

FEDERAL PERSONAL JURISDICTION AND CONSTITUTIONAL AUTHORITY

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Justice Elena Kagan:

Mr. Gannon, the Solicitor General has a choice whether to participate in this suit or not, and so please don't take this as at all a criticism. It's genuine interest and curiosity. What is it about this suit that has made you decide to participate? In other words, what interests of the United States or dangers to the United States do you see at stake in this suit?

Deputy Solicitor General Curtis E. Gannon:

. . . . The Petitioner had called into question the constitutionality of a federal statute, and so we thought that it was important to make sure that the Court's decision here wouldn't implicate the constitutionality of federal statutes. . . . We think that there's potential differences between the Fifth and Fourteenth Amendment, as the Court has repeatedly mentioned and reserved the question most recently in *Bristol-Myers*. But even apart from that, we think that the Congress and the executive branch in the context at issue there have a greater ability to assess international and interstate considerations.

Mallory v. Norfolk Southern Railroad, Tr. of Oral Arg. at 118:15-120:1

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I. INTRODUCTION

In *Mallory v. Norfolk Southern Railroad*, the plaintiff brought a claim against defendant Norfolk Southern Railroad in a Pennsylvania state court.¹ The plaintiff did not have contacts with Pennsylvania, did not bring a claim that arose out of or related to defendant's contacts in Pennsylvania, and could not allege that the defendant was at home in Pennsylvania. Plaintiff's jurisdictional allegation was based purely on consent.² In and of itself, this turn to consent is not remarkable. Anyone who has used a Google product has consented to sue and be sued by Google in the courts of Santa Clara, California.³ Arguably, consent has become over the last forty years the most important ground for jurisdiction.⁴ This trend is consistent with the

1. *Mallory v. Norfolk S. Ry. Co.*, No. 1961 802 EDA 2018, 2018 WL 3025283 (Pa. Ct. Com. Pl. May 30, 2018).

2. *Id.* at *3 ("Plaintiff's sole argument is Defendant consented to general jurisdiction by registering to do business in Pennsylvania. The crux of Plaintiff's argument rests on the notion foreign corporations consent to general jurisdiction when they voluntarily register to do business in this Commonwealth[.]").

3. See John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65, 87 (2021) ("When Google is the plaintiff in a lawsuit, therefore, the clause acts as a jurisdictional lasso that allows California to assert personal jurisdiction over the company's customers. If the clause is valid, then Google can wield this language buried in its terms of service, of which few of its users are aware, to subject its hundreds of millions of visitors to jurisdiction in Santa Clara County.")

4. See John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 193 (2021) (the question of whether a forum selection clause is enforceable has been historically evaluated through the lens of "consent" rather than "minimum contacts.").

movement of the principle of party autonomy to the center of the private international law universe.⁵

However, consent in the *Mallory* case was not premised on consent by contract or consent by submission. Consent was supposedly obtained by statute.⁶ The Pennsylvania corporate registration statute provides that, if an out-of-state business wants to conduct business in Pennsylvania, it must register to do business and that this registration constitutes consent to jurisdiction for any and all claims against it in Pennsylvania courts.⁷ The Pennsylvania statute is now unique in that it requires consent to classic, all-purpose general jurisdiction even for claims brought by non-resident plaintiffs.⁸ This form of statutory consent now starts to look less like conventional consent to jurisdiction and more like an exaction and a potential infringement of interstate federalism.⁹

5. See Horatia Muir Watt, *A Private (International) Law Perspective: Comment on "A New Jurisprudential Framework for Jurisdiction"*, 109 AJIL UNBOUND 75, 79 (2015) ("International law was understood both to provide an overall scheme of intelligibility whereby to understand other social spheres and to make available operational tools with which to define authority, allocate responsibilities, and guide the conduct of public and private actors."); Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347, 375–79 (2011) ("[P]rivate International law provides the tools – the wondrous myth of party autonomy the 'plug-in' network of international arbitration, the neutralization of preemptory rules of local public policy, the free 'delocalised' movement of private awards – through which private, actors have acceded to unshackle themselves from the constraints prevalent in the domestic sphere."); Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOBAL LEGAL STUD. 37 (2018) ("The domestically-nurtured principle of party autonomy, now enshrined in a large variety of international texts, allows parties to an international contract freedom to choose the governing law and the competent court among all those made available by existing legal systems.")

