permits states to unilaterally prosecute atrocities allegedly committed by

cases.<sup>186</sup> Other potentially dispositive *S* factors are imaginable, but unlikely to gain traction.<sup>187</sup> In any event, *S*-factor cases raise unique and disputed questions,<sup>188</sup> and are best bracketed until we have a sense of what purpose personal jurisdiction doctrine serves in ordinary cases. That understanding can in turn influence assessment of whether *S* factors are appropriate departures from general norms.

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foreigners against other foreigners in a foreign country, devoid of any link to the prosecuting state.”). For an argument that the U.S. employs a form of universal jurisdiction when the Coast Guard detains foreign drug traffickers, see Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191 (2009) (discussing the Maritime Drug Law Enforcement Act).

<sup>186</sup> See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271, 305 (2009) (“[T]here is essentially no practice of universal civil liability outside the United States.”); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 11–12 (2002) (noting that personal jurisdiction doctrine has hampered the ability of U.S. courts to address extraterritorial human rights violations). If universal jurisdiction concepts filtered down to subnational actors such as U.S. states, then, for example, Massachusetts could attempt to provide a forum for a suit by an Oklahoma resident (who for some reason wanted to sue in Massachusetts) against a terrorist from Arizona who detonated a bomb in Oklahoma and had no contacts with Massachusetts. In practice, however, a defendant who worried that a jurisdictional challenge might fail would likely remove the action to federal court and then request a transfer to a more appropriately located federal forum. See 28 U.S.C. §§ 1332(a), 1441(a), 1404(a) (2006).

Related concepts that have not migrated to the United States are aspects of so-called “exorbitant jurisdiction,” which “encompasses assertions of general jurisdiction in cases where neither defendant nor the dispute have contacts with the forum that suffice to make the exercise of adjudicatory power reasonable.” Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 142. “Commonly noted examples include . . . [French law] confer[ring] upon French plaintiffs the privilege of suing aliens on any cause of action in a French court, and . . . [German law under] which the ownership of German assets renders nonresidents amenable to full in personam jurisdiction.” *Id.* at 142–43 (footnotes omitted); cf. Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 504–05 (2006) (observing that “exorbitant” aspects of jurisdictional rules in Europe and the U.S. share a “common core” of enabling local plaintiffs “to sue at home” if the resulting judgment can be enforced domestically).

<sup>187</sup> Possible *S* factors might include the special expertise of the state’s judges in resolving certain kinds of disputes, the efficiency of the state’s unusually competent courts, the fact that the state treats litigation as a commercial sector that it seeks to support by encouraging plaintiffs to file suits in local courts, the relative convenience of the state compared to other possible fora in circumstances where no one state is convenient for all the parties, and the fact that no other forum would be available to the plaintiff (which is unlikely if *C* and *E* occurred elsewhere and *D* is located elsewhere). None of these additional factors seems especially compelling, but my analysis does not depend on their invalidity because one could easily add *S* factors as inputs into the analytical framework that I discuss in Part II.

<sup>188</sup> For discussion of whether transient presence in the forum should justify jurisdiction, see *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559 (1991). For discussion of potential limits on jurisdiction based on continuous and systematic contacts with the forum that are unrelated to the action, see Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171; Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1177 (1966).

Accordingly, the insight that we gain from the second “easy” hypothetical is that constitutional analysis should focus on the connection between the forum, the parties, and the disputed events, although establishing the relative importance of each factor requires further analysis.<sup>189</sup> The two easy cases combined reveal: (1) that jurisdiction should be easy to obtain when all relevant actors and events are located within the forum state; and (2) that jurisdiction should be difficult to obtain when all relevant actors and events are located outside the forum state.

## 2. *Relatively Hard Cases*

Having seen two easy cases, we can consider a potentially harder case where a state invokes jurisdiction over an out-of-state defendant based on out-of-state conduct with a local effect:  $P_x$  v.  $D_y$  in  $F_x$  re  $C_y E_x$ .<sup>190</sup> Permutations of this scenario could address situations where the conduct occurred locally but caused exclusively foreign effects ( $C_x E_y$ ), or where the plaintiff is not a citizen of the forum ( $P_y$ ). These are the sorts of cases that have divided the Supreme Court<sup>191</sup> and in turn spawned critical commentary.<sup>192</sup> But what makes such cases difficult?

The sole distinction between the easy and hard cases is the dispersion of relevant variables across the forum state’s borders. In the easy cases, all variables ( $P$ ,  $D$ ,  $C$ , and  $E$ ) were located inside the forum state (creating a consensus favoring jurisdiction) or outside the forum state (creating a

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<sup>189</sup> Modern “minimum contacts” doctrine considers a subset of these factors, focusing on “the relationship among the defendant, the forum, and the litigation.” *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

<sup>190</sup> Jurisdiction, if it exists, would be “specific” rather than “general” because its factual predicate arises from the defendant’s “contacts with the forum.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985).

<sup>191</sup> *See, e.g., Burger King*, 471 U.S. 462 (7–2 decision upholding Florida’s jurisdiction over suit by Florida plaintiff against Michigan defendant regarding damages for breach of contract; the relevant conduct and effects occurred in Florida and Michigan); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (6–3 decision rejecting Oklahoma’s jurisdiction over suit by New York plaintiff against New York defendants regarding sale of vehicle in New York that caught fire and caused injuries in Oklahoma); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (6–3 decision rejecting California’s jurisdiction over child custody action by California citizen against New York citizen); *Hanson v. Denckla*, 357 U.S. 235 (1958) (5–4 decision rejecting Florida’s jurisdiction over suit by Florida citizens against Delaware citizen regarding conduct and effects in Pennsylvania, Delaware, and Florida). The fact-sensitive nature of these cases is often on clear display. *See Kulko*, 436 U.S. at 102 (Brennan, J., dissenting) (“I cannot say that the Court’s determination against state-court *in personam* jurisdiction is implausible, but, though the issue is close, my independent weighing of the facts leads me to conclude . . . that appellant’s connection with the State of California was not too attenuated . . .”).

<sup>192</sup> *See supra* notes 20–26.

consensus against jurisdiction).<sup>193</sup> In the hard cases, some of the variables are inside the forum, but some are outside. The outside variables weigh against jurisdiction, yet the inside variables favor jurisdiction. Judges who want to uphold jurisdiction can emphasize the inside variables, while judges who want to deny jurisdiction can emphasize the outside variables. This contrasting emphasis is evident in divided Supreme Court decisions.<sup>194</sup> Whether one or another emphasis is convincing depends on what values are important to the constitutional calculus.

For example, consider a variant of the Iowa/Nebraska shooting hypothetical from Part I.B.1. Suppose that the person who stood in Nebraska shooting Iowans obtained his rifle from an unlicensed back-alley dealer in California after requesting weapons suitable for revenge against his “invisible enemies.” The buyer did not specify where these enemies were located, and the dealer did not ask.<sup>195</sup> Assume that the dealer had no connection to Iowa other than having been the source of weapons used to shoot Iowans. A suit by the Iowa victims filed in Iowa against the dealer would resemble our model of a hard case:  $P_x$  v.  $D_y$  in  $F_x$  re  $C_y$   $E_x$ , where  $Y$ =California and  $X$ =Iowa.<sup>196</sup> If a judge were inclined to uphold jurisdiction, she could emphasize  $E_x$  by observing that selling dangerous weapons to dangerous people without knowing where those people intend to act should make a person amenable to suit wherever the inevitable carnage occurs. But if a judge were inclined to reject jurisdiction, she could emphasize  $D_y$  and  $C_y$  by observing that a court should not compel a person to appear in a state in which he never did anything, to which he never aimed anything, from which he never obtained any benefit, and about which he never devoted even a momentary thought. Both positions seem facially

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<sup>193</sup> The one exception was the scenario  $P_y$  v.  $D_x$  in  $F_x$  re  $C_x$   $E_x$ .  $P_y$  was not a citizen of the forum, but this did not matter because the Constitution grants judicial access to foreign plaintiffs in circumstances where a local plaintiff would be able to sue. See *supra* note 173.

<sup>194</sup> For example, compare *World-Wide Volkswagen*, 444 U.S. at 295 (stressing that defendants to suit in Oklahoma sold a car “in New York to New York residents”), with *id.* at 305 (Brennan, J., dissenting) (“The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma.”).

<sup>195</sup> If the dealer had asked and received an answer, jurisdiction in Iowa might be easier to obtain. Cf. *Rodenburg v. Fargo-Mooreheard Y.M.C.A.*, 632 N.W.2d 407, 415–16 (N.D. 2001) (holding that the forum state would have jurisdiction in suit by local shooting victim against nonresident who gave the gun used in the shooting to his friend knowing that the friend and the shooter would take the gun into the forum to collect a debt under predictably volatile circumstances).

<sup>196</sup> For simplicity, I treat the conduct in this hypothetical as having occurred entirely in California, where the dealer sold the guns. One could also treat the conduct as having occurred in both California and Nebraska, where the shooter used the guns.



plausible in theory,<sup>197</sup> although modern jurisprudence is stacked against upholding jurisdiction in Iowa due to the shooter's (rather than the seller's) control over where harm occurred.<sup>198</sup> Determining which position is more

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<sup>197</sup> The case for jurisdiction seems stronger, despite the Supreme Court's rejection of similar theories. See *infra* note 198. For a brief illustration of why the shooter's intervening conduct should not shield the seller from jurisdiction, imagine a scenario where a train makes four stops: at stations 1, 2, and 3 in State X, and at station 4 in State Y. At station 1, a disgruntled railroad employee from X seeks to kill the engineer, with whom the employee had grievances, by leaving a bomb in the engine car with a timer set to detonate at station 3 (in X). At station 2, the engineer becomes ill and is replaced before the train resumes its journey. The timer malfunctions, but eventually the bomb explodes in station 4 (in Y), injuring the replacement engineer. If the victim sues the bomber in Y, one can imagine the bomber making two arguments: (1) "I should not be deemed to have committed a tort because I did not want to injure the victim—the person who I wanted to injure unexpectedly left the train for reasons beyond my control"; and (2) "I should not be subject to jurisdiction in Y because I wanted the bomb to explode in X, and it failed to do so for reasons beyond my control." The first argument would be frivolous: if a wrongdoer intends to harm a person, tort law provides a remedy if he inadvertently harms a different person; the wrongdoer generally is responsible for the desired wrong *whomever* it affects. See RESTATEMENT (THIRD) OF TORTS § 33 cmt. c (Proposed Final Draft No. 1, 2005) (discussing "transferred intent"). The second argument seems to have a similar flaw: if a wrongdoer sets out to cause injuries somewhere but inadvertently causes injuries somewhere else, then jurisdiction law should tolerate adjudication in the place of injury; the wrongdoer should be accountable for the expected wrong *wherever* it occurs (at least absent concerns about the inadvertently encountered forum's convenience). Under this reasoning, the California back-alley dealer who sells a gun to a homicidal buyer knowing that the buyer will use the gun *somewhere* should shoulder the risk of jurisdiction wherever that somewhere turns out to be. Cf. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (holding that Libyan agents who sought to attack France by destroying a French airplane travelling between Africa and Europe were subject to personal jurisdiction in the United States because 7 of the 170 murdered passengers were Americans whose presence on the international flight was "foreseeable," even if not known or desired). *But cf.* Brillmayer, *supra* note 39, at 95 (rejecting analogy between strict substantive liability for unexpected torts and strict jurisdictional liability for unexpected local effects because of the risk that states will excessively "shift[] . . . costs to persons to whom its sovereignty does not extend"). Allowing jurisdiction in Iowa against the California dealer arguably might chill interstate commerce by making the dealer reluctant to engage in transactions that could create out-of-state jurisdictional exposure, but even current doctrine creates some risk of chilling: a dealer who "reasonably anticipates" harm in a distant state (*infra* note 198) might be deterred from the transaction due to fear of jurisdiction. For a general discussion of whether a defendant's subjective or objective expectations should affect a state's jurisdiction, see C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601 (2006).

<sup>198</sup> Jurisdiction would depend on whether the dealer could "reasonably anticipate" being sued in Iowa. See *World-Wide Volkswagen*, 444 U.S. at 297. The shooter's "unilateral activity" in bringing the guns to Iowa could place the case into a category where the Court has repeatedly denied jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citation and internal quotation marks omitted); see *id.* at 475 n.17 ("Applying this principle, the Court has . . . [rejected] personal jurisdiction over an out-of-state automobile distributor whose only tie to the forum resulted from a customer's decision to drive there; over a divorced husband sued for child-support payments whose only affiliation with the forum was created by his former spouse's decision to settle there; and over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there." (citations omitted)). The hypothetical case is distinguishable from relevant precedents because the dealer sold an intrinsically dangerous object despite a strong reason to believe that it would be used to ill-effect by an ill person, but the Court has not had an opportunity to decide if these differences matter.

persuasive requires considering why the dispersion of variables across borders poses a difficult problem.

3. *The Importance and Unimportance of State Borders: Using Insights About Jurisdiction in Federal Court to Inform Understanding of Jurisdiction in State Court*

The fact that hard cases are hard because they involve actors and events dispersed across state borders raises a question about why state borders matter. Perhaps counterintuitively, the borders themselves are not important. Instead, what matters is that a state is attempting to assert authority despite lacking a monopoly on relevant contacts. To see why this is the salient issue, consider jurisdictional concerns that arise in federal court under federal law rather than in state court under state law.

Federal courts routinely adjudicate cases that implicate actors and events dispersed across state borders without raising the constitutional concerns that arise when state courts exercise the same power. The default rule absent a claim-specific exception is that each federal district court operates within the jurisdictional limits of local state courts,<sup>199</sup> with two rare modifications.<sup>200</sup> But Congress has often expanded federal judicial authority in federal question cases by authorizing district courts to exercise personal jurisdiction without regard to where in the U.S. *C* and *E* occurred, or where in the U.S. *P* and *D* are citizens.<sup>201</sup> Similar authority also extends to some diversity cases,<sup>202</sup> which

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<sup>199</sup> See FED. R. CIV. P. 4(k)(1)(A) (“Serving a summons . . . establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”). For a critique of current law linking federal service of process and venue rules to state borders rather than to proxies that assess a forum’s suitability more “accurately and efficiently,” see Sharpe, *supra* note 120, at 2945.

<sup>200</sup> See FED. R. CIV. P. 4(k)(1)(B) (slightly expanding jurisdiction beyond what state law might authorize over “a party joined under Rule 14 or 19 [who] is served within a judicial district of the United States and not more than 100 miles from where the summons was issued”). Personal jurisdiction is also available in federal question cases where no state court would have jurisdiction. See *id.* at 4(k)(2). This rule would not apply to the cases discussed in this Article, which involve purely domestic actors and events, such that jurisdiction presumably would be appropriate in at least the defendant’s state of citizenship, if not elsewhere. See *infra* note 227.

<sup>201</sup> See, e.g., Commodity Exchange Act, 7 U.S.C. § 13a-2(4) (2006); 9 U.S.C. § 9 (2006) (award confirmations under Arbitration Act); Clayton Act, 15 U.S.C. § 22 (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2006); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (2006); 28 U.S.C. § 1655 (2006) (property lien enforcement); Employee Retirement Income Securities Act, 29 U.S.C. § 1132(e)(2) (2006). The Supreme Court has facilitated this broad assertion of jurisdiction by promulgating a rule that “[s]erving a summons” in a federal district court action “establishes personal jurisdiction” whenever

raises complex choice of law issues.<sup>203</sup> The rationale for tolerating broader personal jurisdiction in federal courts than in state courts is that the forum is the U.S. rather than a state, and thus the relevant borders for jurisdictional purposes are national.<sup>204</sup> Congress can thus ignore state borders when it establishes federal districts and defines the scope of each district's personal jurisdiction.<sup>205</sup> The Supreme Court has never addressed a constitutional

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"authorized by a federal statute." FED. R. CIV. P. 4(k)(1)(C); *cf.* 28 U.S.C. § 2072(a) (2006) (authorizing the Supreme Court to "prescribe general rules of practice and procedure").

<sup>202</sup> *See* 28 U.S.C. § 2361 (2006) (authorizing nationwide service in interpleader cases); FED. R. CIV. P. 4(k)(1)(B) (selectively authorizing out-of-state service within 100 miles of the forum).

<sup>203</sup> The fact that the Constitution authorizes Congress to provide a forum for diversity cases does not necessarily mean that it authorizes Congress to displace otherwise applicable state law. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (plurality opinion) ("Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure." (citation omitted)). Two questions therefore arise: (1) can a federal long-arm statute in diversity cases be longer than the statute that would apply in state court?; and (2) even if federal and state long-arm statutes are coextensive (because the state statute asserts the maximum constitutionally-permissible reach), can the Fifth Amendment open a federal diversity forum to a case that the Fourteenth Amendment excludes from state court? The Supreme Court has not directly addressed either question. *Cf.* *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988) (holding that federal statute governing venue transfer displaces inconsistent state forum selection rules in diversity cases, but not considering whether Congress may authorize venue within states in which the Constitution would not otherwise tolerate personal jurisdiction); *Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that Congress can specify rules governing the manner of service in diversity cases, but not considering whether Congress can expand the scope of personal jurisdiction beyond what would be permissible in the local state court); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949) (holding that when "one is barred from recovery in the state court, he should likewise be barred in the federal court," but citing cases discussing state limits on remedies rather than jurisdiction); *see also* *Arrowsmith v. UPI*, 320 F.2d 219, 226 (2d Cir. 1963) (en banc) (Friendly, J.) ("[T]he constitutional doctrine announced in [*Erie*] would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not."). Commentators disagree about how the *Erie* doctrine would apply. *Compare* Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 746 (1988) (nationwide jurisdiction in diversity cases "[a]rguably . . . would present a serious constitutional issue" because it "would cut deeply against the grain of *Erie* . . . and would provide a powerful incentive to forum-shop"), with Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness"*, 58 SMU L. REV. 1313, 1379 (2005) ("[A] statute authorizing nationwide jurisdiction of federal courts in diversity cases would be constitutional under *Erie* . . ."). *Cf.* Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1986 (1991) (suggesting that states may be "indifferent to federal adjudication of cases" that could not be heard in state court); *id.* at 1994 n.280 ("The availability of broad federal personal jurisdiction would . . . divert some business from the state courts" and therefore create "state-federal friction").

