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Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After *Walden v. Fiore*

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REORIENTING PERSONAL JURISDICTION DOCTRINE AROUND
HORIZONTAL FEDERALISM RATHER THAN LIBERTY AFTER
WALDEN *v.* FIORE

by
Allan Erbsen*

The Supreme Court's jurisprudence addressing personal jurisdiction has vacillated between different rationales for limiting judicial authority. Some decisions emphasize liberty, some invoke federalism, and some rely on both. This Article uses the Court's 2014 decision in Walden v. Fiore to show that recent emphasis on gilded rhetoric about liberty blurs the distinction between venue and jurisdiction, misconstrues the relevant private interests, and fails to consider the allocation of authority among coequal states in a federal system.

Walden held that adjudication of a civil suit in a Nevada federal court rather than in a Georgia federal court would infringe the defendant's "liberty." However, this Article explains that if Congress had authorized nationwide service of process, the supposedly abusive assertion of personal jurisdiction that the Court unanimously found unconstitutional would have been justified.

Congress's power to confer personal jurisdiction that would otherwise be unconstitutional requires rethinking how the Constitution limits states' adjudicative authority. The prospect of nationwide jurisdiction highlights a critical distinction between states as physical places and states as government entities. Jurisdiction might be appropriate in a state even if a defendant cannot be compelled to appear by the state. This in/by distinction reveals that modern personal jurisdiction doctrine conflates two distinct questions: (1) where may litigation occur, and (2) which governments may authorize litigation. Disentangling the "where" and "which governments" questions has several implications.

First, constitutional limits on venue may operate separately from limits on personal jurisdiction. Venue doctrine should assess whether litigation in a particular physical location is appropriate while personal jurisdiction doctrine should consider whether a particular government can compel the defendant to appear. Second, individual liberty is not a helpful animating principle for determining which governments should be able to authorize jurisdiction. My argument does not rely on formal labels, but the word "immunity" may be more helpful than liberty for describing the dynamics of personal jurisdiction when defendants are domiciled outside the forum. Essentially, defendants have a limited

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immunity from suit that the forum can abrogate, depending on the defendant's actions, government interests, and competing private interests. In contrast, a "liberty" interest that Congress can override merely by deciding to authorize nationwide service seems hollow. Third, principles of horizontal federalism—which govern relationships between states in a federal system—can help courts allocate jurisdictional power among potential fora. Courts might profitably analogize issues that arise when considering personal jurisdiction to issues that arise when analyzing choice of law, enforcement of judgments, extraterritorial legislation, and dormant federal preemption of state authority.

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Imagine a simple hypothetical case in which a state court lacks personal jurisdiction. A resident of Florida driving through his small hometown while intoxicated struck a vacationing Alaska resident, causing moderate injuries. The driver had never set foot outside Florida and did not anticipate that he would encounter non-Floridians along his route. The victim recuperated from her injuries in Florida, returned to Alaska at the end of her vacation, and filed a civil action against the driver in an Alaska state court. May the Alaska court exercise personal jurisdiction under current doctrine? Of course not. Modern personal jurisdiction doctrine requires "minimum contacts" between the defendant and the forum.¹ The driver had no contacts with Alaska and therefore was beyond its reach.²

¹ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

² *See Rush v. Savchuk*, 444 U.S. 320 (1980). In *Rush*, a one-car accident in Indiana injured two Indiana residents. The passenger then moved to Minnesota, where she filed a civil action against the driver. Among several reasons for rejecting personal jurisdiction, the Court held that "the plaintiff's contacts with the forum" were irrelevant when the defendant had "no contacts with the forum." *Id.* at 332 (emphasis in original).

Now suppose that the Supreme Court decides to revisit personal jurisdiction doctrine from first principles. Instead of relying on precedent, our hypothetical Florida resident would need to articulate a theory of why he is immune from suit in Alaska.

Objections to jurisdiction might take three forms. First, the defendant has no contacts with the forum, suggesting that he may have a liberty interest in resisting the forum's authority. Second, the forum is far from the defendant's home. Litigation in the distant forum might therefore impose undue burdens on the defendant's liberty. Finally, coequal states in a federal system have competing interests in providing a forum for civil litigation. Here, conduct, injuries, and convalescence occurred in the same state, suggesting that the case belongs in that state rather than in the state where the plaintiff resided. The first two objections replicate modern doctrine by raising concerns about liberty. But the third objection departs from the supposed focus of modern doctrine by raising concerns about federalism.³

If we revisit personal jurisdiction doctrine from first principles, we must ask whether the first two objections should be more salient than the third. Why should courts conceptualize jurisdictional limits in terms of liberty rather than in terms of the allocation of regulatory power within a federal system? The defendant's interests would still matter in a legal calculus centered on federalism, but the nature and weight of those interests would differ if liberty were not the animating principle.

The Supreme Court's recent decision in *Walden v. Fiore*⁴ provides an opportunity to revisit the role of federalism in personal jurisdiction doctrine. In *Walden*, the Court unanimously held that adjudication of a civil suit in a Nevada federal court rather than in a Georgia federal court would infringe the defendant's "liberty" because he lacked a "substantial connection with the forum State."⁵

Congress could have avoided the result in *Walden* by authorizing nationwide service of process.⁶ If Congress had authorized nationwide service, the defendant's contacts with the United States would have permitted litigation in Nevada despite his lack of contacts with Nevada. The supposedly abusive assertion of personal jurisdiction that a unanimous Court found unconstitutional would have been justified.

The fact that Congress can confer personal jurisdiction that otherwise would not survive constitutional scrutiny requires rethinking how the Constitution limits states' adjudicative authority. Congress's power highlights a critical distinction between states as physical places and states as government entities. Jurisdiction might be appropriate *in* a state even if a defendant cannot be compelled to appear *by* the state. This

³ See *infra* Part III(B).

⁴ 134 S. Ct. 1115 (2014).

⁵ *Id.* at 1121–22, 1125 n.9.

⁶ See *infra* Part II.

in/by distinction reveals that modern personal jurisdiction doctrine conflates two distinct questions: (1) where may litigation occur, and (2) which governments may authorize litigation. Disentangling these questions has several implications. First, constitutional limits on venue may operate separately from limits on personal jurisdiction. Second, individual liberty is not a helpful animating principle for determining which governments should be able to authorize jurisdiction. Third, principles of horizontal federalism—which govern relationships between states in a federal system—can help courts allocate jurisdictional authority among potential fora.

The Article proceeds in three Parts. Part I discusses the facts and holding in *Walden*. Part II explains why jurisdiction would have been appropriate in Nevada if Congress had authorized nationwide service of process. Finally, Part III explores the implications of Congress's power to authorize jurisdiction that would otherwise have been unconstitutional. I previously addressed some of these implications in a wider-ranging article that predates *Walden* (as well as the Court's important decision in *J. McIntyre Machinery, Ltd. v. Nicaastro*⁷).⁸ This Article builds on my prior work and highlights the continued need to rethink personal jurisdiction doctrine as it becomes progressively more unwieldy and undertheorized.