6. *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2037 (2023).

7. 42 Pa. C.S.A. § 5301.

8. Reply Brief for the Pet. at *3 (2016); see, e.g., Kevin D. Benish, Note, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, N.Y.U. L. REV. 1609, 1625 n.102, <https://perma.cc/8ATW-X4YR> ("The Pennsylvania provision states that Pennsylvania may 'exercise general personal jurisdiction' over corporations through '[c]onsent, to the extent authorized by the consent.'").

9. See *Benish*, supra note 8, at 1640 ("After *Daimler*, consent-by-registration also burdens foreign corporations with an unconstitutional condition."); see also Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015) ("[I]t is important to emphasize the far-reaching implications of the view that registration amounts to consent,

As the above exchange between Justice Kagan and Deputy Solicitor General Gannon illustrates, the United States government appeared in the *Mallory* case because it could see the next conflict.¹⁰ The *Mallory* case involved a state jurisdictional statute. However, the Court's decision in *Mallory* will impact a recently enacted federal consent to jurisdiction statute, the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA).¹¹ This federal statute established a consent to jurisdiction regime whereby the Palestinian Authority (PA), the Palestine Liberation Organization (PLO), or any entity that performs their functions will be deemed to have consented to the jurisdiction of a U.S. federal court if it commits certain acts abroad, including payments to the family of a convicted terrorist.¹² But this consent extends only to claims arising under the Anti-Terrorism Act (ATA), the principal statute providing civil relief to U.S. nationals who suffer harm from international terrorism.¹³

which, in turn, amounts to general jurisdiction. This view creates universal jurisdiction in any state that chooses to interpret its statute as conferring general jurisdiction.”).

10. See Brief for the United States as Amicus Curiae Supporting Respondent at *7, *Mallory v. Norfolk S. Ry. Co.*, (2022) (No. 21-1168) 2022 WL 4080618 (“A state court may not exercise general jurisdiction based solely on a corporation’s registration to do business in the forum. Such an exercise of jurisdiction conflicts both with this Court’s precedents on personal jurisdiction and with the principles underlying those precedents. And invoking the label ‘consent’ rather than ‘general jurisdiction’ does not render such an exercise of jurisdiction any more constitutional.”).

11. 18 U.S.C. § 2334I(1)

12. See 18 U.S.C. § 2333(a) (2012) (“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”).

13. 18 U.S.C.A. § 2333; 18 U.S.C.A. § 2334(e)(1) (“(e) Consent of certain parties to personal jurisdiction— (1) In gener—.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant... (B) after 15 days after the date of enactment of the Promoting Security and Justice for Victims of Terrorism Act of 2—9—(i) continues to maintain any office, headquarters, premises, or other facilities or establishments in the United States; (ii) establishes or procures any office, headquarters, premises, or other facilities or establishments in the United States; or (iii) conducts any

The Supreme Court itself made this statute necessary by repeatedly narrowing both general and specific jurisdiction.¹⁴ In *Daimler v. Bauman*, the Court dramatically limited the reach of general, all-purpose jurisdiction.¹⁵ In *Walden v. Fiore*, the court limited specific jurisdiction by essentially eliminating so-called “effects” jurisdiction.¹⁶ Taken together, these decisions have had the effect of neutering numerous federal statutory causes of action, including the federal statutory cause of action created by Congress under the ATA for the express purpose of making it easier for U.S. nationals to obtain civil redress for injuries caused by terrorism.¹⁷ Congress has amended the statute several times by expanding it to cover aiding and abetting terrorism and by amending the consent to jurisdiction provisions in particular when they proved inadequate to create the necessary jurisdiction.¹⁸