<sup>204</sup> *See infra* note 211 (citing sources). The constitutional inquiry in federal court is also different than in state court because the Fourteenth Amendment's Due Process Clause does not bind Congress; instead, the Fifth Amendment's Due Process Clause applies. *See infra* note 211.

<sup>205</sup> *Cf.* 28 U.S.C. § 131 (2006) (creating a district encompassing "Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho"). Neither Article I nor Article III expressly limits how Congress may treat state borders when structuring inferior federal courts. *See* U.S. CONST. art. I, § 8, cl. 9; *id.* art. III.

challenge to this theory that federal courts may assert personal jurisdiction “based on an aggregation of the defendant’s contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits,”<sup>206</sup> but dicta supports it.<sup>207</sup> Moreover, four Justices have endorsed the theory,<sup>208</sup> as have rulemakers<sup>209</sup> and commentators.<sup>210</sup> The courts of appeals that have considered the theory also have overwhelmingly endorsed it: five circuits hold that jurisdiction is always constitutional whenever a defendant served in the U.S. has minimum contacts with the U.S.,<sup>211</sup> two circuits add a requirement that adjudication in the forum should not impose unfair burdens on the defendant,<sup>212</sup> and three circuits fall into one of the prior two groups but

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<sup>206</sup> *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (noting issue without addressing it).

<sup>207</sup> *See* *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (stating that “Congress could provide for service of process anywhere in the United States” without considering potential constitutional objections to jurisdiction); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) (same); *United States v. Union Pac. R.R.*, 98 U.S. 569, 604 (1878) (same); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (same).

<sup>208</sup> *See* *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting, joined by Brennan, J.) (“[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court. . . . The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.”); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 192 (1979) (White, J., dissenting, joined by Brennan & Marshall, JJ.) (“[T]here [are] no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents.”).

<sup>209</sup> *See* FED. R. CIV. P. 4(k) advisory committee’s note to 1993 amendment (“The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. . . . There also may be a further Fifth Amendment constraint in that a plaintiff’s forum selection might be so inconvenient to a defendant that it would be a denial of ‘fair play and substantial justice’ required by the due process clause, even though the defendant had significant affiliating contacts with the United States.” (citations omitted)).

<sup>210</sup> Commentators differ about whether aggregate contacts with the U.S. are sufficient to confer personal jurisdiction, or whether jurisdiction might nevertheless be unfair under some circumstances. *Compare* Casad, *supra* note 5, at 1603 (“Fairness and convenience are important considerations, but they can be adequately assured by the venue statutes.”), *with* Fullerton, *supra* note 92, at 6 (“Federal courts should not presume that it is reasonable to assert personal jurisdiction over a defendant merely because the defendant is located in, resides in, or has minimum contacts with the United States.”), *and* Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 439 (1992) (“[T]he Fifth Amendment should be interpreted to include a fairness limitation on Congress’s ability to authorize nationwide service of process . . . .”), *and* Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 48 (1988) (“[C]ongressional power [to authorize nationwide service] should be limited by a case by case analysis of the fairness of a forum to hear a particular matter.”).

<sup>211</sup> *See* *Med. Mut. of Ohio v. DeSoto*, 245 F.3d 561, 567 (6th Cir. 2001); *Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000); *In re Fed. Fountain, Inc.*, 165 F.3d 600, 601–02 (8th Cir. 1999) (en banc); *Busch v. Buchman, Buchman & O’Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994); *Go-Video Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1416–17 (9th Cir. 1989).

<sup>212</sup> *See* *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997); *Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 946 (11th Cir. 1997). The majority position that the Fifth Amendment does not require a fairness inquiry if minimum contacts are present, even though the Fourteenth Amendment does require such an inquiry, at first glance is difficult to justify as a matter of textual interpretation because both

have not been explicit about which.<sup>213</sup> One potential outlier circuit seems to join the group requiring a fairness inquiry but has used loose language suggesting that federal district courts can assert jurisdiction only if the defendant has contacts with the state in which the federal court sits.<sup>214</sup>

The broad scope of personal jurisdiction in federal court relative to state court highlights the curious role of state borders in jurisdictional analysis. For example, reconsider the “easy” case  $P_y$  v.  $D_y$  in  $F_x$  re  $C_y E_y$ , which a state court would not be able to hear (absent an  $S$  factor) because the forum has no connection to  $P$ ,  $D$ ,  $C$ , or  $E$ .<sup>215</sup> Because  $Y$  and  $X$  are both states within the U.S., we can rewrite the case as  $P_{US}$  v.  $D_{US}$  in  $F_{US}$  re  $C_{US} E_{US}$ . The rewrite does not alter jurisdictional analysis if  $F_{US}$  is a state court—nothing has changed other than labels. But the rewrite would alter the analysis if  $F_{US}$  were a federal court adjudicating a claim for which Congress authorized nationwide service of process. The transition from state to federal court would mean that  $P$ ,  $D$ ,  $C$ , and  $E$  are all within the forum, making the case resemble the  $P_x$  v.  $D_x$  in  $F_x$  re  $C_x E_x$  scenario in which jurisdiction was clearly present.<sup>216</sup>  $P_{US}$  v.  $D_{US}$  re  $C_{US}$

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Amendments use the identical phrase “due process of law.” U.S. CONST. amends. V, XIV, § 1. However, the Supreme Court has interpreted these words to incorporate historical understandings of proper procedure, *see* *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878), and thus the two clauses need not have the same meaning if they embody different understandings of how federal and state courts should behave. Moreover, jettisoning a fairness inquiry under the Fifth Amendment when a defendant is served in the forum (the U.S.) is consistent with the Court’s plurality holding that a separate fairness inquiry is unnecessary under the Fourteenth Amendment when the defendant is served in the forum (the state in *Burnham*, the U.S. in federal cases). *See Burnham*, 495 U.S. at 619–28 (plurality opinion). The absence of a fairness inquiry may also be an extension of *Milliken v. Meyer*, 311 U.S. 457 (1940), because if the Constitution allows state courts to exercise jurisdiction merely because the defendant is a citizen of the forum state, then federal courts presumably can exercise jurisdiction merely because the defendant is a U.S. citizen. *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (“Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.”); *see supra* note 39. In any event, the fairness inquiry is rarely relevant in federal cases against domestic defendants because judges handle concerns about the forum’s suitability “primarily” by considering whether a venue transfer is appropriate under 28 U.S.C. § 1404. *ESAB Group*, 126 F.3d at 627 (quoting *Hogue v. Milodon Eng’g, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984)).

<sup>213</sup> *See* *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 370 n.2 (3d Cir. 2002) (leaning toward a fairness inquiry); *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992); *Mariash v. Morrill*, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974).

<sup>214</sup> *Compare* *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000) (listing state contacts as one of five relevant but not necessarily dispositive factors in the fairness inquiry), *with id.* at 1213 (“[D]efendants have sufficient contacts with Utah . . .”). In contrast, other courts that require a fairness inquiry note that “a defendant’s contacts with the forum state play no magical role in the Fifth Amendment analysis.” *BCCI*, 119 F.3d at 946.

<sup>215</sup> *See supra* text accompanying notes 176–80.

<sup>216</sup> *See supra* text accompanying notes 171–73.

$E_{US}$  is thus an easy case in federal court for the same reason that  $P_x$  v.  $D_x$  re  $C_x$ .  $E_x$  is an easy case in state court: all variables are clustered on the same side of the forum's borders. In both scenarios, the existence of local borders within the forum is irrelevant absent an unlikely challenge to the forum's convenience<sup>217</sup>: city and county borders do not affect constitutional analysis of personal jurisdiction in state courts adjudicating claims under state law,<sup>218</sup> and state borders do not affect constitutional analysis of personal jurisdiction in federal courts adjudicating claims under federal law.<sup>219</sup> Yet state borders do affect constitutional analysis of personal jurisdiction in state courts adjudicating claims under state law.<sup>220</sup>

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<sup>217</sup> Some circuits assessing personal jurisdiction under the Fifth Amendment do not even consider whether a federal forum would be convenient, *see supra* text accompanying notes 211–14, and even when convenience is relevant, domestic defendants face an uphill battle in establishing the inconvenience (or unfairness) of a federal court within their home country, *see supra* note 212. In contrast, an advisory committee note to Rule 4(k)(2) suggests that “district court[s] should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result,” but does not contain a similar admonition to protect non-alien defendants. FED. R. CIV. P. 4(k) advisory committee’s note to 1993 amendment.

<sup>218</sup> *See supra* text accompanying notes 174–75.

<sup>219</sup> *But cf.* David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 *FORDHAM L. REV.* 1, 35 n.203 (1987) (“[T]here is no reason to assume that the Constitution places no restriction on Congress’ venue choices. Whether one calls it ‘venue’ or ‘jurisdiction,’ a defendant still has a due process liberty interest at stake.”).

<sup>220</sup> Congress in theory could authorize state courts to exercise nationwide personal jurisdiction in federal question cases, which would raise an interesting issue about the applicable source of constitutional limits on personal jurisdiction: would the Fifth Amendment apply because the long-arm statute originates in Congress, or would the Fourteenth Amendment apply because the summons emanates from a state court? This is an open question. *Compare* Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 *BYU L. REV.* 731, 764 (“[I]f Congress has authorized nationwide service of process over [a] claim, the state court has the power of nationwide service of process [under the Fifth Amendment].”), *with* Joan Steinman, *Reverse Removal*, 78 *IOWA L. REV.* 1029, 1119 (1993) (“A congressional grant of nationwide jurisdiction to the state courts could not withstand a Fifth Amendment challenge on the basis of nothing more than the defendant’s presence in, or contacts with, the United States.”). *See also infra* note 347 (discussing recommendations of the ALI Complex Litigation Project). Yet the question of which Amendment applies seems misplaced because the viability of nationwide service in state courts depends on the answer to a much broader question: under what circumstances can Congress authorize states to behave in ways that the Constitution would otherwise prohibit? *Cf.* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 *HARV. L. REV.* 1468 (2007) (addressing this question in several contexts, but not considering Congress’s power to regulate personal jurisdiction in state courts). From this perspective, the issue is not whether the Fourteenth Amendment limits state power (it obviously does under current doctrine) but whether Congress can abrogate those limits without in turn violating the Fifth Amendment. So the question then becomes: would abrogating one type of “due process” violate another type of “due process”? The Supreme Court has addressed this question only in thinly reasoned dicta, stating that Congress cannot “authorize violations of the Due Process Clause” without considering whether by virtue of congressional authorization certain acts might cease to be due process violations. *See* *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992). Commentators have not engaged the question, which could fill its own article.

The fact that state borders sometimes matter and sometimes do not reveals three useful insights. First, state borders are not intrinsically relevant when analyzing personal jurisdiction. The mere fact that a case implicates actors and events scattered across multiple states does not tell us anything about whether the defendant must appear in the forum. Instead, the defendant's obligation to appear depends on the type of forum issuing the summons: state or federal. Second, no matter what type of forum issues the summons, some sort of border still matters. State courts can ignore county borders but not state borders, and federal courts can ignore state borders but not national borders.<sup>221</sup> Finally, the fact that state borders limit state jurisdiction and federal borders limit federal jurisdiction suggests that what really matters is that a forum cannot reach beyond *its own* borders absent sufficient grounds for doing so.

The constitutional impediment to unlimited personal jurisdiction in state court thus has something to do with the limits that the state's borders place on the state's power. This observation invites a question: why? What is it about a state border that limits the state's authority to acquire power over defendants in cases that involve contacts with multiple states? One possibility is that reaching over a state border implicates "liberty" interests. The next subsection explores that possibility and finds the concept of liberty unhelpful. Part II then engages the "why" question in more detail by considering personal jurisdiction in the broader context of horizontal federalism.

#### 4. *The Derivative Role of Liberty Interests*

The Supreme Court's answer to the question of why a state's borders limit its courts' personal jurisdiction hinges on the ill-defined concept of "liberty." According to the Court, "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."<sup>222</sup>

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<sup>221</sup> For a discussion of how national borders limit personal jurisdiction in federal court, see Degnan & Kane, *supra* note 44.

<sup>222</sup> *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Subsequent decisions have cited this language from *Bauxites* without elaborating the meaning of "liberty." See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985).

Earlier decisions sometimes characterized the liberty interest in terms of a defendant's "personal privilege" to avoid litigation in the forum, which helped explain why objections to jurisdiction were waivable:

No court can . . . exercise jurisdiction over a party unless he shall voluntarily appear, or is found within the jurisdiction of the court, so as to be served with process. Such process cannot reach

Liberty's central role is an inevitable consequence of the Court's holding that the Due Process Clause is the "only source" of constitutional limits on personal jurisdiction.<sup>223</sup> The Clause solely protects "life, liberty, or property."<sup>224</sup> Life is irrelevant because responding to a summons is unlikely to be fatal or physically harmful. Property is irrelevant because the Court treats in personam jurisdiction as operating on the people against whom claims are asserted, rather than on the property that an unsuccessful defendant may be compelled to surrender.<sup>225</sup> Liberty thus becomes the only remaining beacon of constitutional guidance. But it is a dim beacon. The Court has not explained what exactly liberty means in the context of personal jurisdiction,<sup>226</sup> and an exploration of

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the party beyond the territorial jurisdiction of the court. And besides, this is a personal privilege which may be waived by appearance; and if advantage is to be taken of it, it must be by plea or some other mode at an early stage in the cause. No such objection appears to have been made to the jurisdiction of the court in the present case. There was no want of jurisdiction, then, as to the person . . . .

Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 623 (1838); *see also* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979) ("[N]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.").

<sup>223</sup> *Bauxites*, 456 U.S. at 703 n.10.

<sup>224</sup> U.S. CONST. amend. XIV, § 1.

<sup>225</sup> In theory, one could try to reconceptualize jurisdictional assertions to implicate property rather than liberty interests by framing the problem in terms of the state's power to impose remedies (which takes the defendant's property) rather than to compel the defendant's appearance (which infringes his liberty). Yet seizing property without providing the owner an opportunity to be heard would violate due process. *See Fuentes v. Shevin*, 407 U.S. 67, 81–82 (1972). That opportunity would not be voluntary in any meaningful sense because it would exist on pain of default; in effect, the state asserting jurisdiction would be compelling the defendant to appear, and thus an action against property would infringe a liberty interest in avoiding that appearance. The State's summons under the current and reconceptualized approaches to jurisdiction would thus be mirror images: the liberty approach posits a demand of "appear or lose your property," while the property approach posits a demand of "lose your property unless you appear." Apart from this functional equivalence, using the "property" rather than "liberty" label would not seem to alter due process analysis because both approaches would require defining the state's geographic reach. If the Constitution at some point limits a state's ability to reach beyond its borders to grab a person, it is difficult to see how grabbing that person's property would be less objectionable. *See Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.").

If the property were within the forum, then the state could attach it and thereby convert an in personam action into an in rem action. In such cases, "property" rather than "liberty" interests presumably would animate jurisdictional analysis, although the Court has not said so explicitly. *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (stating in the course of reviewing an in rem civil forfeiture proceeding that the seizure implicated "property interests protected by the [Fifth Amendment's] Due Process Clause").

<sup>226</sup> The Court has of course articulated tests for determining if jurisdiction exists that indirectly communicate what the Court thinks liberty means in practice. But the tests are unsatisfying in part because



the concept reveals that it does not explain what purpose limits on personal jurisdiction serve.

The Court's reliance on liberty interests to limit personal jurisdiction begs the question: liberty from what? What is it about a state's assertion of jurisdiction over a person that impinges that person's constitutionally protected liberty? Three answers seem possible. The defendant may be entitled to: (1) liberty from suit; (2) liberty from suit in the forum state; or (3) liberty from being compelled to enter the forum state by the forum state. Only the last concept makes sense, but for reasons that the Court has not acknowledged.

Constitutional limits on personal jurisdiction do not exist to provide defendants with liberty from being sued. In the kinds of cases that this Article discusses—where U.S. citizens violate state law by acting and causing injury within the U.S.—there will always be a state court somewhere with the constitutional authority to exercise personal jurisdiction.<sup>227</sup> A defendant

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they do not seem to serve any higher purpose, *see supra* notes 2–6, 7–13, which may be a consequence of the Court's failure to directly explore the concept of liberty.

<sup>227</sup> Examples include the state where the defendant is domiciled, *see supra* note 39, the state where the defendant is present when served, *see supra* note 181, and often the states where significant conduct occurred or effects were experienced, *see supra* Part I.B. In practice, jurisdiction might be unavailable in unusual circumstances if: (1) the states that could constitutionally exercise jurisdiction have long-arm statutes that preclude them from doing so; or (2) no state has jurisdiction over all defendants whose joinder state law requires. *See supra* note 78.