I. WALDEN'S FACTS AND HOLDING

According to their complaint,⁹ plaintiffs Gina Fiore and Keith Gipson were professional gamblers who were travelling through an airport in Atlanta, Georgia, en route to their residence in Nevada.¹⁰ Defendant Michael Anthony Walden¹¹ was a local Georgia police officer working with a Drug Enforcement Administration (DEA) task force at the airport.¹²

Various interactions in Atlanta between the plaintiffs and the DEA led the DEA to seize approximately \$97,000 in cash from the plaintiffs' clothing and baggage.¹³ Walden then submitted an affidavit of probable cause justifying civil forfeiture of the seized currency by connecting the money to drug trafficking.¹⁴ This affidavit was allegedly false because Walden knew that the money was not related to drugs and was instead

⁷ 131 S. Ct. 2780 (2011).

⁸ See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010).

⁹ The Court assumed that the allegations in the complaint were true. See *Walden*, 134 S. Ct. at 1119 n.2. This Article makes the same assumption.

¹⁰ See *id.* at 1119.

¹¹ The Court referred to the defendant as "Anthony Walden." *Id.* at 1119. But he signed his declaration as "Michael Anthony Walden." Joint Appendix at 43, *Walden*, 134 S. Ct. 1115 (No. 12-574).

¹² See *Walden*, 134 S. Ct. at 1119.

¹³ See *id.*

¹⁴ See *id.*

related to legal gambling.¹⁵ The United States Attorney's Office in Georgia eventually instructed the DEA to return the seized currency to plaintiffs.¹⁶

The plaintiffs filed a *Bivens* action¹⁷ against Walden in the United States District Court for the District of Nevada. They alleged that the false affidavit violated their rights under the Fourth Amendment by delaying return of their money.¹⁸

Personal jurisdiction in Nevada was tenuous. Walden's sole relevant contacts with the forum were that he knew that the seized currency was en route to Nevada, knew that some of it may have originated in Nevada, and acted in a way that caused the plaintiffs to suffer emotional and economic injuries in Nevada.¹⁹ In all other respects, Walden's contacts were with Georgia—where he lived, worked, seized the currency, and wrote the affidavit.

The Supreme Court unanimously held that Walden was not subject to personal jurisdiction in Nevada. Although he had contacts with residents of Nevada, he did not have contact with "Nevada itself."²⁰ The Court observed that "mere injury to a forum resident is not a sufficient connection to the forum" absent conduct by the defendant that "connects him to the forum in a meaningful way."²¹ Walden's contacts with Nevada were not "meaningful" because even though he "knew" about them, he did not "create" them.²² Instead, the plaintiffs "chose" to locate themselves in Nevada.²³ Thus, the fact that Walden "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada" precluded jurisdiction.²⁴

¹⁵ See *id.* at 1120.

¹⁶ See *id.*

¹⁷ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁸ The complaint arguably did not articulate the claim that animated plaintiffs' appellate theory of personal jurisdiction. See *Fiore v. Walden*, 688 F.3d 558, 593 n.4 (9th Cir. 2012) (Ikuta, J., dissenting) ("One combs through the complaint in vain to find any argument that the creation of a false probable cause affidavit is a separate constitutional tort [from the wrongful seizure]."), *rev'd*, 134 S. Ct. 1115 (2014).

¹⁹ *Walden*, 134 S. Ct. at 1119, 1125–26. Walden also "may have known that Plaintiffs lived in Nevada." *Fiore v. Walden*, No. 2:07-CV-01674-ECR, 2008 WL 9833854, at *3 (D. Nev. Oct. 17, 2008), *rev'd*, 688 F.3d 558 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115.

²⁰ *Walden*, 134 S. Ct. at 1125. For a critique of *Walden's* distinction between a state and its residents, see Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385.

²¹ *Walden*, 134 S. Ct. at 1125.

²² *Id.* at 1125–26.

²³ *Id.* at 1125.

²⁴ *Id.* at 1124.

II. IF CONGRESS HAD AUTHORIZED NATIONWIDE SERVICE OF PROCESS, THE DEFENDANT IN *WALDEN* WOULD HAVE BEEN SUBJECT TO PERSONAL JURISDICTION IN NEVADA

Walden relies on precedent about personal jurisdiction that invokes lofty ideals of “liberty,” “fair play,” and “substantial justice.”²⁵ This styling implies that the holding is a bulwark against extravagant assertions of jurisdiction and that the facts of the case were fundamentally incompatible with adjudication in Nevada. Yet the exact same facts would have warranted jurisdiction in Nevada if Congress had changed the applicable service of process rule.

Jurisdiction was not appropriate in Nevada because Congress has not authorized nationwide service of process in *Bivens* actions.²⁶ Federal Rule of Civil Procedure 4(k) governs “Territorial Limits” for service of process in federal court.²⁷ The default under Rule 4(k)(1)(A) is that federal courts borrow the long-arm statute of the state in which they sit.²⁸ The Supreme Court therefore analyzed personal jurisdiction over *Walden* as if the case were filed in a Nevada state court.²⁹ If Congress had authorized nationwide service of process, then Rule 4(k)(1)(C) would have made

²⁵ See *id.* at 1121–22.

²⁶ Congress arguably *did* authorize nationwide service of process in *Bivens* actions, but the Supreme Court narrowly interpreted the statute. A venue statute governing suits against federal officers allows plaintiffs to sue in their home states and serve process “beyond the territorial limits of the district in which the action is brought.” 28 U.S.C. § 1391(e)(1)(C), (e)(2) (2012). The Supreme Court observed that § 1391(e)(2) authorizes “nationwide service of process.” *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971). However, the Court held that § 1391(e) does not apply to “personal damages actions,” including *Bivens* actions. *Stafford v. Briggs*, 444 U.S. 527, 545 (1980). For an argument that *Stafford* misread § 1391(e), see Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713 (2015). Interestingly, even if § 1391(e) applied to *Bivens* actions, it might not have applied to the action against *Walden*. The statute governs suits against an “officer or employee of the United States.” 28 U.S.C. § 1391(e)(1). *Walden* was a local police officer working on a state–federal task force. The United States acknowledged that he was a “federal agent.” Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Walden*, 134 S. Ct. 1115 (No. 12-574). Whether he was a federal “officer or employee” under § 1391(e) is unclear, although courts have treated local police officers as federal officers under analogous circumstances. See *United States v. Luna*, 649 F.3d 91, 98 (1st Cir. 2011) (holding that local law enforcement officer working on a joint federal–state task force was an “officer . . . of the United States” under 18 U.S.C. § 111); *United States v. Martin*, 163 F.3d 1212, 1214–15 (10th Cir. 1998) (holding that local police officer deputized by the FBI was an “officer . . . of the United States” under 18 U.S.C. § 1114).