One could go further and imagine a normative argument—contrary to current U.S. “minimum contacts” jurisprudence—that at least one domestic forum *should* have jurisdiction over any case with domestic contacts where no foreign forum is available. A case's contacts with the U.S. as a whole would thus justify jurisdiction in a state that would otherwise lack power to provide a forum if the alternative would be that the plaintiff could not sue anywhere. Under this theory, the presumed necessity of opening a forum in some state animates consideration of which state that will be, and prevents a hypertechnical application of jurisdictional doctrine from concluding that no forum is available. For examples of this idea in operation outside the U.S., see UNIF. COURT JURISDICTION & PROCEEDINGS TRANSFER ACT § 6 (1994) (Can.) (“A court that . . . [otherwise] lacks territorial competence in a proceeding may hear the proceeding . . . if it considers that: (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding; or (b) the commencement of the proceeding in a court outside [the enacting province or territory] cannot reasonably be required.” (fourth and fifth alterations in original)); LOI SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [Federal Code of Private International Law] Dec. 18, 1987, RS 291, art. 3 (Switz.) (“If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction.”) [translated from “Lorsque la présente loi ne prévoit aucun for en Suisse et qu’une procédure à l’étranger se révèle impossible ou qu’on ne peut raisonnablement exiger qu’elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes.”]. *Cf. Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984) (“We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.”).

invoking liberty interests to challenge personal jurisdiction thus cannot contend that the Constitution forbids *any state* from exercising jurisdiction over him, but merely that the *wrong state* has asserted jurisdiction. The issue is not *whether* a state may provide a forum, but *which* states may provide a forum.

Liberty interests also do not protect defendants from being sued within a particular state. This conclusion is counterintuitive. The practical effect of an order invalidating a state's exercise of jurisdiction is that the defendant avoids suit in the forum state, which creates a misleading impression that enabling such avoidance was the court's goal. But liberty interests turn out not to shield defendants from the forum state. Consider the following scenario: a plaintiff sues a Massachusetts citizen in a Vermont state court under Massachusetts law based on conduct and effects in Massachusetts, and the court dismisses for want of personal jurisdiction because the defendant lacked sufficient contacts with Vermont. The same plaintiff then files a new action against the same defendant based on the same facts, but this time frames her claims under a federal statute authorizing nationwide service of process and sues in the District of Vermont.<sup>228</sup> The Constitution would almost certainly permit the federal court in Vermont to exercise personal jurisdiction.<sup>229</sup> The defendant thus does not seem to possess a constitutionally protected liberty interest in avoiding suit within the borders of Vermont. One could argue that the Fourteenth Amendment did create a right to avoid Vermont, but that Congress was free to ignore that right because the Fifth rather than Fourteenth Amendment regulates personal jurisdiction in federal court and does not recognize the same sorts of liberty interests that apply in state court.<sup>230</sup> However, the ease with which intrastate forum shopping into federal court can circumvent this supposed Fourteenth Amendment right to avoid the state suggests that such a right would be a hollow foundation for personal jurisdiction doctrine. Instead, a subtly different account of the relevant liberty interest seems more plausible than relying merely on a right not to enter the state.

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<sup>228</sup> Dismissals on personal jurisdiction grounds are not claim preclusive, and thus the plaintiff would be free to refile in federal court despite having withheld the federal claim in the prior action. See RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) (1982).

<sup>229</sup> See *supra* Part I.B.3. To avoid issues regarding convenience, assume that the defendant resides in northern Massachusetts and that the court is nearby in southern Vermont.

<sup>230</sup> See *supra* note 204. This response would posit a clash between two constitutional values—one rejecting state jurisdiction and one favoring federal jurisdiction—and a prioritization of the latter.

The most sensible account of the liberty interest supposedly underlying personal jurisdiction doctrine is that the defendant has a right to avoid being haled into a state *by that state*. The Massachusetts citizen who can resist jurisdiction in a Vermont state court but not in a Vermont federal court cannot avoid the *place of Vermont*, but can avoid the *power of Vermont* (as opposed to the power of Congress or the power of Massachusetts). If this is in fact the relevant interest, it seems less robust than the majestic title of “liberty” suggests. The defendant cannot complain about being sued or about where he is sued, but only about the identity of the entity compelling him to appear.<sup>231</sup> Moreover, it is still not clear why even this cabined interest exists.<sup>232</sup> Liberty is not a self-justifying concept, and thus the constitutionally protected status of asserted liberty interests is open to debate and reexamination depending on the nature of the claim.<sup>233</sup> Relying on liberty interests to limit state jurisdiction therefore requires some sense of the values that such limits promote and the costs that they impose. That discussion is missing from the Court’s invocation of liberty,<sup>234</sup> despite the central role that interest-balancing plays in other aspects of due process jurisprudence that protect liberty interests.<sup>235</sup> The Court’s jurisprudence of course provides clues from which one can infer what it thinks liberty means; for example, that defendants should be free from suits in places they could not have reasonably anticipated or did not purposefully encounter.<sup>236</sup> But the Court has never explained how the abstract concept of “liberty” translates into these particular doctrinal tests given that the defendants are merely resisting a state’s power rather than its location.

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<sup>231</sup> In contrast, applications of the Due Process Clause outside the federalism context focus on whether state action is “substantively unfair or mistaken” such that it burdens a right to avoid “governmental interference” that presumably exists with respect to all states, and not just the forum. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

<sup>232</sup> One possibility is that the liberty interest does not exist—i.e., that the Court was wrong when it held that the Due Process Clause (and hence liberty) is relevant to personal jurisdiction. Many commentators hold this view and would ground jurisdiction doctrine elsewhere in the Constitution. *See supra* notes 2–6. If these commentators are correct, there would still be a question about why *any* provision of the Constitution should be read to limit which states may host suits when the forum is convenient and the suit clearly belongs somewhere in the U.S. Part II’s discussion of horizontal federalism would therefore still be relevant because it addresses this broader question of why and how the Constitution limits state authority in circumstances that implicate the interests of multiple states.

<sup>233</sup> For example, compare *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that bakers had liberty interest in avoiding limits on their working hours), with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (retreating from liberty of contract theory underlying *Lochner*).

<sup>234</sup> *See supra* note 222.

<sup>235</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); Redish, *supra* note 11 (discussing how the Supreme Court’s implementation of the Due Process Clause in the jurisdictional context is inconsistent with its approach in other contexts).

<sup>236</sup> *See supra* notes 1, 71.

The absence of an explanation for why liberty matters may be a legacy of the due process theory's odd origins. The first Supreme Court decision to identify the Due Process Clause as a source of limits on personal jurisdiction in state courts was *Pennoyer v. Neff*.<sup>237</sup> Yet Justice Field's opinion in *Pennoyer* defends these limits using language that is materially identical to language that he used in a prior opinion—*Galpin v. Page* (which *Pennoyer* never cited)—that discussed limits on personal jurisdiction without mentioning the Due Process Clause.<sup>238</sup> Consider first *Galpin*:

The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy.<sup>239</sup>

And then *Pennoyer*:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.<sup>240</sup>

The text of the Due Process Clause thus apparently did not alter the basic jurisdictional standard that existed prior to its adoption. Instead, as the *Pennoyer* Court admitted, the Clause codified prior “rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”<sup>241</sup> The Clause's text thus did not do any real

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<sup>237</sup> 95 U.S. 714 (1878).

<sup>238</sup> 85 U.S. (18 Wall.) 350 (1873). The Court decided both *Pennoyer* and *Galpin* after the states ratified the Due Process Clause in 1868. However, the relevant events in both cases occurred before 1868, and thus the Due Process Clause was not directly controlling in either. See *Pennoyer*, 95 U.S. at 719 (events in 1866); *Galpin*, 85 U.S. (18 Wall.) at 354 (events in 1855–1856). It is not clear why Justice Field chose to cite the Due Process Clause in *Pennoyer* but not in *Galpin*. For a discussion of Justice Field's general approach to due process issues, see Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75 (1997); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 500–08 (1987).

<sup>239</sup> *Galpin*, 85 U.S. (18 Wall.) at 367. For a critique of Justice Field's reasoning in *Galpin*, which blurred the distinction between state power and individual rights (i.e., the capacity/constraint distinction that I note in Part II.A), see Conison, *supra* note 50, at 1113–35.

<sup>240</sup> *Pennoyer*, 95 U.S. at 720.

<sup>241</sup> *Id.* at 733. *Pennoyer*'s reliance on the Due Process Clause was technically dicta because the disputed service occurred before the Fourteenth Amendment was ratified. See *supra* note 238. However, the Court has treated *Pennoyer* as if it constitutionalized personal jurisdiction doctrine. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

work in generating tests for assessing whether jurisdiction exists.<sup>242</sup> Modern doctrine has repudiated *Pennoyer's* assessment of what these tests should be, but has not departed from *Pennoyer's* indifference to textual exegesis.<sup>243</sup>

The fact that “liberty” in the jurisdictional context does not have a self-evident meaning and that the concept makes sense only in a narrowly defined context takes us back to where we left off at the end of the prior section. The question that we were trying to answer is why the Constitution prevents states from exercising personal jurisdiction in certain situations, and our supposition was that such limits arise from the need to prevent the wrong state from exercising jurisdiction in cases involving parties and events scattered across multiple states’ borders. The concept of liberty neither answers the question nor invalidates the supposition. Positing that jurisdiction in some cases can infringe a liberty interest takes us no closer to knowing why that interest is important, or the circumstances under which it yields to competing interests. An additional source of insight is therefore necessary to justify and define the limited scope of state jurisdiction, and thus to flesh out how the Constitution governs the relationship between a state seeking to compel a person’s appearance and the person who does not want to appear. The horizontal federalism framework in Part II can provide that insight.

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<sup>242</sup> Interestingly, Justice Field did not acknowledge that his opinion in *Pennoyer* was arguably in some tension with his opinion four years earlier in *Galpin*. *Galpin* implicitly tolerated publication notice directed at nonresidents, while *Pennoyer* rejected it. Compare *Galpin*, 85 U.S. (18 Wall.) at 369 (“When . . . by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions.”), with *Pennoyer*, 95 U.S. at 727 (“Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.”). *Pennoyer* thus moved beyond *Galpin* by invalidating a state statute enacted in derogation of the common law rather than merely construing it narrowly. For a discussion of *Galpin* explaining why Justice Field may have been reluctant to cite it in *Pennoyer*, and why the *Galpin* holding is arguably consistent with the *Pennoyer* holding, see John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 645–70 (1995).

<sup>243</sup> Nor could the modern Court suddenly reengage the text without raising vexing questions: if a text ratified in 1868 actually made a nuanced contribution to preexisting personal jurisdiction doctrine by creating new limits on state jurisdictional power, then such limits did not exist in the original Constitution, which would mean that proponents of such limits would need to explain why they suddenly became appropriate in 1868 by way of a clause that never mentions them.

## II. HORIZONTAL FEDERALISM FRAMEWORK FOR ASSESSING HOW STATE BORDERS LIMIT PERSONAL JURISDICTION

As we have seen, constitutional law limiting the scope of personal jurisdiction in state courts in cases involving domestic actors and events serves an *allocational* function: it defines which states can and which states cannot provide a forum to issue binding judgments. Jurisdiction over any particular defendant is presumably proper in the courts of at least one state, and possibly many states.<sup>244</sup> A defendant who objects to a state's assertion of jurisdiction over him thus cannot deny that he is subject to some state's authority, and must instead contend that the wrong state has asserted authority. Whether a state asserting jurisdiction is the "wrong" state is an easy question when the state lacks any contact with the parties or the dispute (rendering jurisdiction inappropriate) and when it has a monopoly on such contacts (rendering jurisdiction appropriate).<sup>245</sup> The jurisdictional question is difficult only when relevant contacts straddle state borders, such that multiple states have a potential interest in providing a forum.<sup>246</sup>

Conceptualizing personal jurisdiction doctrine as allocating power between states situates it within the broader context of horizontal federalism that the Supreme Court once briefly embraced, but then prematurely rejected.<sup>247</sup> Section A explores this context, while section B and Part III outline the insight that this new perspective can provide into the doctrine's content and normative foundations.<sup>248</sup>

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<sup>244</sup> See *supra* note 227.

<sup>245</sup> See *supra* Part I.B.

<sup>246</sup> See *supra* Part I.B.

<sup>247</sup> See *infra* text accompanying notes 261–62.

<sup>248</sup> By positing that horizontal federalism principles should define the jurisdictional reach of state courts, I do not mean to suggest that federalism concerns are *intrinsic* to the *concept* of personal jurisdiction. To the contrary: personal jurisdiction is an issue that courts confront even if they do not exist within a federal structure or lack constitutional rules similar to those in the U.S. See generally Linda Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389 (1995). Scholars therefore are capable of articulating rules governing personal jurisdiction that seem normatively sensible and yet have nothing to do with "federalism" as that term is used in the U.S., see, e.g., AM. LAW INST. & INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE § 2 (2004), reprinted in 9 UNIFORM L. REV. 758, 762 (2004), although federalism concepts may be relevant in transnational litigation if one posits that at least one nation should have jurisdiction over every claim, such that jurisdictional rules allocate power between the "wrong" and "right" national legal systems, see Michaels, *supra* note 109, at 1058 ("[T]he role of state boundaries in the international European paradigm is one of allocation . . . . The problem with extraterritorial jurisdiction is that it interferes with another state's jurisdiction . . ."). However, no matter how sensible jurisdictional rules may seem in the abstract, courts in the U.S. cannot rely on such rules to trump state preferences in domestic

### A. *Integrating Personal Jurisdiction into a Broader Constitutional Context*

An emerging field of constitutional law recognizes and explores a widely overlooked aspect of American federalism: how the Constitution regulates the allocation of authority between states. The relationship between states is “horizontal” because states have equal status and equivalent powers, and thus exist on the same plane of authority. In contrast, the Supremacy Clause elevates federal law above state law,<sup>249</sup> making the federal–state relationship “vertical.” Scholarship about “federalism” typically focuses on this vertical dimension, but the horizontal dimension is now “coming into view as a subject for the legal academy.”<sup>250</sup>

Horizontal federalism problems have similar structures. Typically, the Constitution endows all fifty states with a certain power and thus creates a scenario where each state might exercise its power in a manner that burdens other states or citizens of other states, which in turn requires a rule explaining how the existence of multiple states with equivalent powers limits the authority of each.<sup>251</sup> Such a rule would posit that if a state’s action implicates sufficiently important interests and is sufficiently objectionable (for any number of context-sensitive reasons) then the action is unconstitutional. Examples of horizontal federalism problems that can lead courts to invalidate state action on constitutional grounds include efforts by one state to tax property located in another state, to apply its substantive law to extraterritorial transactions, to regulate local commerce in a manner that affects actors or markets in other states, or to discriminate between in-state citizens and out-of-

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litigation unless courts can extract them from an authoritative source. Absent an applicable statute or treaty, that source is the Constitution. My goal therefore is to consider the context in which personal jurisdiction issues arise under the Constitution, which leads me to conclude that principles governing horizontal federalism are the mechanism for translating abstract jurisdictional ideas into binding domestic law.

<sup>249</sup> U.S. CONST. art. VI, cl. 2.

<sup>250</sup> Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44 (2007). For examples of such scholarship, see Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008); Vanessa Abballe, *Comparative Perspectives of the Articulation of Horizontal Interjurisdictional Relations in the United States and the European Union: The Federalization of Civil Justice*, 15 NEW ENG. J. INT’L & COMP. L. 1 (2009); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267 (2009); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003); Michael Aaron Granne, *Two-Dimensional Federalism and Foreign Affairs Preemption*, 44 VAL. U. L. REV. 863 (2010); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006); Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005).

<sup>251</sup> See Erbsen, *supra* note 250, at 501–04 (defining horizontal federalism).

state citizens when administering government programs.<sup>252</sup> In each scenario, the question is whether a state has exceeded a limit on its power that exists because of its status as only one of fifty co-equal entities that must govern within limits created by the existence of the other forty-nine.

Assertions of personal jurisdiction by state courts in the “difficult” cases discussed in Part II fit easily into the horizontal federalism mold. The Constitution reserves power for all states to provide fora for civil litigation.<sup>253</sup> If each of these fifty states could exercise that power in every case, then personal jurisdiction would never be an issue. If instead a single state had a monopoly on all relevant contacts in every case, then personal jurisdiction would be easy to ascertain. The problem is that in “difficult” cases a decision by one state to provide a forum can undermine the interests of other states,<sup>254</sup> citizens of other states,<sup>255</sup> and the nation.<sup>256</sup> Some states might therefore be the “right” states to provide a forum and others the “wrong” states, depending on the facts of the case and how one defines the relevant values. A rule is therefore necessary to determine when a power that all states possess (here, to provide civil fora) might nevertheless be unavailable in particular circumstances because the exercise of that power by all fifty states would undermine constitutionally protected interests. This is the same question that arises when considering limits on, for example, a state’s powers to tax, regulate commerce, apply its substantive law, and allocate government benefits.<sup>257</sup>

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<sup>252</sup> See *id.* at 514–29 (discussing these and other examples).

<sup>253</sup> This reservation of power is implicit in the Tenth Amendment and the Full Faith and Credit Clause (which assumes the existence of state “judicial Proceedings”). U.S. CONST. art. IV, § 1.

<sup>254</sup> See Stein, *supra* note 64, at 414 (noting that aggressive assertions of jurisdiction come “at the expense of other states”). States historically reacted to each other’s perceived jurisdictional excesses by allowing defendants to collaterally attack out-of-state judgments allegedly rendered without personal jurisdiction, see *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 468–69 (1873), but modern preclusion law makes such attacks more difficult, see *infra* note 299.

<sup>255</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (noting that personal jurisdiction doctrine should enable defendants to “predict[]” where they are amenable to suit so that they can “structure their primary conduct” to avoid or plan for “burdensome” fora).