²⁷ FED. R. CIV. P. 4(k).

²⁸ 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.”).

²⁹ *Walden*, 134 S. Ct. at 1121 (citing FED. R. CIV. P. 4(k)(1)(A) and the Nevada long-arm statute).

the Nevada long-arm statute irrelevant.³⁰ The federal district court would no longer have needed to confine itself to the jurisdictional reach of Nevada's courts.³¹

If a statute had authorized nationwide service, then a different constitutional standard would have governed Walden's objection to personal jurisdiction. His contacts with the forum would still have mattered, but the definition of the forum would have changed. The United States would have been the relevant forum, rather than Nevada.³² That expanded geographic focus makes all the difference: Walden's limited contacts with Nevada would cease to preclude jurisdiction and his contacts with the United States as a whole would justify jurisdiction.³³

The constitutional inquiry for nationwide service cases in federal courts is less developed than the parallel inquiry for ordinary cases in state courts.³⁴ However, jurisdiction over Walden in Nevada would have been appropriate under either of two theories.

First, the Court has held that a state can exercise general jurisdiction over its domiciliaries.³⁵ A similar rule would presumably enable federal courts to exercise general jurisdiction over United States domiciliaries when Congress authorizes nationwide service.³⁶ The Court has never

³⁰ See FED. R. CIV. P. 4(k)(1)(C) (in effect establishing personal jurisdiction "when authorized by a federal statute").

³¹ For a more detailed analysis of personal jurisdiction when Congress authorizes nationwide service, see Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589 (1992); Erbsen, *supra* note 8, at 49–54; Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117 (1989).

³² See, e.g., *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (holding that when a statute authorizes nationwide service of process, the "relevant forum" for constitutional purposes is "the United States").

³³ See *infra* notes 40–42.

³⁴ Precedent is sparse for two reasons. First, only a few statutes authorize nationwide service, creating relatively few opportunities for litigation about personal jurisdiction. See Erichson, *supra* note 31, at 1123 n.30. Second, the constitutional standard for personal jurisdiction in nationwide service cases imposes relatively few limits on the forum's authority, such that many defendants (especially if they reside in the United States) would not bother challenging jurisdiction. See *infra* notes 40–42.

³⁵ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile."); *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 for purposes of a personal judgment by means of appropriate substituted service.").

³⁶ General jurisdiction in state court is not entirely analogous to general jurisdiction in federal court because the United States is much larger than any state, rendering federal jurisdiction more burdensome. However, litigation burdens are best understood as implicating constitutional limits on venue rather than constitutional limits on personal jurisdiction. See *infra* Part III(A). Another distinction between general jurisdiction in federal and state court might be the varying history relevant to each. Thus, although personal service in the forum state is usually sufficient to establish jurisdiction over a natural person in state court, service outside

expressly endorsed (or rejected) this rule, but three Justices concluded that “there [are] no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents.”³⁷ A fourth Justice later reached the same conclusion, observing that “[n]o due process problem exists” when federal courts exercise personal jurisdiction over “residents of the United States.”³⁸

Second, even if general jurisdiction based on domicile was not available, a nationwide service statute would still have authorized jurisdiction in Nevada under the minimum contacts test. The Supreme Court has explicitly declined to decide whether federal statutes authorizing nationwide service permit 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.”³⁹ However, all the federal appellate courts that have addressed the issue agree that when Congress authorizes nationwide service, the Constitution requires minimum contacts with the United States rather than with the forum state. In six circuits, minimum contacts with the United States are sufficient to establish jurisdiction.⁴⁰ Four circuits add a requirement that adjudication in the forum must be fair.⁴¹ Two other circuits fall into one of these groups, but have not been clear about which.⁴²

the forum state but within the United States might not be sufficient in federal court even when Congress authorizes nationwide service. *See* *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) (linking jurisdiction based on presence in the forum to “continuing traditions of our legal system”).

³⁷ *Leroy v. Great W. United Corp.*, 443 U.S. 173, 192 (1979) (White, J., dissenting, joined by Brennan & Marshall, JJ.).

³⁸ *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting). Assessing Congress’s authority to authorize nationwide service against foreign entities in transnational litigation may raise additional issues that are not present when the defendant is a United States resident. *See* *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (noting importance of “comity” and “international rapport” when analyzing general jurisdiction in transnational litigation); *cf.* Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013), http://www.vanderbiltlawreview.org/content/articles/2013/09/Childress_Final.pdf (considering how forum shopping in transnational litigation should affect traditional personal jurisdiction jurisprudence).

³⁹ *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

⁴⁰ *See* *Luallen v. Higgs*, 277 F. App’x 402, 404–05 (5th Cir. 2008) (confirming validity of previously challenged decision in *Busch v. Buchman, Buchman & O’Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994)); *SEC v. Bilzerian*, 378 F.3d 1100, 1106 n.8 (D.C. Cir. 2004); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001); *Bd. of Trs. 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); *Go-Video Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1416–17 (9th Cir. 1989).

⁴¹ *See* *SEC v. Montle*, 65 F. App’x 749, 751–52 (2d Cir. 2003); *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997); *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 945–48 (11th Cir. 1997).

⁴² *See* *Sinclair v. Atty. Gen.*, 198 F. App’x 218, 223 (3d Cir. 2006) (confirming continued uncertainty after *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 370 n.2 (3d

Jurisdiction over Walden in Nevada would have been appropriate under the minimum contacts standard that applies to nationwide service cases in federal courts.⁴³ Walden had ample contacts with the United States, where he resided, worked, acted, and caused injury. His lack of contacts with Nevada would have been irrelevant.

Even in the circuits that consider whether personal jurisdiction in nationwide service cases would be unfair,⁴⁴ Walden would have lacked a compelling fairness objection. Indeed, Walden's counsel conceded at oral argument that his client would have lacked a constitutional objection to personal jurisdiction if Congress had authorized nationwide service.⁴⁵ That concession was appropriate. Walden did not need to locate competent local counsel because he was represented in the District Court by Department of Justice lawyers based in Nevada.⁴⁶ He also probably would not have had to travel to Nevada. His deposition could have been taken in Georgia,⁴⁷ his physical presence would have been unnecessary for routine hearings,⁴⁸ and the probability of the case going to trial was at

Cir. 2002)); *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992).

⁴³ For an argument that the current standard should be stricter, see Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 439 (1992) ("Since *International Shoe*, we have viewed the constitutionality of exercises of personal jurisdiction as a question of fundamental fairness that turns on an individualized evaluation of the burdens and inconvenience to the defendant in light of the relationship of the defendant and the litigation to the forum. These concerns do not evaporate if a different flag flies over the courthouse." (footnote omitted)). Interesting constitutional questions about the relevance of contacts with the forum state arise when nationwide service is available for state law claims in federal court. See Erbsen, *supra* note 8, at 50 n.203 (discussing potential *Erie* issues in diversity cases when the federal service rules have a longer reach than otherwise applicable state service rules); Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code*, 16 AM. BANKR. INST. L. REV. 37 (2008) (discussing adjudication of state law claims in federal bankruptcy courts).

⁴⁴ See *supra* notes 41–42.

⁴⁵ See Transcript of Oral Argument at 5, *Walden*, 134 S. Ct. 1115 (No. 12-574) ("[T]he only reason that . . . the personal jurisdiction question, as applied in this case, is a constitutional one is because Congress hasn't provided for nationwide service of process for *Bivens* claims.").

⁴⁶ Brief for Petitioner at 4, *Walden*, 134 S. Ct. 1115 (No. 12-574). Walden subsequently obtained private counsel after losing in the Ninth Circuit. See *id.* at 9. The record is apparently silent about why he obtained new counsel and whether the United States paid all his legal expenses, although the United States paid for his representation in the Supreme Court. See Klerman, *supra* note 26, at 722 n.38.

⁴⁷ See FED. R. CIV. P. 26(c)(1)(B) (allowing court to grant protective order specifying "place" for discovery); *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987) (noting presumption in favor of deposing non-resident defendants in their home states); *O'Sullivan v. Rivera*, 229 F.R.D. 187, 189 (D.N.M. 2004) (holding that even though a Colorado resident "subjected himself to personal jurisdiction in New Mexico," the plaintiff must depose him in Colorado).

⁴⁸ Even if Walden participated, he may have been able to appear "telephonically or by video conference." *Wilcox v. Career Step, L.L.C.*, No. 2:08-CV-998 CW, 2010 WL

best low,⁴⁹ if not infinitesimal.⁵⁰ Indeed, Walden might not have noticed any significant difference between litigation in Nevada and Georgia.⁵¹ Upholding personal jurisdiction in Nevada therefore was unlikely to impose an undue burden,⁵² especially in proportion to the correlative burden of requiring plaintiffs to litigate in Georgia.⁵³

4968263, at *4 (D. Utah Dec. 1, 2010) (rejecting challenge to personal jurisdiction in part because technology facilitated appearances by nonresident defendants); *Talent Tree, Inc. v. Madlock*, No. 4:07-cv-03735, 2008 WL 8082752, at *6 (S.D. Tex. Apr. 8, 2008) (exercising personal jurisdiction and noting that “given modern communications, many interactions with the Court, including hearings, can be conducted electronically or by telephone”).

⁴⁹ Identifying the percentage of *Bivens* actions that reach trial is difficult because of how the Administrative Office of the United States Courts codes data. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 833 & n.131 (2010) (noting that several broad case categories encompass *Bivens* claims). However, the trial rate appears to be very low. In 2008—the year that plaintiffs sued Walden—the national trial rate for “other civil rights” actions against the United States was 1.4%. ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 167 tbl.C-4 (2008) (showing data from the year ending September 30, 2008). That is similar to the 1.2% trial rate in 2008 for the District of Nevada’s entire civil docket. See *id.* at 173 tbl.C-4A.

⁵⁰ Walden was a strong candidate for pretrial settlement given that the United States Attorney’s office in Georgia apparently concluded that the challenged probable cause affidavit did not justify forfeiture. See *Walden*, 134 S. Ct. at 1119–20; cf. Reinert, *supra* note 49, at 846 & n.167 (noting that the United States generally pays settlements negotiated on behalf of *Bivens* defendants).

⁵¹ Perhaps Walden would have preferred to meet with his lawyers in person rather than via telephone or video conferencing. But that concern does not warrant a constitutional remedy. See *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) (“[I]t is only in highly unusual cases that inconvenience will rise to a level of constitutional concern [in nationwide service cases].”); *Klein v. Eaton*, No. 2:13-cv-00440, 2014 WL 1922723, at *3 (D. Utah May 14, 2014) (upholding personal jurisdiction over nonresident and observing that “[a]ny burden of litigating this matter in Utah is significantly lessened by technology that allows [the defendant] to communicate remotely with counsel and to travel between Texas and Utah”).

⁵² See *Arocho v. Nafziger*, 367 F. App’x 942, 951 (10th Cir. 2010) (upholding personal jurisdiction in Colorado *Bivens* action against federal officer in Washington, D.C., who “can count on the resources and legal staff of the United States Attorney for Colorado to defend his interests”). But see *Will v. Hallock*, 546 U.S. 345, 353 (2006) (noting that qualified immunity in *Bivens* actions protects officers from the “burden of trial”); *Stafford v. Briggs*, 444 U.S. 527, 545 (1980) (expressing concern about “the burden of defending personal damages actions” under *Bivens*).

⁵³ Unlike Walden, plaintiffs lacked the benefit of representation by the Department of Justice. The plaintiffs also contended that requiring them to travel could create disturbing incentives for potential defendants. They speculated that law enforcement officers may feel “embolden[ed]” to seize property from travelers because the agents know that owners would encounter difficulty returning to the situs of the seizure to oppose forfeiture. Brief for the Respondents at 48, *Walden*, 134 S. Ct. 1115 (No. 12-574) (noting that when local officers such as Walden seize currency, some of the revenue might be used to fund their local police departments).

In the unlikely event that litigating in Nevada would have been burdensome, statutory remedies were available to protect Walden. First, he could have challenged venue.⁵⁴ Walden actually did challenge venue in Nevada, but dismissal on personal jurisdiction grounds mooted his venue arguments.⁵⁵ A successful venue challenge would have resolved Walden's fairness concerns.⁵⁶ Second, if the federal court in Nevada had doubts about whether venue was reasonable, it could have transferred the case to a federal court in Georgia.⁵⁷ Transfer would have resolved fairness concerns without resort to constitutional law.⁵⁸

In sum, Congress could have forced Walden to litigate in Nevada despite his lack of contacts with Nevada. If Congress had authorized nationwide service, the constitutional objections endorsed in *Walden* would have been irrelevant.

III. CONGRESS'S POWER TO AUTHORIZE PERSONAL JURISDICTION EVEN WHEN THE DEFENDANT LACKS CONTACTS WITH THE FORUM STATE UNDERMINES SEVERAL PILLARS OF MODERN PERSONAL JURISDICTION DOCTRINE

The foregoing discussion may seem academic because Congress did *not* authorize nationwide service in *Bivens* actions. The Supreme Court's focus on Walden's contacts with Nevada was therefore appropriate under current doctrine. Moreover, I am not contending that nationwide service

⁵⁴ See 28 U.S.C. § 1391(b) (2012) (listing venue requirements).

⁵⁵ See *Walden*, 134 S. Ct. at 1121 n.5. The Ninth Circuit had upheld venue in Nevada. See *Fiore v. Walden*, 688 F.3d 558, 587–88 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115 (2014). Justice Scalia apparently contemplated ruling for Walden on venue grounds without considering personal jurisdiction. See Transcript of Oral Argument at 5, *Walden*, 134 S. Ct. 1115 (No. 12-574) (“Of course, the venue question . . . does not bring into the Court a constitutional question and the . . . the jurisdictional one does. . . . And we usually try to avoid constitutional questions.”).