<sup>256</sup> For example, a state’s exercise of personal jurisdiction may undermine national interests if the outcome of the case could chill interstate activity. See *Brilmayer*, *supra* note 4, at 743–48.

<sup>257</sup> The Supreme Court generally does not treat these areas of doctrine as related, although aspects of personal jurisdiction doctrine make cameo appearances within jurisprudence addressing seemingly distinct questions, and other horizontal federalism concepts have seeped into personal jurisdiction cases. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 307–08 (1992) (relying on recent developments in personal jurisdiction doctrine to refine rules governing state taxation of extraterritorial activity); *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 315 (1923) (relying on Commerce Clause to invalidate state statute requiring out-of-state corporation to appoint local agent for service of process in suits unrelated to its local contacts); *cf. Curry v. McCanness*, 307 U.S. 357, 372 (1939) (opinion by Justice Stone addressing states’ “jurisdiction to tax”



The problem that personal jurisdiction doctrine addresses is thus a run-of-the-mill horizontal federalism problem: something happening (litigation) in one state should arguably be happening in another state, or power that one state is exercising (summoning a defendant) should arguably be exercised by another state. This insight tells us what is at issue, but not why it matters—i.e., it does not directly explain why the Constitution should be read to care about forcing a person to litigate in the wrong place, at the behest of the wrong actor. But the insight does the next best thing—understanding the problem provides a framework for thinking about the solution.

Recognizing the structural similarities between assertions of personal jurisdiction and other types of state action raising horizontal federalism concerns is helpful because it suggests that the Constitution's methods for coping with these other actions may be relevant to regulating personal jurisdiction. As I have argued elsewhere,<sup>258</sup> the Constitution can be read to use five distinct methods to police horizontal federalism: (1) Codependence and Disablement (weakening states by depriving them of certain powers and institutions and making them depend on each other and the national government); (2) Cooperation and Dispute Resolution (creating procedures, such as the compacts process, or institutions, such as federal courts, capable of avoiding interstate tension); (3) First-in-Time Rules (prioritizing the claims of the first state to assert a particular interest or entitlement); (4) Individual Empowerment (creating rights that individuals can invoke to challenge state overreaching); and (5) Federal Oversight and Preemption (authorizing the federal government to invalidate or endorse state action that would otherwise implicate horizontal federalism concerns). These five methods limit state power in four ways by, depending on the circumstances: (a) depriving states of the *capacity* to act; (b) creating rights that serve as *constraints* on otherwise extant capacity; (c) imposing *comity* obligations that require states to exercise restraint; and (d) subjecting states to *central* federal authority.<sup>259</sup>

If personal jurisdiction doctrine can be understood as a component of horizontal federalism, then there is a question about whether the Constitution should be read to rely on any of the above methods (alone or in combination) to limit states' authority to provide a forum and, if so, whether current

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intangible property that previews arguments he would later use in his opinion in *International Shoe* to explain how the Fourteenth Amendment limits states' jurisdiction to adjudicate).

<sup>258</sup> See Erbsen, *supra* note 250, at 529–60.

<sup>259</sup> See *id.* at 561–72.

jurisprudence adequately accounts for and prioritizes these methods. For example, one might wonder if the reason that a state cannot acquire jurisdiction over a particular defendant is that the state lacks sovereign capacity to bind that person, or that the person has a right to avoid the state even if the state has such capacity, or that the state on comity grounds must cede to the interests of other potential fora, or that the assertion of jurisdiction offends a federal interest. The content of personal jurisdiction doctrine might look very different depending on which of these perspectives one adopts.<sup>260</sup> Yet modern doctrine has never explicitly considered the relative merit of any of these perspectives. The Supreme Court has instead denied the centrality of “interstate federalism” to jurisdictional analysis,<sup>261</sup> but without attempting to

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<sup>260</sup> See *infra* Part III. More generally, choosing between a capacity-focused or constraint-focused approach to jurisdiction would require reconsidering the relative salience and compatibility of arguments based on “public ordering” and “private ordering” of relationships between the individual and the state. Stein, *supra* note 9, at 691 (distinguishing between “tort-like” and “contract-like” “style[s] of argument” that courts have used to justify limiting a state’s jurisdictional reach).

<sup>261</sup> The Court in 1980 observed that constitutional limits on personal jurisdiction “ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system” and that in this context the Due Process Clause acts as an “instrument of interstate federalism.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 294 (1980). This framing of the problem echoed language from *International Shoe Co. v. Washington*, which had sought to evaluate the sufficiency of a defendant’s “contacts” with the forum “in the context of our federal system of government.” 326 U.S. 310, 317 (1945).

The Court then backtracked in 1982, stating that:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

*Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982); *id.* at 713 (Powell, J., concurring in the judgment) (noting that although the holding addressed a challenge to jurisdiction in a federal court, its reasoning applied to jurisdiction in state courts). None of the three cursory arguments in *Bauxites* for retreating from *World-Wide Volkswagen* are compelling. Part I.B.4 critiqued the Court’s focus on “liberty,” while this Part critiques the Court’s assertion that the Due Process Clause is the “only” constitutional provision relevant to jurisdiction. The Court’s remaining point about waiver is likewise flawed: it is self-defeating because the Court concedes that the defendant’s consent can vitiate otherwise viable limits on state authority; it is misdirected because, as this Part explains, horizontal federalism encompasses many factors beyond “sovereignty”; and it is muddled because it relies on an unnuanced view of waiver that does not account for the possibility that some limits on personal jurisdiction might be waivable but that others might not, see *infra* note 365. Nevertheless, the Court has continued to follow *Bauxites* when considering how the Fourteenth Amendment limits the states’ power to assert personal jurisdiction. See *supra* note 222. *But cf. Quill Corp.*, 504 U.S. at 307 (stating that courts must evaluate defendants’ objections to jurisdiction “in the

explore the implications of situating personal jurisdiction doctrine within a context of horizontal federalism.<sup>262</sup>

The irony of modern personal jurisdiction doctrine is thus that it embraces multiple undefined and malleable values—liberty, fairness, justice, and reasonableness—and yet eschews the one value—horizontal federalism—that could animate the rest. Whatever purpose limits on personal jurisdiction serve, those limits exist because the Constitution allocates jurisdictional power among multiple states in a way that cabins the powers of each. To say that a given exercise of personal jurisdiction is unconstitutional is thus to say that a state has usurped authority that belongs elsewhere. And to say that this usurpation offends a “right” or infringes upon “liberty” or violates “due process” simply begs the question of what values animate the constitutional inquiry into where jurisdiction belongs. That question is not unique to the personal jurisdiction context because it arises in every case raising a horizontal federalism issue. Reevaluating personal jurisdiction doctrine from a horizontal federalism perspective can thus provide a foundation for considering whether modern doctrinal slogans such as “minimum contacts” and “fair play” are relevant to assessing state power and, if so, precisely how they should operate.<sup>263</sup> My approach thus does not deny that individuals may have a

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context of our federal system of Government” without linking this statement to the discussion of liberty interests in *Bauxites*).

<sup>262</sup> The Court in *Bauxites* (which framed jurisdiction doctrine as protecting liberty interests rather than federalism concerns) did not cite early nineteenth-century opinions that seemed to frame personal jurisdiction as a horizontal federalism problem. For example, in 1813 Justice Johnson was concerned that unconditionally enforcing state court judgments in federal court could encourage states to overreach by exercising “jurisdiction . . . over persons not owing them allegiance or not . . . found within their limits,” which would undermine the “object of the constitution” by inciting “state jealousies.” *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting). Johnson stressed the same point in 1827, now writing for a majority, by noting that allowing states to exercise jurisdiction over nonresidents could undermine the “harmonious distribution of justice throughout the Union.” *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 359 (1827) (holding, apparently as a matter of substantive bankruptcy law rather than personal jurisdiction doctrine, that states adjudicating insolvency actions could not discharge debts owed to nonresident creditors who had not voluntarily appeared). A subsequent decision blurred constraint and capacity arguments by characterizing personal jurisdiction doctrine as “protect[ing] persons” and enforcing the “limits” that state borders place on state authority. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406, 408 (1855). Nineteenth-century state court decisions similarly justified jurisdictional limits by invoking the need for interstate harmony and comity. See James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 27–42 (1992) (discussing interpretations of the Full Faith and Credit Clause by state courts seeking to avoid enforcing foreign judgments rendered without jurisdiction).

<sup>263</sup> Some commentators have suggested that federalism concerns should influence jurisdictional rules, but have not taken the further step of replacing the modern due process framework with a regime rooted in the principles of horizontal federalism. See, e.g., Weinstein, *supra* note 3, at 267 (contending that “aspects” of modern jurisdictional doctrine would benefit from “federal common law” linked to the Constitution’s

constitutionally protected interest in avoiding some assertions of personal jurisdiction, but rather suggests that one cannot define the scope of this interest or develop rules for enforcing it unless one first understands the constitutional framework in which it operates.

*B. Methodological Benefits of Rethinking Personal Jurisdiction from a Horizontal Federalism Perspective*

*1. Analyzing the Constitution's Text on a Clean Slate*

This Article's approach to personal jurisdiction is self-consciously atextual, in the sense that it does not rely on any preconceptions about which, if any, clauses in the Constitution limit the jurisdictional reach of state courts. Rather than starting from a conclusion and reasoning backward (i.e., selecting a supposedly controlling text and then figuring out why it applies), I start with a problem and reason forward to consider if, why, and how the problem may require a constitutional solution. This approach posits a context (horizontal federalism) that can provide useful guidance for thinking about jurisdiction while avoiding unwarranted assumptions and needless distractions that have undermined past efforts to rationalize doctrine. In particular, situating personal jurisdiction doctrine within the context of horizontal federalism as a precursor to identifying its constitutional foundation and content has five advantages.

First, not precommitting to the idea that the Constitution limits the reach of state courts avoids making a normative assumption based on a dubious predicate. Lawyers educated in a post-*Pennoyer* world "know" that the

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"structure" that would supplement the current due process test); Spencer, *supra* note 9; Stein, *supra* note 9, at 734 (considering "the sovereign allocation function of jurisdictional rules" in the context of "due process doctrine"); Simon E. Sobeloff, *Jurisdiction of State Courts over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196, 197 (1957) (limits on personal jurisdiction "find[] expression as a personal right under the due process clause of the fourteenth amendment" but are "readily seen to be merely an application of standards of fairness thought to flow from our taken-for-granted preconception of a federal order"); cf. Kogan, *supra* note 84 (discussing how the Supreme Court has used personal jurisdiction doctrine at critical moments of national history to frame contemporary understanding of the federal system). *But see* Redish, *supra* note 11 (discussed *infra* at note 276); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1047 (1983) (contending that limits on personal jurisdiction "first and foremost" vindicate a "personal right" but as a "by-product" preserve the states' status as "independent sovereigns" in a "nation of states"); Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 701–02 (1983) (contending that personal jurisdiction doctrine should focus on "the individual rights of litigants" rather than "sovereignty" or "state interest[s]"); Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 542 (1982) ("A concern for interstate federalism . . . is not easily extracted from the fourteenth amendment.").

Constitution limits personal jurisdiction because the Supreme Court has said that it does.<sup>264</sup> But that conclusion is far from obvious: the Constitution never explicitly mentions state jurisdiction, venue, or service of process in civil cases,<sup>265</sup> and before 1878 the Supreme Court often suggested that the Constitution did not directly limit the states' jurisdictional reach.<sup>266</sup> Modern doctrine elevating jurisdictional rules to the status of constitutional law is thus debatable both as a matter of interpretation (because the cited text's semantic meaning is opaque)<sup>267</sup> and construction (because the text can support various plausible values and rules).<sup>268</sup> Situating jurisdiction within a broader constitutional context is thus a necessary predicate to determining what, if anything, the Constitution has to say about the subject.<sup>269</sup>

Second, using a specific clause as a starting point for analysis needlessly imports the doctrinal baggage associated with that clause. The analysis then becomes an exercise in fitting the current problem into preconceived notions about what the text means based on its prior application in other contexts. Indeed, one of the recurring debates in personal jurisdiction scholarship addresses whether precedent outside the jurisdictional context has given "due process" a meaning that requires jurisdiction doctrine to focus—or not focus—on individual rights, state interests, federalism concerns, or some combination of these factors.<sup>270</sup> That discussion is vital if the Due Process Clause is the Constitution's sole source of limits on state jurisdiction. But the discussion is premature if alternative sources might exist. Such alternative sources clearly do play a role in some horizontal federalism contexts,<sup>271</sup> raising the threshold question of which alternative sources might govern jurisdiction. Focusing on

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<sup>264</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>265</sup> The Constitution is more explicit about jurisdiction and venue in criminal cases. See *supra* note 148.

<sup>266</sup> See discussion *infra* note 330. A judgment rendered without jurisdiction might therefore be enforceable in the rendering state, although courts interpreted the Constitution as not requiring other states to recognize the judgment. See *infra* note 330.

<sup>267</sup> See *supra* Part I.B.4 (discussing "liberty" interests).

<sup>268</sup> See *supra* notes 7–13. For discussion of the differences between constitutional interpretation and construction, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 89–130 (2004); Lawrence B. Solum, *Semantic Originalism* 67 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> ("[I]nterpretation gleans meaning whereas construction resolves vagueness.").

<sup>269</sup> For discussion of whether and why structure and context influence constitutional construction, see citations *infra* notes 281, 283.

<sup>270</sup> See, e.g., Braveman, *supra* note 263, at 542–43; Conison, *supra* note 50, at 1188–1203; discussion *infra* note 276.

<sup>271</sup> See Erbsen, *supra* note 250, at 529–60 (identifying the many relevant clauses).

the idiosyncrasies of the Due Process Clause is thus needlessly restrictive if one's goal is to move beyond explaining or justifying current law.

Third, even if the Constitution does not provide *alternative* sources of jurisdictional rules, it may provide *additional* sources. An interesting feature of personal jurisdiction doctrine is that the Supreme Court believes that a single clause is relevant; the Due Process Clause is the “only” modern limit on states' jurisdictional reach.<sup>272</sup> Yet in analogous horizontal federalism contexts multiple clauses are relevant. For example, the Due Process and Full Faith and Credit Clauses regulate choice of law;<sup>273</sup> the Due Process and Commerce Clauses limit a state's authority to tax extraterritorial conduct;<sup>274</sup> and the Commerce, Privileges and Immunities, and Equal Protection Clauses can prevent states from discriminating against out-of-state actors.<sup>275</sup> Analyzing personal jurisdiction in the context of horizontal federalism could therefore suggest a similar fragmentation of the applicable constitutional law: different clauses might create different tests for different purposes. Seemingly contradictory approaches that scholars have proposed for regulating personal jurisdiction thus need not be mutually exclusive if each is reconceptualized as a component of broader doctrine governing the availability of fora in civil litigation.<sup>276</sup> Adopting the framework in Part II.A thus permits greater analytical flexibility than accepting the Court's modern due process regime.

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<sup>272</sup> *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982). The Court has also invoked the Commerce Clause to prevent states from requiring certain interstate actors to consent to jurisdiction as a condition of doing business, but has not considered whether the Clause has broader implications for personal jurisdiction doctrine. *See Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988).

<sup>273</sup> *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–23 (1985).

<sup>274</sup> *See MeadWestvaco v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) (noting that the two clauses provide “distinct but parallel” rules “subsum[ing]” the same “broad inquiry” (citation and internal quotation marks omitted)).

<sup>275</sup> *See W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655–56 (1981).

<sup>276</sup> For example, consider two articles by leading scholars published in the same law review roughly twenty years apart. In one, Martin Redish contended that the Due Process Clause does not embrace “vague concepts of inter-state sovereignty” and limits states' jurisdiction by focusing on the “actual burdens of litigation.” Redish, *supra* note 11, at 1113–15. In contrast, Allan Stein contended that the Due Process Clause, with “guidance” from the Commerce Clause, embraces federalism concerns about the extraterritorial implications of state jurisdiction. Stein, *supra* note 64, at 429. Both scholars cannot simultaneously be right about what due process means. But both might persuasively describe types of state action that the Constitution forbids: the Due Process Clause may limit state assertions of venue for the reasons that Professor Redish identifies, *see supra* Part I.A.2 and note 68, and other constitutional provisions—which come into play if we abandon the impulse to focus solely on due process—may preclude the extraterritorial externalities that concern Professor Stein. *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 305, 307 (1992) (observing that the Commerce Clause can police extraterritorial spillover effects of regulation by barring state action even when the state has “minimum contacts” with a regulated entity).

Fourth, reconsidering personal jurisdiction from first principles without relying on prior historical commitments liberates commentators from the “fanciful vocabulary” of buzzwords that dominate modern doctrine.<sup>277</sup> Reliance on these terms, such as “purposeful availment” and “minimum contacts,” despite their questionable textual origin and opaque meanings, often reduces jurisdictional analysis to an exercise in creative semantics.<sup>278</sup> A new framework for analyzing jurisdiction offers a fresh opportunity to craft an integrated set of doctrinal rules that subordinate form to function. There is of course no guarantee that new rules will be more satisfying than current rules. Indeed, some indeterminacy and pliability is inevitable when implementing complex regimes for allocating regulatory authority.<sup>279</sup> But tethering doctrine to a foundation in principles governing horizontal federalism at least offers a promise of coherence that the modern ad hoc approach to rulemaking has failed to achieve.<sup>280</sup> To build a better mousetrap, we need to better understand the mouse.