⁵⁶ Courts may address challenges to venue before addressing challenges to personal jurisdiction. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007).

⁵⁷ See 28 U.S.C. § 1404(a) (2012) (“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 . . .”). Venue would have been proper in the Northern District of Georgia because a “substantial part of the events or omissions giving rise to the claim occurred” in Atlanta. *Id.* § 1391(b)(2).

⁵⁸ See, e.g., *Mountain Mktg. Grp., LLC v. Heimerl & Lammers, LLC*, 9 F. Supp. 3d 895, 898 (W.D. Wis. 2014) (transferring case to a “more convenient forum” and thereby mooting a pending challenge to personal jurisdiction). The district court in *Walden* asked the parties if they wished to request a transfer, but they apparently declined. See *Fiore v. Walden*, No. 2:07-CV-01674-ECR, 2008 WL 9833854, at *4 (D. Nev. Oct. 17, 2008) (“[T]he parties here agree that such a transfer would not be in the interests of justice.”), *rev'd*, 688 F.3d 558 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115 (2014). The district court focused on transferring the case under 28 U.S.C. § 1631 due to a lack of personal jurisdiction. See *id.* It is not clear whether the district court also considered transferring the case under 28 U.S.C. § 1404(a) before addressing personal jurisdiction.

is desirable in *Bivens* actions or in general.⁵⁹ Instead, my argument focuses on how Congress's ability to authorize personal jurisdiction requires reconsidering doctrine that applies when Congress has not acted.

The fact that Congress could have altered the result in *Walden* suggests that the Court's personal jurisdiction jurisprudence is fundamentally misguided. The argument proceeds in three steps. First, the question of whether venue within the state's borders would be burdensome is analytically distinct from the question of which governments can compel a defendant to appear within those borders. Second, the concept of "liberty" is not helpful when trying to determine which governments can compel a defendant's appearance. Finally, when Congress has not authorized nationwide service, personal jurisdiction should be understood as a horizontal federalism problem.⁶⁰

A. Disentangling the Physical and Legal Dimensions of States and Distinguishing Constitutional Limits on Venue from Constitutional Limits on Jurisdiction

"States" exist in two distinct forms: as physical places and as government entities.⁶¹ When assessing constitutional limits on personal jurisdiction, courts must consider two different issues: whether litigation is appropriate within the state's physical borders; and whether the state may compel the defendant to appear and penalize him for not appearing. Distinguishing these issues isolates two key questions: (1) *where* is litigation appropriate; and (2) *which governments* may exercise jurisdiction?

Asking the "where" question in *Walden* reveals that adjudication in Nevada did not raise constitutional concerns relevant to personal jurisdiction. Litigation in Nevada would have been equally burdensome whether Congress authorized nationwide service or borrowed Nevada's long-arm statute. Likewise, the plaintiffs' interest in litigating in Nevada would have been equally strong, as would the relevant government's interest in providing a forum in Nevada.⁶² Accordingly, if the defendant's

⁵⁹ I have previously observed that nationwide service might not be optimal in many diversity cases; whether it is appropriate in particular federal question cases is beyond the scope of this Article. See Erbsen, *supra* note 8, at 83 n.323. For recent proposals to expand nationwide service in federal court, see Klerman, *supra* note 26; Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 Nw. U. L. REV. 1301 (2014); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325 (2010).

⁶⁰ A more detailed account of the underlying theory is available in my prior work. See Erbsen, *supra* note 8.

⁶¹ For analysis of how geography and government power intersect in the federal system, see Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168 (2011).

⁶² Nevada's long-arm statute authorizes jurisdiction to the maximum extent that the Constitution allows. See NEV. REV. STAT. § 14.065(1) (2013). Thus, whether Congress authorized nationwide service or borrowed Nevada's long-arm statute, the

interest in avoiding the burdens of litigation in Nevada could not have raised a constitutional obstacle to personal jurisdiction in a nationwide service case, it could not have raised a constitutional obstacle in either the actual *Walden* case or an identical hypothetical case filed in a Nevada state court under the same long-arm statute.⁶³

The apparent absence of a remedy for burdensome assertions of forum power may seem troubling, but there is an easy solution: the Court should constitutionalize venue doctrine, such that neither Congress nor the states may authorize unduly burdensome litigation.⁶⁴ The Constitution would generate two distinct doctrines addressing two distinct inquiries: venue doctrine would assess whether litigation in a particular physical location is appropriate while personal jurisdiction doctrine would consider whether a particular government can compel the defendant to appear.

Given that the constitutional concern animating *Walden* could not have arisen from the “where” question, it must have arisen from the “which governments” question. In other words, the problem was that the defendant was haled into court under the authority of a government that could not compel his appearance. In *Walden*, the relevant government entity was Nevada because Congress chose to make federal authority coextensive with Nevada’s authority.⁶⁵ If Congress had authorized nationwide service, the relevant government would have been the United States and jurisdiction would have been proper.⁶⁶ The next two sections consider how courts should approach the “which governments” question.

B. Decoupling Personal Jurisdiction Doctrine from Concerns About Liberty

If jurisdiction hinges on the identity of the government actor asserting power, then liberty should not be the central issue. Outside the personal jurisdiction context, the Court often invokes individual liberty

relevant government would have been attempting to extend its reach as far as possible.

⁶³ The Court often interchangeably cites precedents involving personal jurisdiction in state and federal court when the federal court relied on the state’s long-arm statute. For example, *Walden* was a case about jurisdiction in federal court, but it extensively cited an analogous precedent about jurisdiction in state court without noting the federal/state distinction. *See Walden*, 134 S. Ct. at 1123–24 (discussing *Calder v. Jones*, 465 U.S. 783 (1984)).

⁶⁴ *See Erbsen*, *supra* note 8, at 18–32 (discussing constitutional limits on venue); Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153 (2014).

⁶⁵ *See Erbsen*, *supra* note 8, at 51–52 & n.212 (considering how “due process” applies in federal court when federal law incorporates limits on state authority). A constitutional rule might limit even intrastate venue, preventing large states from compelling a defendant to appear in a distant outlying area. *See id.* at 29–31 (“The current rule making burdens relevant when the issue is ‘jurisdiction’ but not when the issue is ‘venue’ is a pointless jurisprudence of labels.”).