Finally, thinking about personal jurisdiction in the context of horizontal federalism is useful because the Constitution’s structure—and the structure of the institutions that it creates—can shape our understanding of how to apply the text to specific problems. If one accepts my contentions that: (1) personal jurisdiction problems are difficult for reasons that arise in other legal contexts;

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<sup>277</sup> Juenger, *supra* note 24, at 1027.

<sup>278</sup> Consider, for example, the Court’s effort to distinguish state contacts that a defendant can “foresee” from those she can “reasonably anticipate.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also id.* at 311 n.18 (Brennan, J., dissenting) (noting that the “reasonable anticipation” test is circular because the “defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is”); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 488 (1985) (Stevens, J., dissenting) (criticizing majority’s “superficial analysis” of whether defendant had “purposefully availed” itself of the forum).

<sup>279</sup> *Cf.* Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 973 (2009) (“Jurisdiction’s inaccurate rhetoric does more than misstate its own firmness. It creates a need for offsetting measures . . . to soften jurisdiction’s hard rules.”). Even “bright-line” jurisdictional rules are not as bright as they seem. For example, *Pennoyer v. Neff* appeared to create an easily administrable rule: service inside the state conferred jurisdiction, while service outside the state did not. *See* 95 U.S. 714, 720 (1878). Assuming the state’s borders were clear, so was the rule. But reality was more complex. The state could obtain jurisdiction over outsiders by requiring them to consent to jurisdiction as a condition for various state benefits, *see id.* at 735, spawning litigation about the exception’s scope, *see, e.g., Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927) (“[T]he State may declare that the use of the highway by the nonresident is the equivalent of the appointment of [a state official] as agent on whom process may be served.”).

<sup>280</sup> *See* Walter W. Heiser, *A “Minimum Interest” Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 916 (2000) (“The Supreme Court has been unable to develop clear standards that provide meaningful guidelines for litigants and lower courts. This is largely due to the Court’s failure to adequately identify the reasons for the due process restrictions on personal jurisdiction, as well as its inability to consistently explain the nature of the due process right.”).

(2) these analogous contexts implicate horizontal federalism; and (3) recurring values and themes define the Constitution's approach to horizontal federalism, then it follows that these values and themes could shape a new approach to personal jurisdiction. There is of course a risk of arbitrariness and judicial overreaching associated with translating vague principles derived from the Constitution's "structure" into workable rules grounded in text.<sup>281</sup> But these risks will be inherent in any effort to create constitutional law governing personal jurisdiction because of the Constitution's silence on the question, as is evident from the fact that scholars have proposed myriad plausible yet inconsistent theories of jurisdiction.<sup>282</sup> Inferences from structure and context can thus be a useful addition to an otherwise meager arsenal of tools for construing the Constitution's approach to personal jurisdiction in state court.<sup>283</sup>

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<sup>281</sup> See Redish, *supra* note 11, at 1130 (cautioning against relying on "interstate federalism concerns . . . 'implicit' in the broader framework of the Constitution"). Such "multiclausal purposivism" can also be methodologically illegitimate when abused. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009); see also *infra* note 283. For a critique of Manning's position arguing that cautious use of structural inferences can be valuable when assessing the constitutional mechanics of federalism, see Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 103–05 (2009), [http://www.harvardlawreview.org/media/pdf/LWebsite\\_Content\\_for\\_JenniferForum\\_Vol.\\_122Metzgermetzger.pdf](http://www.harvardlawreview.org/media/pdf/LWebsite_Content_for_JenniferForum_Vol._122Metzgermetzger.pdf); see also Metzger, *supra* note 220, at 1475–76; Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885, 1895 (1987).

<sup>282</sup> See *supra* notes 2–6, 7–13.

<sup>283</sup> Although *context* is by general consensus relevant to construing the Constitution's text, commentators disagree about whether "structural" arguments permit readers to find a transcendent meaning in the document that lacks foundation in specific language, and yet shapes binding law. I do not take a position on this debate because I am not proposing a specific jurisdictional rule that could be tested against competing positions, but rather a framework for constructing such rules. This framework can produce various conclusions, some of which would be more or less grounded in text (or more or less central to an allegedly important value) and thus more or less acceptable to participants in the debate over the proper role of structural inferences. My framework is therefore conceptually sound insofar as relying on context is defensible, but the legitimacy of specific reasoning behind specific outputs would require scrutiny. For a discussion of competing theories, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 719–29 (2008); Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833 (2004); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Kermit Roosevelt III, *The Indivisible Constitution*, 25 CONST. COMMENT. 321 (2008) (reviewing LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008)).



2. *Removing Jurisdictional Doctrine from the Silos of Civil Procedure and Conflicts and Situating It Within Broader Debates About Constitutional Law*

Situating personal jurisdiction within a broader constitutional context can help counteract the subtle framing effects that arise from treating jurisdiction as an aspect of civil procedure or conflicts of law. Changes in context can lead to changes in perspective, which can in turn reveal ideas that were hidden in plain sight.

The exile of personal jurisdiction doctrine from the canonical understanding of constitutional law is evident in how and where the legal academy addresses jurisdictional questions. First, treatises about constitutional law do not devote substantial attention to personal jurisdiction.<sup>284</sup> In contrast, the subject receives ample coverage in treatises on civil procedure and conflicts of law.<sup>285</sup> Second, law school casebooks and curricula similarly treat personal jurisdiction as a topic for a civil procedure or conflicts course,<sup>286</sup> but not for a constitutional law course.<sup>287</sup> Indeed, the phrase “personal jurisdiction” (or anything similar) does not appear in the table of contents or index of several leading constitutional law casebooks, which do not mention personal jurisdiction (let alone cite the leading cases) in their discussions of interstate federalism.<sup>288</sup> Finally, scholars who teach and write about personal jurisdiction tend not to teach and write more generally about constitutional

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<sup>284</sup> See, e.g., 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8(d) (4th ed. 2008) (short section on personal jurisdiction that does not discuss other aspects of horizontal federalism); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1280–89 (3d ed. 2000) (short section on personal jurisdiction lumped in with choice of law discussion).

<sup>285</sup> See, e.g., JAMES, *supra* note 140, at 60–96; WEINTRAUB, *supra* note 32, at 117–306.

<sup>286</sup> Interestingly, personal jurisdiction has not always been an established part of the civil procedure canon, and civil procedure courses have arguably not focused as much as they should on constitutional law beyond the jurisdictional context. See Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1328 (2007) (“[A]t least three important constitutional values animate civil procedure: due process, equality, and rights to association and expression. Nevertheless, the civil procedure canon includes very few constitutional decisions . . . .”); Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 433–34 (1998) (noting lack of consensus in 1950s about whether personal jurisdiction was a civil procedure subject).

<sup>287</sup> Curricular decisions and casebook coverage presumably are interdependent, although it is not clear which is the chicken and which is the egg.

<sup>288</sup> See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed. 2006); ERWIN CHEMERINKSY, CONSTITUTIONAL LAW (3d ed. 2009); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (6th ed. 2009).

law.<sup>289</sup> These curricular and cultural divides are not necessarily undesirable: every topic must fit somewhere and is unlikely to be taught twice in first-year classes, and scholars unsurprisingly tend to hone their expertise by specializing in particular fields. The Constitution also creates such a wide regulatory net that some curricular fragmentation is inevitable.<sup>290</sup> My point is thus not that personal jurisdiction's isolation from other aspects of horizontal federalism requires reforming the academy, but rather that scholarship should be aware of and seek to overcome misleading conventional wisdom that curricular distinctions may inadvertently create.

Marginalizing personal jurisdiction into a separate enclave from constitutional law—and thus from horizontal federalism—arguably influences how judges and lawyers understand and shape the issue. These effects are subtle. After all, judges are generalists, scholars are fully capable of borrowing ideas from other disciplines, and the relevance of constitutional law to personal jurisdiction doctrine is self-evident in the doctrine's citation to the Constitution. Nevertheless, even though state courts' assertions of personal jurisdiction seem analogous to other exercises of state power with extraterritorial implications—such as the power to tax, to regulate commercial transactions, and to allocate government benefits—jurisdictional doctrine generally follows its own path without guidance from these other areas.<sup>291</sup> One cannot help but wonder if the connections between personal jurisdiction and other horizontal federalism doctrines would be clearer if conversations about constitutional law in treatises, casebooks, courses, and scholarship more frequently reached beyond traditional boundaries. Rules are often a function of context, and context is often a function of defining broad doctrinal fields, accepting that each field is idiosyncratic, and then approaching specific problems by situating them within fields and incorporating the relevant idiosyncrasies.<sup>292</sup> If we reconsider our understanding of which field

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<sup>289</sup> There are exceptions, but anecdotally it appears that experts in personal jurisdiction often teach courses on civil procedure, conflicts of law, federal courts, or international law, while scholars who teach constitutional law rarely write about personal jurisdiction.

<sup>290</sup> For example, criminal procedure courses rather than constitutional law courses typically cover Bill of Rights provisions regulating criminal investigations and prosecutions, federal courts courses cover many aspects of Article III, and various Article I powers receive attention primarily in related specialized courses, such as intellectual property, immigration law, or bankruptcy.

<sup>291</sup> See *supra* Part II.A. The Court even eschews linking personal jurisdiction to its curricular cousin—choice of law, see *supra* note 60—although conflicts scholars are more willing to breach that barrier, see *supra* note 64.

<sup>292</sup> Cf. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 473 (2007) (noting that conventional understanding of what counts as constitutional law can create “pressure” to resolve

encompasses personal jurisdiction, a different set of idiosyncrasies may become relevant. Scholars have developed this idea in the context of *criminal* procedure's curricular isolation from constitutional law, which they contend "distorts, causing us to see things that are not there" and "obscures, leading us to miss things that are there."<sup>293</sup> The analysis in this section suggests that isolating aspects of *civil* procedure from related problems and relevant methodologies in constitutional law can be similarly misleading.

Accordingly, exposing the connection between personal jurisdiction in state court and other aspects of horizontal federalism can alter basic assumptions about each. In a system of legal reasoning built heavily on analogies, similarities between ostensibly different contexts are not merely intellectually interesting; they can fundamentally shape the evolution of legal rules.<sup>294</sup> Framing personal jurisdiction doctrine as lying outside the field of constitutional law obscures these similarities, which highlights the importance of revealing them in this Article and instigating additional scholarship to further integrate personal jurisdiction into the constitutional framework of horizontal federalism.

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legal problems through "preexisting" rules rather than "extracanonical" innovations); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1002–03 (1998) ("Because canonical materials are both causes and effects of thought, the causal story of how canons influence us is inevitably a complicated one.").

<sup>293</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994); see also Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1465 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) (considering implications of fact that "'criminal procedure' and 'constitutional law' are kept in separate rooms of the (now-)traditional law school curriculum"); Balkin & Levinson, *supra* note 292, at 1013 (noting risk that "[t]he criminal procedure amendments will . . . be written out of the legal imagination of an entire generation of constitutional scholars"). Of course, observing that aspects of criminal and civil procedure fit within a broader framework of constitutional law does not tell us precisely *how* they fit, leaving room for disagreement about the substantive implications of any change in analytical perspective. Cf. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1563 (1996) ("Given my belief that constitutional law and criminal procedure stand to benefit from closer connections, I am naturally excited by Professor Amar's recent work on criminal procedure. I am also disappointed by it."); Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2294 (1998) ("Amar's preoccupation with text and history sometimes causes him to pay insufficient attention to how his proposals might work in practice.").

<sup>294</sup> See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 n.6 (2010) (noting effect of "borrowing," "appropriation," "cross-pollination," "migration," and "cross-fertilization" of ideas from one aspect of constitutional law to another).

### III. IMPLICATIONS

Parts I and II identified the methodological benefits of a horizontal federalism approach to personal jurisdiction and proposed rethinking modern doctrine's uncritical emphasis on due process. This Part further explores the implications of viewing personal jurisdiction through a horizontal federalism prism by exposing unexamined assumptions underlying the Court's jurisprudence and suggesting alternative approaches. Section A considers whether Congress rather than the judiciary should play the leading role in policing state jurisdiction, and section B considers whether the modern "reasonableness" test for assessing jurisdiction is a coherent implementation of horizontal federalism values. Both sections identify loose threads in modern doctrine and pull on them to see what unravels.

The goal of this Part is to sketch examples of how the horizontal federalism framework challenges conventional accounts about the purpose and content of modern personal jurisdiction doctrine. These examples thus are not intended to prove a particular conclusion or exhaust the rich range of inquiries that a new approach to personal jurisdiction would permit, but rather to highlight the utility of this new approach and inspire further inquiry.<sup>295</sup> Future scholarship can build on these examples to explore the implications of viewing limits on personal jurisdiction as an incident of federalism rather than solely as a means to protect a free-floating liberty interest.

#### A. *"Centralization," the Diversity Clause, and Skepticism About Judicial Solutions to Jurisdictional Overreaching*

An intriguing implication of the horizontal federalism framework is that allowing litigants to challenge personal jurisdiction in state courts might not be the optimal way to limit state overreaching. Instead, perhaps the Constitution's Diversity Clause prevents overreaching by allowing Congress to provide a federal rather than state forum in cases where states might abuse their authority. This theory would recognize that the Constitution uses multiple methods and institutions to protect the values that it cares about, and would posit that Congress rather than courts should have principal responsibility for preventing states from excessively asserting personal jurisdiction. The argument runs against centuries of jurisprudence, but is sufficiently plausible to warrant a brief sketch as a foundation for further scholarship. Even if the

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<sup>295</sup> For examples of other lines of inquiry, see *infra* note 365.

argument ultimately goes too far, it exposes unexamined and fragile assumptions underlying current doctrine and suggests a need to rethink the role of judicial review in limiting state authority.

Modern personal jurisdiction doctrine reflects what my horizontal federalism framework labels an “individual empowerment” approach to addressing troubling state action.<sup>296</sup> The state’s assertion of power is constitutionally tolerable so long as the defendant is willing to tolerate it by appearing in the suit.<sup>297</sup> If the defendant objects, the Constitution empowers her to raise the Due Process Clause as a shield that courts must consider before proceeding. State judicial systems can restrain themselves by sustaining objections to personal jurisdiction, but sometimes external judicial systems must intervene: for example, the federal judiciary when the defendant appeals to the Supreme Court,<sup>298</sup> or other states’ judiciaries when the plaintiff seeks to enforce a judgment rendered without personal jurisdiction and the defendant mounts a collateral attack.<sup>299</sup> But no matter which institution reins in the offending state, it does so because of a right that the Constitution empowers the individual defendant to assert.<sup>300</sup> The emphasis on individual rights seems sensible. It flows naturally from the supposed source of limits on state power

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<sup>296</sup> See *supra* text accompanying notes 258–59.

<sup>297</sup> See *supra* note 182, *infra* note 365 (discussing waiver of jurisdictional objections).

<sup>298</sup> States do not always take the hints that federal courts provide. For example, in *Rush v. Savchuk*, 444 U.S. 320 (1980), the Minnesota Supreme Court affirmed quasi-in-rem jurisdiction over a nonresident who had no contacts with the state, the U.S. Supreme Court vacated the decision and remanded for reconsideration in light of *Shaffer v. Heitner*, 433 U.S. 186 (1977), the state court again upheld jurisdiction, and the U.S. Supreme Court then reversed 8–1, concluding that the state court had misapplied *Shaffer*. See *Rush*, 444 U.S. at 324–25.

<sup>299</sup> The Full Faith and Credit Clause ordinarily requires states to enforce each other’s judgments, but allows collateral attacks on personal jurisdiction when the defendant either did not appear in the prior action or did not have an opportunity to “fully and fairly” challenge jurisdiction. *Durfee v. Duke*, 375 U.S. 106, 111 (1963); see also *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 524–25 (1931) (holding that according preclusive effect to decisions upholding personal jurisdiction does not violate due process); Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1094 n.39 (1999) (“A default judgment attacked for lack of jurisdiction . . . [can be collaterally attacked] because the party did not have a full and fair opportunity to litigate the question without forfeiting the very protection that personal jurisdiction doctrines are designed to afford. To hold otherwise would be to require a defendant to litigate jurisdictional issues in the forum he claims has no jurisdiction over him.”).

<sup>300</sup> Entities other than the party over whom jurisdiction is questionable may also have standing to challenge personal jurisdiction if the absence of jurisdiction would adversely affect their interests. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805–06 (1985) (defendant in class action had standing to verify state court’s personal jurisdiction over class members to ensure that a defense victory on the merits would preclude class members from relitigating); *Hanson v. Denckla*, 357 U.S. 235, 245 (1958) (defendant had standing to challenge personal jurisdiction over a non-appearing codefendant who was an indispensable party because a successful challenge would require dismissal of the entire action).

(liberty interests)<sup>301</sup> and is easy to implement; if the problem is a court's exercise of authority over a defendant, the defendant is well-positioned to object. But the empowerment approach is imperfect, as the myriad criticisms of modern doctrine attest.<sup>302</sup> If alternative approaches are feasible, they are worth considering.

Situating personal jurisdiction within the broader context of horizontal federalism reveals that individual empowerment is not the only feasible method for preventing states from overreaching their authority. As noted in Part II, the Constitution uses several methods to allocate power among coequal states and prevent states from asserting power over other states' citizens that could undermine constitutionally protected values, including federal preemption of state law and the creation of federal courts. Modern personal jurisdiction doctrine uncritically ignores these alternatives, but a thought experiment reveals how they may challenge basic assumptions about the necessity of limiting state courts' personal jurisdiction.

Imagine a theory that at first sounds implausible: the Diversity Clause—which allows Congress to vest federal courts with jurisdiction over suits “between Citizens of different States” removed from state courts—coupled with the possibility of nationwide service of process in federal court, is the Constitution's remedy for states' excessive assertions of personal jurisdiction.<sup>303</sup> This theory posits that U.S. citizens (if they are also citizens of a state)<sup>304</sup> sued by citizens of other states regarding conduct in the U.S. should not be able to challenge a state court's personal jurisdiction if Congress has authorized removal to and nationwide service in federal court. As explained below, the argument is more plausible than it first seems because removal would eliminate the problems that current due process doctrine governing

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<sup>301</sup> See *supra* Part I.B.4.

<sup>302</sup> See *supra* notes 20–26.

<sup>303</sup> U.S. CONST. art. III, § 2; see also *id.* art. I, § 8 (Congress may “constitute Tribunals inferior to the supreme Court”). The Supreme Court has upheld Congress's authority to authorize removal in diversity cases. See *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 289 (1871) (“The [Diversity Clause] had its existence in the impression, that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. The protection intended against these influences to non-residents of a State was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a State court a like election to the defendant afterwards.”).

<sup>304</sup> “In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State.” *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989).

personal jurisdiction attempts to solve, and Congress rather than the judiciary often has a leading role in policing horizontal federalism.

First, the Constitution makes diversity jurisdiction available in virtually all situations where personal jurisdiction could be an issue if the case were tried in state court. The Diversity Clause generally requires only minimal diversity without regard to the amount in controversy; a federal forum can thus hear cases even if only one defendant is diverse from only one plaintiff.<sup>305</sup> The “hard” cases discussed in Part I.B.2 typically involved diverse parties and thus would be removable. Removal is not available under the Constitution—as opposed to the present diversity statute<sup>306</sup>—in only two categories of actions, but personal jurisdiction is unlikely to be a contested issue in most cases within these categories. *First*, the Diversity Clause does not permit removal if all parties are citizens of the forum state:  $P_x$  v.  $D_x$  in  $F_x$ . Personal jurisdiction in these cases is not a concern because states have general jurisdiction over their citizens.<sup>307</sup> *Second*, removal would be unavailable if all the parties were

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<sup>305</sup> See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967). Although the Court has endorsed minimal diversity in some contexts, it has not fully explored the outer limits of diversity jurisdiction in controversies involving multiple parties raising distinct claims. See James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423, 1458 (2007) (“[T]he Court’s relaxation of the strict version of the complete diversity rule does not imply the absence of all limits.”). One limit might be that nondiverse parties could join litigation between diverse parties only if their claims would satisfy the historical criteria for ancillary jurisdiction. See *id.* at 1471; cf. Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1175 n.230 (2009) (suggesting that joinder of “transactionally unrelated” claims by nondiverse parties may preclude diversity jurisdiction). In addition, a commentator has suggested that Congress may authorize minimal diversity only if it is “necessary and proper” in light of the “purpose” of the Diversity Clause. See C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 615–16 (2004). For a critique of Professor Floyd’s argument, see Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2067 n.85 (2008).

<sup>306</sup> Significant statutory limits on diversity jurisdiction that Congress would need to revisit if it used federal subject matter jurisdiction as a solution to excessive assertions of personal jurisdiction in state court include: (1) a requirement of complete rather than minimal diversity in most cases, see 28 U.S.C. § 1332(a) (2006); (2) an amount in controversy requirement, see *id.*; (3) a requirement that all served defendants must agree to remove, see *id.* § 1446(a); (4) a rule barring removal by local defendants, see *id.* § 1441(b); and (5) denial of jurisdiction in certain cases involving probate, divorce, alimony, and child custody decrees, see *Marshall v. Marshall*, 547 U.S. 293, 307–08, 311–12 (2006).

<sup>307</sup> See *supra* note 39. If one doubted the propriety of general jurisdiction over local defendants, the presence of a local plaintiff would likely mean that the state would have a substantial connection to the effects of the defendant’s conduct, even if the conduct occurred out of state. An exception might arise if the plaintiff were a citizen of the forum state but resided elsewhere and therefore experienced the effects of a legal wrong at a location outside the forum. Alternatively, even a plaintiff who resides in the forum might experience fleeting harms while outside the forum that dissipate prior to the plaintiff’s return. For example, suppose two citizens of Florida fight while on vacation in Georgia, but their injuries fully heal before they return to Florida, where one sues the other for assault. The suit could be written as  $P_x$  v.  $D_x$  in  $F_x$ , re  $C_y$ ,  $E_y$ , and would pose an

citizens of a single state other than the forum state:  $P_y$  v.  $D_y$  in  $F_x$ . Personal jurisdiction would be a concern in such cases if the challenged conduct and effects had little or no connection to the forum, although in those circumstances a forum non conveniens dismissal would often be an appropriate remedy for the plaintiff's forum shopping.<sup>308</sup> Assessing personal jurisdiction in nonremovable cases would thus raise difficult questions only in unusual circumstances. Aside from the two foregoing scenarios, the Diversity Clause would in theory allow Congress to make a federal court available to hear all the cases discussed in Part I that raise difficult jurisdictional questions. In practice, Congress has not vested the full scope of diversity jurisdiction and has limited the availability of removal,<sup>309</sup> but this stems from congressional discretion rather than constitutional command and is thus more readily amenable to revision.

Second, removal of a case from state court to federal court would eliminate the problem that doctrine governing personal jurisdiction in state courts, properly understood, attempts to solve. Recall from Part I that the problem with aggressive assertions of personal jurisdiction in state court is not that the Constitution protects the defendant from having to enter a court in the state, or from being sued, but rather that in some circumstances the defendant may resist being compelled to appear in the state *by the state*.<sup>310</sup> Removal moots that concern by enabling the defendant to appear in the first instance in a federal court, in effect evading the state's summons to appear in a state court.<sup>311</sup> If there is any lingering taint from the state's summons (which may have had some coercive effect because it forced the defendant to seek refuge in a federal court), the federal court can expunge the taint by requiring the plaintiff to serve a new summons that invokes federal rather than state

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interesting question about whether Georgia should have power to hear the suit if it were unable to rely on general jurisdiction. Cf. Stein, *supra* note 9, at 743–44 (contending that a state's desire to compensate a local plaintiff is insufficient, standing alone, to legitimize the exercise of power over a noncitizen defendant).

<sup>308</sup> See, e.g., Eric T. v. Nat'l Med. Enters., 700 A.2d 749, 755 (D.C. 1997) (affirming dismissal of action by nonresident plaintiff against nonresident defendants regarding extraterritorial conduct); cf. Conison, *supra* note 50, at 1206 (“There is no historical basis for supposing that, if jurisdiction were not governed by the Due Process Clause, states would run amok exercising jurisdiction over everyone, everywhere in the world.”).

<sup>309</sup> See *supra* note 306.

<sup>310</sup> See *supra* Parts I.B.3–4.

<sup>311</sup> Defendants can even remove before being served. See 28 U.S.C. § 1446(a) (2006) (removal appropriate after defendant receives a complaint “through service or otherwise”); *id.* § 1448; Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 355 n.6 (1999); cf. Welsh v. Cunard Lines, Ltd., 595 F. Supp. 844, 845–46 (D. Ariz. 1984) (allowing transfer of removed action where neither the state court nor transferor court had personal jurisdiction).



authority.<sup>312</sup> The defendant would thus be no worse off after removal than he would have been if the plaintiff had invoked her right to sue in federal court initially, at least if Congress deems the state limitations period to terminate upon reservice rather than the original service.<sup>313</sup> The federal court might be just as inconvenient a place to litigate as a state court, but as noted above, inconvenience ought not to be a jurisdictional factor, and in any event the federal court could address convenience concerns by transferring venue to a different district.<sup>314</sup>

Personal jurisdiction in the removed action would thus not be an issue in cases involving U.S. parties and domestic conduct if we assume that: (1) Congress can authorize nationwide service and personal jurisdiction in federal diversity cases based on the defendant's aggregate contacts with the U.S.,

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<sup>312</sup> The removal statute already allows reservice in the federal court in limited circumstances, *see* 28 U.S.C. § 1448 (2006), and could be amended to allow reservice in any diversity action where the defendant challenges the state court's authority to issue a summons. Most defendants presumably would waive reservice to avoid having to pay for it. *See* FED. R. CIV. P. 4(d)(2) ("If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant . . . the expenses later incurred in making service . . .").

<sup>313</sup> If the limitations period expired after the plaintiff served the state summons but before he served a proper federal summons, three questions would arise: (1) whether the state summons was sufficient under state law to toll the limitations period; (2) if so, whether the Constitution limits a state's power to toll a limitations period (rather than compel the defendant's appearance) by serving process on a defendant with only a tenuous connection to the state; and (3) if so, whether the state summons satisfied the Constitution. The second question is trickier than it appears because limitations periods are a product of "legislative grace" and therefore "subject to a relatively large degree of legislative control." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). The state's discretion to define limitations periods could arguably extend to authorizing tolling based on service, even if the service would not also authorize jurisdiction; in effect, the state would be creating a grace period for perfecting post-removal service. *But cf. Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893 (1988) (noting that "[a]lthough statute of limitations defenses are not a fundamental right . . . [a] State may not withdraw such defenses on conditions repugnant to the Commerce Clause" and therefore cannot condition the defense's availability on a defendant's waiver of objections to personal jurisdiction).

<sup>314</sup> *See supra* Part I.A.2; 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."). Transfers would not, however, solve the problem that arises when a plaintiff forum shops into an inconvenient forum to exploit favorable choice of law rules, which would be the same in federal court as they would be in state court, and would follow the case from the original forum to the transferee forum. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); Silberman, *supra* note 64, at 587–89 (noting the risk of forum shopping between federal districts to obtain favorable substantive law that would carry over to a new venue); *cf. 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE* § 3827 (3d ed. 2010) (contending that the law of the transferee court should apply when a transfer is based on a defect in personal jurisdiction). Accordingly, if Congress vastly expanded the scope of personal jurisdiction in federal court, it would need to consider adopting new choice of law rules to govern in cases transferred from districts that had no plausible connection to the dispute. *See generally* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991) (discussing the need for a federal choice of law statute even under the current regime governing diversity jurisdiction).

which seems clear under the Fifth Amendment although possibly debatable under *Erie*;<sup>315</sup> and (2) Congress in fact exercises this power. If Congress does not authorize nationwide service, then removal would not eliminate personal jurisdiction issues because under current statutes and rules a federal diversity court's personal jurisdiction is usually coextensive with the state court's personal jurisdiction.<sup>316</sup> Using removal as a remedy for excessive assertions of personal jurisdiction by state courts in domestic cases therefore is viable only if Congress grants broader personal jurisdiction to federal courts than state courts could exercise under the Fourteenth Amendment.<sup>317</sup>

Third, using the existence of diversity jurisdiction as a means of policing state behavior would fit into the framework of horizontal federalism. As I have noted elsewhere, the five “Interstate Jurisdiction” Clauses in the Constitution—the State Controversies Clause, the Diversity Clause, the Land Grants Clause, the Admiralty Clause, and the Out-of-State Citizen Clause—each play a role in preventing undesired consequences from state judicial action that affects other states or citizens of other states.<sup>318</sup> Indeed, the Framers explicitly linked federal jurisdiction to the goal of preserving national “harmony,”<sup>319</sup> and even theorized that inappropriate behavior by state courts in

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<sup>315</sup> See *supra* notes 203 (noting *Erie* issues), 212 (noting Fifth Amendment issues).

<sup>316</sup> See FED. R. CIV. P. 4(k)(1)(A). For exceptions to this rule, see *supra* note 200. A statute authorizing nationwide service in diversity cases would expand federal jurisdiction relative to the jurisdiction of a state court within the relevant federal district even if the Fifth Amendment requires a fairness inquiry. See *supra* notes 211–14 (noting circuit split about whether a defendant's aggregate contacts with the U.S. are alone sufficient to justify jurisdiction even if none of the contacts are with the state in which the action is proceeding). First, the fairness inquiry should arguably affect the propriety of venue, not jurisdiction (see *supra* Part I.A.2), and thus the remedy for a defendant who removes to an unfairly burdensome district should be transfer to a different district rather than dismissal. See 28 U.S.C. § 1404(a) (2006). Second, even if jurisdiction in the initial federal district would violate the Fifth Amendment, Congress may authorize transfer to another district where jurisdiction would be proper. See *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465–66 (1962); AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 220 (2004) (proposing revision of 28 U.S.C. § 1406(a) to clarify that lack of personal jurisdiction is a basis for transfer even if venue is otherwise proper); *supra* note 314 (discussing how transfer may affect choice of law).

<sup>317</sup> For discussion of whether nationwide service of process is desirable, see Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1 (1982); Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117 (1989); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325 (2010).

<sup>318</sup> See Erbsen, *supra* note 250, at 537–43.

<sup>319</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 147 (Max Farrand ed., 1937) (reprinting early draft of the Constitution that included the Diversity Clause as subset of a section granting jurisdiction over “such other cases, as the national legislature may assign, involving the national peace and harmony”).

suits against nonresidents could undermine national interests.<sup>320</sup> Creating a federal forum for private disputes under state law was thus an accepted component of policing horizontal federalism. Treating diversity jurisdiction as a means of addressing abusive assertions of personal jurisdiction in state court should therefore not be unsettling if Part II is correct in showing that such jurisdictional overreaching is a classic horizontal federalism problem.

Fourth, relying on Congress to police jurisdiction in state court by authorizing removal of certain actions to federal court also fits into the framework of horizontal federalism. Removal is essentially a form of preemption. Instead of preempting the exercise of state legislative power, it preempts the exercise of state judicial power.<sup>321</sup> A twist is that the preemption takes effect only when a litigant invokes it. Congress thus delegates the decision about whether states should have power in particular cases to the people most adversely affected by that assertion of power. Preemption is a standard approach to policing horizontal federalism problems; it is a blunt instrument, but it eliminates the states' capacity to offend the interests Congress seeks to protect.<sup>322</sup>

In sum: one way that the Constitution avoids horizontal federalism problems is by authorizing federal subject matter jurisdiction over cases that for various reasons do not belong in state courts, and another way is by authorizing Congress to preempt state action when it perceives a good reason for doing so. The combined effect of these approaches is that the Constitution apparently authorizes Congress to use federal subject matter jurisdiction as a means of preempting virtually every difficult personal jurisdiction issue that

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<sup>320</sup> See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 557 (Jonathan Elliot ed., 2d ed. 1836) (reporting John Marshall's statement at Virginia ratifying convention that "refusal of justice" by state courts to out-of-state residents in private suits could lead to "disputes between the states"); THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that Diversity Clause was one of several that were "essential to the peace of the Union").

<sup>321</sup> Preemption occurs in the form of a statutory directive requiring the state court to stay proceedings upon filing of a notice of removal. See 28 U.S.C. § 1444(d) (2006). Federal courts can use their equitable powers to enforce this requirement. See *Younger v. Harris*, 401 U.S. 37, 60 n.3 (1971) (noting that the removal statute authorizes an exception to the Anti-Injunction Act); Telford Taylor & Everett I. Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1174 (1933) (tracing the history of injunctions supporting removal).

<sup>322</sup> See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1431 (2006) ("We are struck by the similarity of the rationales put forward for the preemptive role of federal law to promote horizontal equity among the states and for the need to provide a federal forum for diversity and federal question cases implicating the needs of national market integration."); Erbsen, *supra* note 250, at 550–60.

could arise in state courts in the broad range of cases that this Article addresses.

Whether Congress *should* exercise its power is a separate question: there are many sound reasons not to expand the scope of diversity and removal jurisdiction and not to authorize nationwide service of process in diversity cases.<sup>323</sup> Limited rather than complete preemption may also be preferable. For example, Congress could mitigate some of the problems that expanding diversity jurisdiction would create by permitting removal only in cases that are especially likely to involve dubious assertions of personal jurisdiction, such as suits based on conduct that occurred and had effects primarily outside the forum. This inquiry into the nexus between the suit and the forum would be subjective and potentially difficult without discovery. However, there is precedent for such an inquiry in modern statutes conditioning diversity jurisdiction on the location of conduct and injuries in class actions and other forms of complex litigation.<sup>324</sup>

But suppose that Congress does make federal courts available to exercise personal and subject matter jurisdiction in cases removed from state courts where the defendant would otherwise have challenged personal jurisdiction. The question would then become: why not make removal the only available remedy for the jurisdictional challenge? If the defendant wants to leave the state court, he can, and the jurisdictional problem disappears. If he does not want to use the get-out-of-state-court-free card that Congress has provided, then he forfeits his ability to raise a jurisdictional defense that the Supreme Court has repeatedly said is waivable by implied consent to adjudicate in the forum.<sup>325</sup> Indeed, his complaints would often be pointless—beyond foisting

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<sup>323</sup> Making federal courts more accessible siphons cases from state courts, which is undesirable if such cases in a sense “belong” in state courts because they arise under state law, or if plaintiffs’ preference for a state forum has any weight. Expanding federal subject matter jurisdiction as a means of policing the states’ adjudicative jurisdiction would thus replace a horizontal federalism problem (a potential misallocation of power among the states) with a vertical federalism problem (a potential misallocation of power between the states and the national government). Additional diversity cases would also inflate the federal docket and crowd out federal question cases that arguably have a better claim on the courts’ attention. *See generally* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97 (critiquing diversity jurisdiction); Moller, *supra* note 305, at 1178 (noting that the Diversity Clause was drafted with sensitivity to Founding Era concerns about the need for “limits on the power of federal courts to draw litigation out of state courts”).