⁶⁶ *See supra* Part II.

in the sense of a protected zone of conduct, where the emphasis is on shielding the actor from government interference with his or her behavior.⁶⁷ This aspect of liberty would be relevant to personal jurisdiction if the fear of jurisdictional consequences chilled constitutionally protected activity. Yet the Court has declined an opportunity to consider this aspect of liberty in a personal jurisdiction case.⁶⁸ Liberty may also be relevant in the sense that it protects people from being wrongfully seized by the government, which is what service of process symbolically achieves.⁶⁹ Yet that conception of liberty could not have animated *Walden* because the liberty interest in avoiding a civil summons does not create a right to avoid being sued *anywhere*, but merely a right to avoid being sued in the *wrong forum*. Nobody argued in *Walden* that the defendant could not be served with process. The only issue was whether process needed to emanate from Georgia rather than Nevada.

My argument does not rely on formal labels, but the word “immunity” may be more helpful than liberty for describing the dynamics of personal jurisdiction when defendants are domiciled outside the forum.⁷⁰ Essentially, defendants have a limited immunity from suit that the forum can abrogate,⁷¹ depending on the defendant’s actions,

⁶⁷ The Fifth and Fourteenth Amendments have not generated a single comprehensive account of individual liberty interests because “the Court has not assumed to define ‘liberty’ with any great precision.” *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). I therefore do not doubt that framing personal jurisdiction in terms of liberty might be theoretically coherent for some purposes, but instead contend that references to liberty in personal jurisdiction cases are often unhelpful.

⁶⁸ See *Calder v. Jones*, 465 U.S. 783, 790 (1984) (“We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry.”).

⁶⁹ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant’s person.”); *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709, 712 (N.Y. 1965) (“[Personal jurisdiction] is an imposition of sovereign power over the person. It is usually exerted by symbolic and rarely by actual force, e.g., the summons as a symbol of force; the attachment and the civil arrest, as exerting actual force.”); Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 *YALE L.J.* 52, 58–80 (1968) (tracing history of service mechanisms that were to varying degrees symbolic and coercive).

⁷⁰ Defendants domiciled within the forum are subject to general jurisdiction and thus have no immunity from suit. See *Goodyear*, 131 S. Ct. at 2853–54 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”).

⁷¹ Cf. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *HARV. L. REV.* 1559 (2002) (exploring doctrine that blurs concepts of immunity and personal jurisdiction). I do not intend this informal word choice to imply that personal jurisdiction doctrine is rooted in an “Immunities” Clause of the Constitution. U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *id.* amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or

government interests, and competing private interests.⁷² In contrast, a “liberty” interest that Congress can override merely by deciding to authorize nationwide service seems hollow. This hollowness is the core of modern doctrine.

For example, Justice Kennedy recently explained in *J. McIntyre Machinery, Ltd. v. Nicastro* that personal jurisdiction offends “liberty” when the forum does not exercise “lawful” power.⁷³ Whether power is lawful in this framework depends on who exercises it: “a judicial judgment is lawful” if “the sovereign has authority to render it,” which requires analysis “sovereign-by-sovereign.”⁷⁴ Thus, Justice Kennedy’s plurality opinion acknowledged that a federal court might be able to exercise personal jurisdiction when a colocated state court could not,⁷⁵ and that allowing the wrong state to exercise jurisdiction “would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”⁷⁶ Despite these concessions, the *Nicastro* plurality embraced the Court’s prior decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,⁷⁷ denying that federalism concerns animate personal jurisdiction doctrine.⁷⁸ The plurality therefore intermingled its references to federalism with a rights-centered vision of liberty, stating that “it is the defendant’s purposeful availment that makes jurisdiction consistent with traditional notions of fair play and substantial

immunities of citizens of the United States.”); *see also* Erbsen, *supra* note 8, at 86 n.331 (discussing Article IV).

⁷² For a discussion of interest balancing in a portion of the Court’s *Asahi* opinion that garnered eight votes, see *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (“When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.”).

⁷³ 131 S. Ct. 2780, 2786 (2011) (plurality opinion). Justice Kennedy’s opinion mustered three additional votes (Chief Justice Roberts and Justices Scalia and Thomas). A separate concurrence by Justice Breyer (joined by Justice Alito) sidestepped most of the plurality’s constitutional analysis in favor of a narrow holding. *Id.* at 2792 (Breyer, J., concurring in the judgment) (“There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. . . . But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them.”).

⁷⁴ *Id.* at 2789 (plurality opinion).

⁷⁵ *See id.* (“[A] defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”).

⁷⁶ *Id.* For an analysis of *Nicastro* that situates the plurality opinion in the context of Justice Kennedy’s broader jurisprudence about sovereignty, see John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 860–63 (2012).

⁷⁷ 456 U.S. 694 (1982).

⁷⁸ *See Nicastro*, 131 S. Ct. at 2789 (plurality opinion) (“Personal jurisdiction, of course, restricts ‘judicial power not as a matter of sovereignty, but as a matter of individual liberty’” (quoting *Bauxites*, 456 U.S. at 702)).

justice.”⁷⁹ Justice Ginsburg’s dissent in *Nicastro* also clung to *Bauxites*,⁸⁰ even though a federalism theory might have strengthened the dissent’s argument.⁸¹ The Justices’ decision to invoke liberty cloaks a federalism problem with the distracting rhetoric of individual rights.⁸²

A high-minded emphasis on liberty can cause courts to lose sight of reality. The *Nicastro* plurality ended its opinion by observing that “the Constitution commands restraint before discarding liberty in the name of expediency.”⁸³ That gilded rhetoric seems comforting until one focuses on the supposed “expediency”: a New Jersey court exercising jurisdiction over the manufacturer of a machine that severed four of the plaintiff’s fingers in *New Jersey*.⁸⁴ The manufacturer had helped market its scrap metal shearing machine to buyers throughout the United States,⁸⁵ and

⁷⁹ *Id.* at 2787 (plurality opinion) (internal quotation marks omitted). Justice Kennedy suggested in an analogous case that he is more willing to accept the existence of state power over a nonresident when local contacts implicate important state interests. See *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (“There is a powerful case to be made that a retailer doing extensive business within a State” should be subject to taxation by that state “even if that business is done through mail or the Internet.”).

⁸⁰ See *Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J. dissenting) (“[C]onstitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty.” (citing *Bauxites*, 456 U.S. at 703)).

⁸¹ See *infra* text accompanying notes 84–87. The plurality and dissenting opinions may not mean exactly what they appear to say. Each opinion offers an explicit account of what it is trying to accomplish, but the tone and emphasis suggest additional commitments. Thus, as Wendy Collins Perdue observed: “In the topsy-turvy world of personal jurisdiction, Justice Kennedy can assert that he is mostly concerned about sovereignty but adopt an approach to jurisdiction that seems far more grounded in a particular vision of individual liberty. In contrast, Justice Ginsburg can profess that her primary concern is to protect due process rights of individuals, but in fact focus on what powers it is reasonable for a state to have to address injuries occurring within its borders.” Wendy Collins Perdue, *What’s “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 743 (2012). I focus on the methodological approach that the Justices claimed to adopt, which most lower courts presumably will attempt to apply.