<sup>324</sup> *See* 28 U.S.C. § 1369(a)(3) (2006) (court must consider where a “substantial part[] of the accident” occurred); *id.* § 1332(d)(3)(D) (court must consider whether forum has a “distinct nexus” with the “alleged harm”); *id.* § 1332(d)(4)(A)(i)(III) (court must consider where “principal injuries” were “incurred”).

<sup>325</sup> *See supra* note 182. Finding a waiver based on the defendant’s failure to exercise an opportunity to leave the forum would stretch the definition of “consent,” but not much more than the Court has already

costs and delay on the plaintiff<sup>326</sup>—because if he succeeds in avoiding the state court’s jurisdiction the plaintiff could simply refile in federal court (assuming that the limitations period had not expired).<sup>327</sup> A seemingly compelling argument against allowing the availability of a removal remedy to forfeit a jurisdictional challenge in state court is that the defendant has a right to raise that challenge. But that argument is circular: the question here is whether the Constitution regulates personal jurisdiction solely by creating rights, through federal oversight, or via a hybrid approach (or, in Part II’s parlance, whether the Constitution relies on “constraints,” “centralization,” or both). That is a question that the Supreme Court has never engaged, presumably in part because Congress has not generally authorized nationwide service in removed diversity actions.<sup>328</sup>

Now suppose, as is likely, that Congress does not authorize nationwide service and removal in most diversity cases. The unexamined question of whether the Constitution regulates personal jurisdiction in state court using a constraint or centralization approach remains important because when one recognizes the possibility that *Congress* can *preempt* judicial due process remedies, there is a possibility that the *Constitution* itself *precludes* such remedies. This theory would posit that the Constitution adopts a structural rather than rights-based approach to jurisdictional overreaching by state courts, relying on Congress to intervene if states misbehave.<sup>329</sup> Thus, the Due Process

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stretched it. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (treating absent class member’s failure to opt out of class as “consent” to jurisdiction).

<sup>326</sup> A defendant might assert an interest in complaining about state jurisdiction rather than acquiescing to federal jurisdiction if he would prefer to litigate in state court rather than federal court in the event that his challenge to personal jurisdiction fails. But if in fact the defendant prefers the forum with questionable personal jurisdiction to the forum with clear personal jurisdiction, and if jurisdictional defenses are waivable (see *supra* note 182), then forcing the defendant to sacrifice one of his preferences (challenging the state court’s jurisdiction or avoiding federal court) seems more reasonable than allowing the defendant to consume the court’s and plaintiff’s resources litigating personal jurisdiction in state court when an alternative forum is available.

<sup>327</sup> Plaintiffs might recognize this possibility and file in federal court in the first instance to avoid the uncertainty of personal jurisdiction in state court. If one doubts whether diversity jurisdiction is desirable and thinks that cases arising under state law belong in state court, then this incentive to file in federal court is a reason that Congress should not authorize nationwide personal jurisdiction in diversity cases.

<sup>328</sup> See *supra* note 200 (citing two exceptions where a federal diversity court can serve process more broadly than a local state court).

<sup>329</sup> Congress arguably used its diversity/removal preemption power for such anti-mischief purposes when it expanded federal jurisdiction over class actions. See 28 U.S.C. § 1332(d) (2006); S. REP. NO. 109-14, at 4–5 (2005) (criticizing “inadequate supervision” by state courts of cases with “nationwide ramifications”); *id.* at 6 (“Interstate class actions which often involve millions of parties from numerous states . . . present the precise concerns that diversity jurisdiction was designed to prevent: frequently in such cases, there appears to be . . . a

Clause would have no role in any case where Congress could have authorized removal to and personal jurisdiction in federal court, even if Congress did not. This possibility is not as outlandish as it seems because the Diversity Clause is the only provision of the Constitution that explicitly recognizes the prospect that suits might be filed within one state against citizens of another state; the Full Faith and Credit<sup>330</sup> and Privileges and Immunities Clauses<sup>331</sup> are less

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judicial failure to recognize the interests of other states in the litigation.”); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1298 (2007) (noting concerns in the Class Action Fairness Act’s legislative history about “damage to one state’s sovereignty caused when a second state’s court” adjudicated certain types of class actions).

<sup>330</sup> The Full Faith and Credit Clause addresses the consequences of one state’s lack of personal jurisdiction when a plaintiff tries to enforce a judgment in “other” states, but the Clause has nothing to say about whether a judgment is enforceable in the state that rendered it. U.S. CONST. art. IV, § 1; *see also infra* note 338 (discussing problems that may arise if the rendering state’s judgment is enforceable). *But see* *Trangsrud*, *supra* note 3, at 880–81 (contending that courts could create federal common law to implement full faith and credit principles even in direct appeals challenging jurisdiction in the rendering state); Ralph U. Whitten, *The Constitutional Limitations on State Court Jurisdiction (Part I)*, 14 CREIGHTON L. REV. 499, 605 (1981) (contending that the Clause would authorize Congress to regulate state court jurisdiction even in cases that do not involve collateral enforcement).

Consistent with the text’s focus on “other” states, pre-*Pennoyer* Supreme Court decisions often did not conceptualize defects in personal jurisdiction as an intrinsic flaw in the rendering state’s judgment, but rather as an excuse for enforcing states to circumvent their otherwise applicable comity obligations. *See* *Hall v. Lanning*, 91 U.S. 160, 167 (1875) (observing in dicta that a judgment rendered without service on the defendant might be enforceable in the rendering state but unenforceable in other states); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 461, 468–69 (1873) (noting that even if courts in the rendering state would not reexamine a rendering court’s “jurisdiction of the person,” courts in other states could do so). The Court did not reconcile these observations with its earlier statements that judgments rendered without proper service were “nullities,” and thus presumably void even in the rendering state. *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850); *see also* *Harris v. Hardeman*, 55 U.S. (14 How.) 334, 339 (1852) (“[A] judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service of process . . . . [W]ith respect to such a person, such a judgment is absolutely void . . . .”). The distinction between domestic and foreign validity became moot after *Pennoyer*, which explained that prior decisions (which the Court alluded to generally without identifying) had

been accompanied with the observation that a personal judgment thus recovered [without jurisdiction] has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and, consequently, no authority to pass upon his personal rights and obligations . . . it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered.

directly relevant. Yet the Diversity Clause allows such suits to proceed in state court because it makes diversity jurisdiction concurrent rather than exclusive and gives Congress discretion about how much, if any, jurisdiction to vest. The rest of the original Constitution then says nothing about the possibility of states overreaching their concurrent authority over outsiders, except insofar as jurisdiction in specific contexts may undermine particular federal interests.<sup>332</sup> Even the Fourteenth Amendment—which was not ratified until 1868—does not explicitly address personal jurisdiction, despite being the “only source” of current personal jurisdiction doctrine.<sup>333</sup> The Constitution as originally drafted thus seems indifferent to the content of jurisdictional rules and can be read to address jurisdiction, if at all, indirectly by allowing removal (which Congress made available in the first Judiciary Act for suits by local plaintiffs against citizens of other states).<sup>334</sup> That indifference raises the question of whether the Supreme Court was correct to assert a role for courts in addressing a problem whose solution the Constitution arguably delegated to Congress.<sup>335</sup>

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95 U.S. 714, 732 (1878). *Pennoyer* thus simultaneously relied on the Fourteenth Amendment to constitutionalize personal jurisdiction doctrine and retroactively deemed cases decided before enactment of the Fourteenth Amendment to have implicitly recognized a judicially enforceable limit on a rendering state’s power without citing any applicable constitutional provision. The decision thus managed not to ground personal jurisdiction doctrine in any constitutional text: not the Fourteenth Amendment, which merely continued prior tradition, and not any other text, because precedents had not relied upon the Constitution.

<sup>331</sup> The Privileges and Immunities Clause contemplates that a citizen of one state might wander into another and become subject to its power, which presumably could include judicial power. U.S. CONST. art. IV, § 2. The equality norm embedded in the Clause likely would not benefit a noncitizen defendant seeking favorable treatment relative to local citizens by claiming an immunity from suit that local citizens do not enjoy. *See Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (noting that the Clause places “citizens of each State upon the same footing with citizens of other States”). Indeed, future scholarship could consider whether the equal treatment requirement obviates further constitutional scrutiny of the state’s authority to provide a forum (at least beyond an inquiry into convenience). If the Privileges and Immunities Clause was an important mechanism by which the Constitution protected individual rights from the costs of federalism, and if it merely requires equal treatment, and if state courts treat outsider defendants as well as they treat insider plaintiffs (and provide an unbiased opportunity to obtain forum non conveniens dismissal, *see supra* Part I.A.2), then perhaps jurisdiction is acceptable without need to consider “contacts,” “availment,” and their ilk. *But cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (contending that the equal treatment norm is only one of three values relevant to establishing limits on state authority over outsiders).

<sup>332</sup> For example, the Commerce Clause might be relevant if state overreaching chills interstate trade, and foreign affairs preemption might in some cases preclude jurisdiction over aliens. *See supra* notes 4, 145, 272, 330–31.

<sup>333</sup> *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

<sup>334</sup> *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

<sup>335</sup> For further discussion of how determining the *content* of constitutional limits on state authority requires considering the proper *institution* to define and apply those limits, see Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 744–59 (2008); Metzger, *supra* note 220, at 1503–07; Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and*

The fact that the Constitution *could* be read to rely on removal rather than due process to regulate personal jurisdiction in state courts does not mean that it *should*. Among the many issues that further scholarship would need to address are: (1) whether the original text's apparent indifference to personal jurisdiction in state court stemmed from a Founding Era belief that territorial limits on service of process prevented states from engaging in excessive mischief,<sup>336</sup> and if so, whether the modern repudiation of those territorial limits requires altering the Constitution's approach to personal jurisdiction; (2) whether the Fifth Amendment and *Erie* tolerate personal jurisdiction based on national rather than state contacts in diversity cases (as perhaps they should if a virtue of diversity jurisdiction is its potential to mitigate jurisdictional overreaching by state courts);<sup>337</sup> (3) how the availability of statutory remedies for a particular problem should affect the propriety of and potential waiver of

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*Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815–53 (2005). Cf. *Dep't of Revenue v. Davis*, 553 U.S. 328, 355 (2008) (observing that “the unsuitability of the judicial process and judicial forums” may justify deferring resolution of controversies regarding scope of state regulatory power to Congress); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 269 (2000) (“Institutional choice is the core of constitutional law and constitution making. Analysis of institutional choice must consider the relative merits of various alternatives for each relevant context.”); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 85–90 (2009) (analyzing distinct lines of scholarship addressing institutional choice and assessing them within a broader framework of “new legal realism”).

<sup>336</sup> Evidence about Founding Era endorsement of what became *Pennoyer*'s in-state-service rule supports multiple interpretations. For example, consider *Kibbe v. Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786), in which a Connecticut court refused to enforce a Massachusetts judgment because the rendering court had attempted to obtain jurisdiction over the defendant by attaching his handkerchief rather than by personally serving him with process in the forum. The Connecticut court's decision is arguably evidence that Founding Era lawyers equated jurisdictional power with the defendant's presence in the forum state's territory, but the Massachusetts court's original decision arguably is evidence that they did not. Compare Weinstein, *supra* note 3, at 192 (focusing on the Connecticut decision), with *Perdue*, *supra* note 27, at 564 n.184 (focusing on the Massachusetts decision). For another example, compare Weinstein, *supra* note 262, at 9 n.34 (suggesting that *Phelps v. Holker*, 1 Dall. 261 (Pa. 1788), may have implicitly endorsed a territorial view of a state's authority to serve process), with Whitten, *supra* note 330, at 541 (contending that the *Phelps* opinion did not embrace territorial limits on jurisdiction). The First Congress enacted a venue statute that created a variant of *Pennoyer*'s in-state-service rule for federal courts, but this action does not tell us whether Congress believed that states would or should restrain their courts in a similar fashion. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (“[N]o civil suit shall be brought before [the federal district or circuit courts] against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . .”). Evidence also suggests that the Founding generation believed that service in the forum was generally *sufficient* to establish jurisdiction, but this evidence does not indicate the extent to which such service was *necessary*. See *Burnham v. Superior Court*, 495 U.S. 604, 610–15 (1990) (plurality opinion) (reviewing evidence supporting transient jurisdiction).

<sup>337</sup> See *supra* notes 203, 212.



judicially implied rights-based remedies;<sup>338</sup> (4) whether congressional silence (not authorizing removal or nationwide service of process, or doing so without specifying the effect on defendants' ability to challenge personal jurisdiction by other means) can justify precluding defendants from challenging personal jurisdiction in state court in circumstances where the state seems to lack a legitimate basis for asserting its power; and (5) the comparative institutional competence of courts and Congress when making decisions about allocating jurisdictional authority among states.<sup>339</sup> The preemption and preclusion theories thus may be overbroad. Nevertheless, the theories illustrate how situating personal jurisdiction within the context of horizontal federalism highlights unexamined assumptions underlying due process doctrine and the doctrine's potentially fragile status and narrow scope if one reexamines those assumptions. If the simple expedient of removal could solve most problems that current due process doctrine addresses, then the Supreme Court's rhetoric of "liberty" rings hollow, and the widespread disenchantment with current doctrine has an additional foundation: not only is the content of doctrine debatable, but its very existence as a judicial creation in the face of congressional inaction is debatable as well. The role of the Diversity Clause in addressing personal jurisdiction in state court is therefore an issue ripe for further scholarship.<sup>340</sup>

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<sup>338</sup> A related question arises in the context of considering how Congress's power under the Effects Clause, *see* U.S. CONST. art. IV, § 1, interacts with the judiciary's supposed power to enforce constitutional limits on state jurisdiction. One can imagine a plausible horizontal federalism argument along the following lines: (1) jurisdiction in state court is most troubling when the defendant has no connection with the forum; (2) if the defendant has no connection with the forum, he almost certainly lacks assets in the forum; (3) if he lacks assets in the forum, then a judgment would be pointless unless the plaintiff can enforce it in other states; (4) other states are unlikely to enforce such jurisdictionally dubious judgments unless they must do so under the Full Faith and Credit Clause; (5) the Effects Clause enables Congress to relieve other states of their Full Faith and Credit obligations; such that (6) Congress can enact a statute that protects defendants who default and obviates judicially imposed remedies. If Congress chooses not to act, courts arguably lack institutional competence to fill the void. *See supra* note 335. This argument is appealing, but may be an incomplete solution to excessive assertions of state jurisdiction because Congress probably lacks power to dictate the effect of judgments within the rendering state, *see supra* note 330, such that defaulting defendants would be at risk if: (1) they have assets in the forum unconnected to the litigation that could be attached to satisfy the judgment; or (2) they in the future acquire local assets within the time frame when the judgment is enforceable. *See, e.g.,* FLA. STAT. ANN. § 95.11(1) (West 2002) (local judgments are enforceable for twenty years); ARIZ. REV. STAT. ANN. § 12-1551(A) (2003) (local judgments are enforceable for five years, but also are renewable).

<sup>339</sup> *See supra* note 335.

<sup>340</sup> *Cf. Perdue, supra* note 27, at 549 (suggesting, in context of analyzing jurisdictional theories based on "political obligation," that "[t]he combination of the privileges and immunities clause, assuring equal treatment for those who choose to litigate before a 'foreign sovereign,' and the option [via diversity jurisdiction] to litigate before one's own sovereign, i.e., the United States, solves the problem").

B. “Comity” and Skepticism About the “Reasonableness” Balancing Test

The possibility that the Constitution manages horizontal federalism problems in part by imposing mandatory comity rules<sup>341</sup> raises an interesting question about the propriety and focus of the Court’s current “reasonableness” inquiry for assessing states’ assertions of personal jurisdiction. A comity approach to personal jurisdiction would probably be undesirable, but considering why sheds new light on existing law by highlighting its arbitrariness and poor construction. This section therefore briefly considers the potential benefits and weaknesses of a comity rule, and then analyzes current doctrine in light of those weaknesses.

Imagine what a constitutionally required comity rule might look like in the context of personal jurisdiction. The rule would apply only in cases where multiple states could exercise jurisdiction, and the goal would be to promote harmony among coequal states by forcing them to recognize each other’s interests and exercise restraint.<sup>342</sup> A state thus could not assert personal jurisdiction if jurisdiction would be more appropriate in a different state (we can bracket precisely what “more appropriate” means because we are not trying to frame the test in detail). Courts considering challenges to personal jurisdiction would therefore need to determine which states *could* exercise jurisdiction and which *should* do so. A court would thus need to consider not only the propriety of allowing the case to proceed in the current forum, but also the relative propriety of allowing the case to proceed somewhere else. To make this determination, courts would need to evaluate the interests of each prospective forum state.<sup>343</sup> If we assume that states generally care about the interests of litigants as well as their own interests, then the parties’ preferences would also be relevant. And if we assume that states care about the efficient resolution of disputes, then finding an efficient forum would also be a

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<sup>341</sup> See *supra* Part II.A.

<sup>342</sup> See Erbsen, *supra* note 250, at 567–72 (discussing how horizontal federalism principles may translate into comity rules).