⁸² For additional analysis of Justice Kennedy’s reasoning, see Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 358–70 (2012); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd v. Nicastro*, 63 S.C. L. REV. 481, 491–504 (2012); Allan Erbsen, *Personal Jurisdiction, McIntyre v. Nicastro, and Horizontal Federalism*, PRAWFSBLAWG (Aug. 17, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/08/personal-jurisdiction-mcintyre-v-nicastro-and-horizontal-federalism.html>. Most academic commentary about *Nicastro* has been critical to varying degrees. But see David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 78 (2014) (contending that *Nicastro*’s holding is a “powerful, if indirect” means of limiting state authority to regulate product design in a national market).

⁸³ *Nicastro*, 131 S. Ct. at 2791 (plurality opinion).

⁸⁴ See *id.* at 2795 (Ginsburg, J., dissenting).

⁸⁵ See *id.* at 2795–96.

New Jersey was one of its largest potential markets.⁸⁶ From a federalism perspective, it is difficult to see the problem with allowing New Jersey's courts to adjudicate the suit.⁸⁷

The Court's unanimous opinion in *Walden* does not repeat the statements about liberty that appeared in the *Nicastro* plurality opinion three years earlier. Indeed, *Walden* does not cite *Nicastro* even though *Walden*'s author (Justice Thomas) was part of the *Nicastro* plurality. *Walden* simply invoked "liberty" without explaining why it mattered given that Congress could easily have authorized jurisdiction notwithstanding the asserted liberty interest.⁸⁸ The lean references to "liberty" in *Walden* compared to the extensive discussion in *Nicastro* suggests that the *Walden* Court consciously avoided elaboration, perhaps due to the absence of a fifth vote for Justice Kennedy's theories. In any event, *Walden* indicates that the Court has no discernable theory of liberty in personal jurisdiction cases.

Walden relies on liberty without acknowledging that the precedent on which it grounds that reliance did not invoke liberty. *Walden*'s two references to "liberty" both cite *World-Wide Volkswagen Corp. v. Woodson*.⁸⁹ But the word "liberty" does not appear anywhere in *Volkswagen*. Instead, the cited pages of *Volkswagen* stated that:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not

⁸⁶ See *id.* at 2801 ("How could [the defendant] not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?"); John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in Goodyear Dunlap Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1732 (2013) (criticizing the plurality's distinction between serving the entire United States market and targeting its individual state components).

⁸⁷ See *Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim."). The defendant was a foreign rather than domestic corporation, which in some circumstances can complicate analysis of jurisdiction. See Erbsen, *supra* note 8, at 35–36. However, the plurality did not indicate that the holding might have changed if the defendant had been based in the United States (but outside New Jersey).

⁸⁸ *Walden*, 134 S. Ct. at 1122 ("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant" (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980))); *id.* at 1125 n.9 ("[W]e reiterate that the 'minimum contacts' inquiry principally protects the liberty of the nonresident defendant" (quoting *Volkswagen*, 444 U.S. at 291–92)).

⁸⁹ 444 U.S. 286 (1980). See *supra* note 88.

reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁹⁰

Volkswagen's reference to burdens relates to the “where” question discussed above, while the reference to “coequal sovereigns” relates to the “which governments” question. Neither reference supports *Walden's* broad concept of “liberty.”

The erratic treatment of liberty and federalism in the Court's personal jurisdiction decisions is disconcerting. Here is the relatively recent sequence:

-In *Volkswagen*, the Court invoked federalism and never mentioned liberty.

-In *Bauxites*, the Court relied on liberty and retreated from the federalism reference in *Volkswagen*.⁹¹

-In *Nicastro*, the plurality endorsed *Bauxites's* reference to liberty while also reviving the federalism angle of *Volkswagen*.

-In *Walden*, the Court relied on liberty rather than federalism but attributed the liberty rationale to *Volkswagen*.

The Court either does not realize or refuses to acknowledge the extent of its vacillations; either way, the consequences are troubling.⁹² The problem is that the Court is trying to squeeze a “which governments” federalism question into the framework of individual rights, where it does not fit comfortably and creates confusion.⁹³

Reorienting personal jurisdiction doctrine to emphasize horizontal federalism would not eliminate consideration of the defendant's interests. First, a newly constitutionalized venue doctrine would account for individual rights.⁹⁴ Second, horizontal federalism doctrines consider

⁹⁰ *Volkswagen*, 444 U.S. at 291–92.

⁹¹ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The 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.”). The Court in *Bauxites* retreated from *Volkswagen's* reference to federalism. *See id.* at 702 n.10 (“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.”).

⁹² These vacillations extend farther back than *Volkswagen*. *See* *Perdue*, *supra* note 81, at 734–39 (discussing evolution of the Court's references to liberty, sovereignty, and federalism).

⁹³ For a more theoretical analysis of why liberty is an inadequate guiding principle for personal jurisdiction doctrine, see Erbsen, *supra* note 8, at 54–60; *id.* at 66 (“To say that a given exercise of personal jurisdiction is unconstitutional is . . . 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.”).

⁹⁴ *See supra* Part III(A).

individual interests as a part of a broader calculus of competing public and private interests.⁹⁵ Emphasizing federalism places the state at the “center” of the inquiry, but still requires developing an “analytic approach” that accounts for all relevant factors, including individual interests.⁹⁶ My suggested framework for reforming personal jurisdiction doctrine therefore avoids the concern that federalism-oriented theories may be unattractive because they “neglect[] to provide any account of the individual interests at stake.”⁹⁷ The challenge for courts is to identify individual interests that matter in the context of allocating regulatory power in a federal system, rather than interests that resonate with a vaguely defined sense of liberty.⁹⁸

C. Reframing Personal Jurisdiction Doctrine in Terms of Horizontal Federalism

Sections A and B established that constitutional challenges to personal jurisdiction raise questions about the allocation of jurisdictional authority in a federal system. This Section briefly notes three potential benefits of reframing personal jurisdiction as a horizontal federalism problem.

First, a horizontal federalism perspective facilitates grounding personal jurisdiction doctrine in the Constitution’s text. Part of the reason that modern personal jurisdiction doctrine is so unstable is that it draws authority “only” from the Due Process Clause.⁹⁹ Yet that clause provides very little guidance. For example, the district court in *Walden* provided the defendant adequate notice, an opportunity to be heard, an impartial adjudicator, and a statutory safety valve that would have allowed transfer to a more convenient forum.¹⁰⁰ The Due Process Clause does not explicitly suggest that more is required, but *Walden* demanded more.¹⁰¹

⁹⁵ See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 547–50, 564–66 (2008).

⁹⁶ Perdue, *supra* note 81, at 739.

⁹⁷ Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 624 (2012).

⁹⁸ See, e.g., Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 748 (1987) (considering implications of reframing a rights-oriented theory of “purposeful availment” as a federalism-oriented theory of “predictability”).

⁹⁹ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (stating that the Due Process Clause “is the only source of the personal jurisdiction requirement”).

¹⁰⁰ See *supra* note 57–58.

¹⁰¹ *Cf. Milliken v. Meyer*, 311 U.S. 457, 462–63 (1940) (upholding personal jurisdiction over a defendant domiciled in the forum and observing that “traditional notions of fair play and substantial justice implicit in due process” require “notice” and “an opportunity to be heard” (citation omitted)). For an argument defending the prominent role of “due process” in personal jurisdiction doctrine, see Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567 (2007).

Operating without textual guidance, the Court has constructed an array of oft-criticized standards, such as “purposeful availment,” “reasonably anticipate,” and “minimum contacts.”¹⁰² In contrast, numerous provisions of the Constitution govern horizontal federalism.¹⁰³ These texts may not be a model of clarity, but collectively can provide additional guidance about the allocation of jurisdiction among states with overlapping authority. Rebuilding personal jurisdiction doctrine on the foundation of these additional texts would provide an opportunity to sweep aside the oft-criticized atextual jargon that currently animates judicial decisions.

Second, building from the prior point, if multiple texts can provide more precise guidance, so too can the many doctrines emerging from those texts. Courts might profitably analogize personal jurisdiction issues to choice of law, enforcement of judgments, extraterritorial legislation, and dormant federal preemption of state authority.¹⁰⁴ Such an approach could have changed the outcome in *Nicastro* given New Jersey’s strong regulatory interests, but might have reached the same result in *Walden* given Nevada’s tenuous connection to the underlying conduct relative to Georgia.¹⁰⁵

Finally, treating personal jurisdiction as a federalism problem suggests that federal statutory remedies may obviate judicially created remedies that rely on the Fourteenth Amendment (although constitutional remedies for improper venue would still be available). The premise of modern personal jurisdiction doctrine is that adjudication can violate individual liberty interests, requiring a judicial remedy (dismissal)

¹⁰² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985) (citations omitted).

¹⁰³ *See Erbsen*, *supra* note 95, at 529–60 (categorizing the Constitution’s methods for regulating horizontal federalism).

¹⁰⁴ *See id.* at 560–72 (identifying patterns in the Court’s jurisprudence governing horizontal federalism); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 78 (2014) (noting that personal jurisdiction doctrine implicates “horizontal federalism” when it leads to the “underenforcement” of state law); Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 24 (2014) (suggesting that incorporating “horizontal federalism” principles into personal jurisdiction analysis can help identify “the tribunal that can resolve the controversy at the lowest social cost”); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1206 (2013) (“[F]ocus[ing] on choice of law explains the importance of state lines [in personal jurisdiction doctrine].”).

¹⁰⁵ *See supra* text accompanying notes 84–86. Eighteen states and the District of Columbia filed an amicus brief in *Walden* contending that their “interest in vindicating the injuries of their own residents, as plaintiffs, in their own courts” was “outweighed by their interest in protecting their residents from being haled, unfairly, into other States’ courts as defendants.” Brief of Alabama et al. as Amici Curiae in Support of Petitioner at 1, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574); *see also id.* at 2 (“It would be very easy for a State to maintain, in a particular case in which one of its residents has been harmed, that it wants its own courts to resolve these kinds of disputes. But . . . their residents are better off if personal jurisdiction is not based solely on the defendant’s knowledge of the plaintiff’s home State.”).

that forces the plaintiff to refile in another forum or abandon the suit. But if the real problem is not *where* adjudication occurs but rather *which government* compels the defendant's appearance, then Congress can provide a remedy by authorizing nationwide service and removal to federal court. Even if removal and/or nationwide service are not available in a particular case, the fact that Congress could have provided a statutory remedy but chose not to may be sufficient to preclude judicially created remedies that rely on the Fourteenth Amendment (although constitutional remedies for improper venue would still be available. If considering the "which governments" aspect of personal jurisdiction leads to an emphasis on statutory remedies rather than the judicially created "minimum contacts" test, then the entire body of precedent underlying *Walden* would become defunct. This theory of course has limits, which I have addressed in prior work.¹⁰⁶

Jettisoning decades of precedent would be unsettling, but may be faithful to the original Constitution's design. The constitutional provision creating current judicial remedies for aggrieved state court defendants is the Fourteenth Amendment's Due Process Clause.¹⁰⁷ This clause did not exist when the Constitution was adopted. In contrast, the Constitution has always authorized Congress to federalize certain cases that would otherwise have been heard in state courts,¹⁰⁸ including cases where local residents sue outsiders.¹⁰⁹ Common law rules were also available to prevent enforcement of judgments rendered without jurisdiction under the territorial view of state power in vogue at the time.¹¹⁰ If this regime was sufficient to protect outsiders from overreaching states until 1868, it may remain sufficient, although more historical research and normative analysis would be necessary before reaching a definitive conclusion.¹¹¹ In any event, my argument here does not depend on abandoning judicially

¹⁰⁶ See Erbsen, *supra* note 8, at 35–36, 79. A role for constitutional remedies might remain in transnational cases and unusual situations where statutory remedies would be inadequate. See *id.*

¹⁰⁷ U.S. CONST. amend. XIV, § 1.

¹⁰⁸ See *id.* art. III, § 2.

¹⁰⁹ See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.").

¹¹⁰ Compare *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 367 (1873) (opinion by Justice Field articulating a territorial theory of jurisdiction without reference to the Fourteenth Amendment), with *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878) (opinion by Justice Field that essentially repeats *Galpin's* analysis while resting the holding on the Due Process Clause); see also John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1020–24 (1983) (discussing jurisprudence before 1868); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004) (same).

¹¹¹ See Erbsen, *supra* note 8, at 75–88 (discussing the relevant history in more detail and suggesting a need for further scholarship about how the original Constitution's mechanisms for addressing personal jurisdiction should influence modern doctrine grounded on the Fourteenth Amendment).

created remedies that invoke the Constitution. For present purposes, the possibility that statutory and common law remedies might be adequate requires a more precise account of why judicially enforceable constitutional remedies are necessary. Current doctrine blurring venue and jurisdiction into a single “liberty” inquiry does not provide a sufficient justification for judicial intervention when venue is proper and only jurisdiction is at issue.

IV. CONCLUSION

The unanimous opinion in *Walden* is an imposing edifice constructed on sand. The result and reasoning seem sturdy until one asks unsettling questions. Considering how a nationwide service statute would have changed the result reveals that the jurisdictional defect hinged on congressional inaction rather than an intrinsic constitutional obstacle to litigation in Nevada. Taking that observation to its logical conclusion suggests that the Court must overhaul personal jurisdiction doctrine. Analysis of venue and personal jurisdiction should entail distinct constitutional inquiries, and the inquiry into personal jurisdiction should focus on state regulatory authority in a federal system rather than individual liberty. There is even a plausible argument that judicially created remedies are unnecessary when federal statutory remedies are potentially available.