<sup>343</sup> This comity rule would differ from the constitutional inquiry into venue that I discussed and briefly defended in Part I.A.2. The inquiry suggested earlier focused on whether litigation in the forum would excessively burden the defendant. The constitutional standard of excessiveness would require subjective balancing of burdens against other factors, but the object would be to determine if the forum satisfied a minimal threshold of adequacy. In contrast, a comity inquiry would seek to prioritize one state’s desire to provide a forum over another’s. Burdens would be relevant only to the extent that relevant state interests accounted for the parties’ convenience.

concern.<sup>344</sup> Moreover, a comity rule would be pointless if the reviewing court could not control where the case was ultimately litigated. Absent such control, a comparative assessment of fora would be speculative: a plaintiff might choose to refile a dismissed action in an unexpected forum and thus necessitate a costly second round of jurisdictional inquiry. A comity rule would therefore require linking a dismissal on jurisdictional grounds to a holding about where else the case could proceed.<sup>345</sup>

Such a comity rule would be superficially attractive because considering the relative merit of potential fora is more satisfying than allowing jurisdiction in any minimally adequate forum that a plaintiff chooses to promote his own self-interest. In extreme cases where one forum would clearly be superior to another in every material respect, allowing the inferior forum to hear the case would expose the limits of law's capacity to achieve optimal results. Lawyers are accustomed to these limits, but they are nevertheless disappointing. Indeed, a desire to avoid suboptimal results apparently animates statutory and common law venue rules, as courts may invoke the doctrine of forum non conveniens to dismiss a case so that it may be heard in a state with stronger interests, or where litigation would be more convenient or efficient.<sup>346</sup> One can even imagine that comity rules could *expand* states' jurisdictional authority beyond what current law tolerates to facilitate consolidation of complex litigation that current law fragments across multiple states.<sup>347</sup> Comity-based

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<sup>344</sup> Statutes authorizing forum non conveniens dismissals codify these state interests in fair and efficient resolution of disputes. *See, e.g.*, ALA. CODE § 6-5-430 (2005); N.C. GEN. STAT. § 1-75.12(a) (2009). However, some states do not permit dismissal of suits filed by their residents. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (West 2008).

<sup>345</sup> The holding about where jurisdiction is proper presumably would have a preclusive effect against plaintiffs who refiled in the wrong state. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (recognizing that resolution of federal question regarding personal jurisdiction in federal court has an issue-preclusive effect when the same federal question arises in state court). A state court that dismisses an action on comity grounds might not be able to enjoin the plaintiff from refiled in a particular state, *see Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 n.9 (1998) (noting that the question is open), but the state court's holding that the Constitution permitted jurisdiction in only one specified forum would be enforceable in other states if it would be preclusive under the rendering state's law, *see* 28 U.S.C. § 1738 (2006).

<sup>346</sup> Courts adjudicating motions to dismiss cases under forum non conveniens doctrine typically consider both "public interests" and the parties' "private interests," and can rely on either or both. *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 277 (Ill. 2005); *State ex rel. Smith v. Cuyahoga Cnty. Court of Common Pleas*, 832 N.E.2d 1206, 1209 (Ohio 2005).

<sup>347</sup> Restrictive jurisdictional rules contribute to the sprawl of related suits across multiple states by preventing joinder of all desired parties in a single state. *See AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* §§ 3.08 cmts. a-b, 4.01 cmt. f (1994) (proposing remedies for the vexing problems that arise when different states exercise concurrent jurisdiction over cases that share a common nexus). Part III.B generally considers whether comity concerns *limit* state authority by barring

rules thus have the potential to better match cases with fora, suggesting that perhaps the Constitution should be read to require them.

Despite its allure, constitutionalizing comity analysis would probably be unwise and unworkable. First, the Constitution does not offer any guiding principle for framing a comity inquiry because it does not indicate what constitutes a more appropriate forum. The goal could be to find the best forum, or avoid the worst forum, or identify a forum that is “good enough.” Choosing any of these standards would moor the comity inquiry to an arbitrary and atextual starting point. Second, even if one atextually selected a standard to guide the comity inquiry, implementing that standard would likewise be arbitrary because competing interests are difficult to define and weigh.<sup>348</sup> The Supreme Court learned this lesson when it incorporated similar comity rules into constitutional tests governing choice of law, and as a result abandoned the effort.<sup>349</sup> Likewise, state courts have struggled to apply choice of law theories that require interest balancing and often cannot resist the temptation to prioritize their own state’s interests at the expense of competing interests,<sup>350</sup> or to ignore the interests of out-of-state citizens.<sup>351</sup> Third, dismissing cases on jurisdictional grounds despite a forum’s minimal sufficiency merely because another forum would be better could impose significant costs if the court’s

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jurisdiction over cases that belong elsewhere, but arguably comity concerns could *expand* state authority in circumstances where a state is the optimal forum for a complex case despite having limited contacts with some relevant parties. If we accept that horizontal federalism principles animate jurisdictional objections, and that comity is a relevant principle, then the need for states to respect the forum’s assertion of authority in the interests of systemic efficiency might diminish a defendant’s ability to evade that authority. *Cf. id.* § 3.08(a) (proposing to permit transfer of complex cases from federal courts to state courts and to permit the state transferee court to exercise nationwide personal jurisdiction); *supra* note 220 (discussing nationwide jurisdiction in state courts).

<sup>348</sup> For an argument that methods of ascertaining competing state interests in the choice of law context are “intellectually unsatisfying” and merely replicate preexisting “unexplained value preferences,” see Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 461 (1985). *But see* Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer’s “Foundational Attack,”* 46 OHIO ST. L.J. 483 (1985).

<sup>349</sup> *See* Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 499 (2003) (“Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States’ competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.”). Subconstitutional limits on choice of law often include a comity element that requires states to choose the applicable law in part by reference to other states’ “relative interests . . . in the determination of the particular issue.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (1971).

<sup>350</sup> *See supra* note 62; Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249, 287 (“The states have generally employed an interest analysis that begins with a presumption that a state’s primary interest is to protect its own citizens at the expense of out-of-state interests.”).

<sup>351</sup> *See* Laycock, *supra* note 332, at 275 (contending that some variants of interest analysis postulate that “the interests of outsiders do not count”).

speculation turns out to be wrong. For example, a plaintiff might decide to abandon a suit rather than refile in the new forum, and thus the Constitution's desire for a better forum would produce the perverse result of having no forum.<sup>352</sup> Likewise, a state might find itself burdened with a suit refiled within its courts after a comity ruling despite the fact that the state did not have the strong interest in the case that a foreign court surmised. Indeed, a comity doctrine could become a handy excuse for courts in one state to foist unwanted cases on sister states under the guise of deference and respect.<sup>353</sup> Finally, the benefit of a comity rule may be illusory in light of the cost of obtaining it. Litigating jurisdictional challenges burns time and money. A comity rule would thus be sensible, if at all, if the benefits of facilitating movement from one forum to another are worth the costs of adjudicating jurisdictional challenges (including the many motions that presumably would fail). These costs and benefits are not easily quantifiable due to the absence of data and intangible nature of the competing interests. However, the fact that the common law and statutes have made *forum non conveniens* dismissals difficult to obtain<sup>354</sup> without provoking substantial reform suggests that respecting plaintiffs' forum choice in all but the most unusual cases does not impose intolerable costs.

Now that we know what a comity rule would do and why the Constitution probably does not require it, we can see the implications for current law. Current jurisprudence includes a covert form of quasi-comity rule that appears worse than the model discussed above. Exposing the rule for what it is suggests a need for further scrutiny of whether the rule is desirable.

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<sup>352</sup> This outcome is already possible under the common law because plaintiffs whose claims are dismissed on *forum non conveniens* grounds need not refile. The Constitution tolerates this outcome because it does not require states to make their courts available merely because a plaintiff would prefer to use them. *See supra* note 173. However, it seems needlessly harsh to interpret the Constitution to *require* rather than *tolerate* depriving plaintiffs of an otherwise adequate forum merely because an alternative forum would be better in some indeterminate sense. A court could avoid the harsh result by not dismissing cases that a plaintiff vows not to refile, but then the comity rule would be toothless because plaintiffs could veto its application through self-serving statements about their future intent.

<sup>353</sup> This problem in theory could arise under current *forum non conveniens* rules, but in practice courts typically interpret such rules to warrant dismissal only in "rare" circumstances. *Clark v. Luvel Dairy Prods.*, 731 So. 2d 1098, 1113 (Miss. 1998); *see also* *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285, 292 (W. Va. 1994) ("[T]he doctrine of *forum non conveniens* is a drastic remedy which should be used with caution and restraint."). Constitutionalizing a comity inquiry may make dismissals more routine and thus provide cover for dubious motives.

<sup>354</sup> *See supra* note 353 (noting that the doctrine authorizes dismissal only in exceptional circumstances).

The current constitutional test for assessing a state court's exercise of personal jurisdiction includes a inquiry into the "reasonableness" of allowing the state to adjudicate the case.<sup>355</sup> If the defendant makes a "compelling" showing that jurisdiction would be unreasonable despite the defendant's contacts with the forum, then doctrine requires dismissing the case.<sup>356</sup> In contrast, if jurisdiction is especially reasonable, then a "lesser showing of minimum contacts" can justify jurisdiction.<sup>357</sup> The factors that the Court uses to assess reasonableness include:

[1] the burden on the defendant, [2] the forum State's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several States in furthering fundamental substantive social policies.<sup>358</sup>

The first three factors are straightforward. Courts rarely mention the fourth factor (efficiency), which probably encompasses concerns about a forum's accessibility to witnesses and evidence and its ability to obtain jurisdiction over all rather than only some necessary defendants in relatively complex cases.<sup>359</sup> The fifth factor (social policies) is likewise undeveloped and seems focused on whether allowing jurisdiction would undermine a sufficiently important regulatory interest to some indeterminate extent,<sup>360</sup> and possibly on considering what law the forum will apply.<sup>361</sup> All five factors thus seem remarkably similar to the factors that a comity test would consider insofar as they address state, party, and systemic interests in finding a proper forum for litigation.

The reasonableness inquiry can be coherent in the cases that this Article considers (involving domestic parties and events) only if it involves

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<sup>355</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* (citation and internal quotation marks omitted).

<sup>359</sup> See 1 ROBERT C. CASAD & WILLIAM M. RICHMAN, *JURISDICTION IN CIVIL ACTIONS* 170–71 (3d ed. 2002).

<sup>360</sup> See *id.* at 171 n.360 (tracing the factor's evolution through sparse caselaw).

<sup>361</sup> See *Burger King*, 471 U.S. at 477 ("[T]he potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules."). The emphasis on choice of law is odd because: (1) a court considering a jurisdictional challenge often will not know what law will apply because jurisdictional issues arise early in a case, before the parties reach the merits, see *supra* note 100; and (2) the Supreme Court has repeatedly stated that choice of law and jurisdiction entail distinct inquiries, see *supra* note 60.

comparative assessments of available fora, even though the Court has not acknowledged this comparative aspect of the test. To see why, recall that in purely domestic cases there is always at least one and often more than one state that can exercise jurisdiction consistent with the Constitution, although in unusual cases state law may close constitutionally available fora.<sup>362</sup> So if a court invokes the reasonableness factors to dismiss a case, it must implicitly be concluding that on balance these factors render jurisdiction in another state *more* reasonable. Indeed, it would be bizarre if the Constitution required courts to dismiss cases on reasonableness grounds if adjudication in the forum where the case would eventually be heard would be *less* reasonable than adjudication in the challenged forum.<sup>363</sup> In such circumstances the reasonableness inquiry would not promote any legitimate purpose: the plaintiff would either refile the action in the less reasonable forum, which is counterproductive, or would abandon the suit, which is unfortunate prior to any inquiry into the merits. A dismissal on reasonableness grounds is thus sensible only if personal jurisdiction in another forum would be more reasonable.<sup>364</sup>

Recognizing the comparative nature of the reasonableness inquiry exposes its flaws because the inquiry lacks the virtues of a comity rule while suffering from its defects. First, the virtue of the comity rule discussed above is that it would explicitly seek to find a relatively superior forum, yet the current reasonableness inquiry does not purport to achieve that goal even as it implicitly makes findings about comparative suitability. Second, a comity rule has the potential to promote comity—an important value in horizontal federalism cases—because it directly compares the interests of competing states. Yet the interests of possible alternative fora are not one of the five current reasonableness factors listed above and thus courts can ignore these interests when assessing jurisdiction. Third, a comity rule's principal defect would be its arbitrariness, both in deciding on the goal of the comparative inquiry (finding the best forum, avoiding the worst forum, etc.) and in defining and weighing competing interests. Yet the reasonableness inquiry is just as arbitrary: it also must determine how severe a difference between the reasonableness of two fora must be before it matters, and it also must define

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<sup>362</sup> See *supra* note 227.

<sup>363</sup> Dismissal would be similarly pointless if the two fora were equally reasonable, given the transaction costs of dismissal and refiling.

<sup>364</sup> In contrast, if a court invokes reasonableness to justify (rather than reject) jurisdiction and thus excuse an otherwise tenuous showing of minimum contacts, then it need not make a comparative assessment. It would hold only that the forum is sufficiently reasonable; the other available fora, if any, might be more or less reasonable.

and weigh a similar set of interests. Finally, dismissals on reasonableness grounds apparently do not contain any limits on where the plaintiff can refile, and thus do not foreclose further jurisdictional scuffling in another forum.

The reasonableness inquiry thus manages to look enough like a comity rule to suffer from its flaws but not enough to capture its benefits. Applying the comity lens of the horizontal federalism framework to personal jurisdiction doctrine therefore adds a fresh perspective that raises three questions warranting further scrutiny. First, should the inherently comparative aspects of the reasonableness inquiry be made to resemble a comity rule more closely? Second, if not, should the reasonableness inquiry be abandoned? Finally, if reasonableness is an appropriate test, how can it best be defended or altered in light of the concerns raised in this section? All three questions challenge a core element of modern doctrine that merits further scrutiny.

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The foregoing discussions of the Diversity Clause and comity analysis illustrate but do not exhaust the rich range of inquiries into personal jurisdiction theory and doctrine that a horizontal federalism approach can inspire. For example, two issues that are especially ripe for further scrutiny concern when a defendant may waive otherwise fatal defects in a state's jurisdiction,<sup>365</sup> and whether a defendant's inability to anticipate suit in the forum weighs against jurisdiction.<sup>366</sup> More generally, the analysis in Part II

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<sup>365</sup> The Supreme Court has held that a defendant may waive jurisdictional objections, and therefore that "federalism" principles are not the foundation for limits on state adjudicative authority because "[i]ndividual actions cannot change the powers of sovereignty." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982). The analysis in Part II undermines the Court's syllogism between "federalism" and "sovereignty" by fragmenting federalism into three distinct institutional relationships that do not reduce neatly into an issue of sovereign power: the relationship between the person and the forum state (encompassed in the "capacity" and "constraint" themes), between the forum and other states ("comity"), and between the forum and the nation as a whole ("centralization"). A defendant's waiver might vitiate federalism concerns arising from his own lack of relationship to the state if we assume that consent is a suitable foundation for state power. See *Trangsrud*, *supra* note 3, at 898. But it would be interesting to consider whether systemic comity or centralization concerns should in theory override a defendant's consent to the forum, and if in practice there is any plausible means of addressing such concerns if defendants have no desire to raise them. Cf. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 *CORNELL INT'L L.J.* 51, 67-69 (1992) (discussing private and public ordering of adjudication in the context of current personal jurisdiction doctrine).

<sup>366</sup> Current doctrine links the scope of states' jurisdictional power to the defendant's subjective expectations about where harm might arise. Compare *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that jurisdiction was appropriate in state where no conduct occurred but "effects" were experienced because forum was "focal point" of defendants' behavior), with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding that Oklahoma lacked jurisdiction over car dealer in New York who could not



provides a framework for reevaluating the many competing normative theories that commentators have developed to justify particular jurisdictional rules,<sup>367</sup> for revisiting specific doctrinal problems that have confounded courts, and for exploring analogies between assertions of personal jurisdiction and other forms of state action that implicate horizontal federalism. Further scholarship can pursue these and other inquiries to critique and reform modern jurisprudence governing personal jurisdiction in state courts.

## CONCLUSION

Personal jurisdiction doctrine is erratic and incoherent because it is a “solution in search of a problem.”<sup>368</sup> This Article redefines the problem and suggests a framework for addressing it. Situating personal jurisdiction in the context of horizontal federalism reveals constitutional values and analytical tools that challenge modern doctrine’s foundational assumptions. These insights integrate civil procedure with mainstream constitutional theory and can help courts and commentators reinvent a deeply confused yet vitally important area of constitutional law.

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“reasonably anticipate” suit in the forum). This doctrinal quirk is plausible (though debatable, *see supra* note 197) if one views constitutional law governing personal jurisdiction as a one-way ratchet that seeks only to protect individual due process rights by limiting state authority. State interests are relevant in this framework, but only as a component of the due process-centered fairness inquiry. *See supra* Part III.B. Applying horizontal federalism principles would arguably lead to a more nuanced two-way focus: constitutional law governing jurisdiction would exist to protect individual rights (impose constraints) but also to vindicate state interests (respect capacity). Future scholarship employing a horizontal federalism approach might therefore consider whether current law overly accommodates jurisdictional objections by defendants who cause harm in unexpected locales that nevertheless have an interest in providing a forum. Distinguishing between three types of situations implicating expectation interests would be useful: (1) when the defendant cannot reasonably anticipate that its conduct would cause effects in *the particular state* seeking to provide a forum (e.g., a manufacturer might have known that its product was potentially harmful but could not predict where the harms would occur); (2) when the defendant cannot reasonably anticipate that its conduct would cause effects in *any state* other than its preferred forum (e.g., a person engaging in a routine and generally safe activity might not have realized that his conduct was capable of causing anything more than localized harm); and (3) when the defendant *could have* reasonably anticipated that its conduct might cause effects outside its preferred forum but did not in fact anticipate these effects (e.g., an actor was negligent in its *ex ante* assessment of jurisdictional risk).

<sup>367</sup> *See supra* notes 7–13.

<sup>368</sup> Perdue, *supra* note 27, at 530.