Surprising many, the Court turned back challenges to consent jurisdiction in *Mallory*, holding in a fractured decision that jurisdiction obtained under the heading over “consent” did not require further scrutiny under the minimum contacts framework of *International Shoe v. Washington* interpreting the Due Process Clause of the Fourteenth Amendment.¹⁹ A plurality of the Court adopted the straightforward view that “consent may be manifested in various ways by word or deed.”²⁰

Less than three months later, the Government’s fears proved justified, notwithstanding the Court’s decision in *Mallory*. The United States Court of Appeals for the Second Circuit held that the PSJVTA violated the Due Process Clause

activity while physically present in the United States on behalf of the Palestine Liberation Organization or the Palestinian Authority.”)

14. See Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT’L L. 325, 339 (2018) (“Beginning in 2011, the Court embarked on a series of decisions that further narrowed transnational personal jurisdiction.”).

15. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

16. *Walden v. Fiore*, 571 U.S. 277, 291 (2014) (“[T]he effects of petitioner’s conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction.”).

17. Simowitz, *supra* note 14, at 366 (“Congress enacted the Anti-Terrorism Act (ATA) specifically to provide an avenue of civil relief to U.S. victims of terror who had previously been without a clear cause of action.”).

18. 18 U.S.C. § 2333 (2016).

19. *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2039 (2023).

20. *Id.*

of the Fifth Amendment.²¹ After *Mallory*, the PLO and PA had argued that the PSJVTA lacked the formal indicia of consent (e.g. signing a piece of paper and depositing it with a state officer) and the reciprocity of obligation (e.g. register and, in turn, get to do business in the state).²² The Court of Appeals distinguished the PSJVTA from the corporate registration statute in *Mallory* on the basis that the PSJVTA did not involve “litigation-related activities or reciprocal bargains”²³ that would indicate “an intention to submit” to the power of U.S. courts.²⁴ This decision leads to a puzzling result: Under the PSJVTA, a defendant voluntarily takes an action that it knows with full information will subject it to the personal jurisdiction of a U.S. court for a small subset of claims brought by U.S. nationals. However, this act may not be a “reasonable” basis “to infer the defendant’s voluntary agreement to submit itself to a court’s authority.”²⁵ By contrast, reasonable manifestations of consent include purchasing a ticket without reading the fine print,²⁶

21. *Fuld v. Palestine Liberation Org.*, 82 F.4th 74 (2d Cir. 2023).

22. At the time of this writing, at least three federal district courts have held that the PSJVTA violates the Due Process Clause of the Fifth Amendment, though all three were decided before *Mallory*. See *Sokolow v. Palestine Liberation Org.*, 607 F. Supp. 3d 323, 326 (S.D.N.Y. 2022) (“The activities at issue here—primarily the notarization of documents and a handful of interactions with the media—are insufficient to support any meaningful consent to jurisdiction by Defendants.”); *Fuld v. Palestine Liberation Org.*, 578 F. Supp. 3d 577, 591 (S.D.N.Y. 2022) (“In short, to hold that fair notice and an opportunity to conform ‘ne’s behavior are the only requirements for “deemed consent” jurisdiction to comport with due process would be to hold that personal jurisdiction is limited only by reach of the legislative imagination — which is to say, that there are no constitutional limits at all.”); *Shatsky v. Palestine Liberation Org.*, No. 18-CV-12355 (MKV), 2022 WL 826409, at *4 (S.D.N.Y. Mar. 18, 2022) (“I join my colleagues in concluding that the PSJVTA is unconstitutional, as applied to Defendants, because I am bound by Second Circuit precedent holding that the PLO and PA are entitled to constitutional due process.”). The issue of the PSJVTA’s constitutionality is currently pending before the United States Court of Appeals for the Second Circuit, which heard argument before *Mallory* was decided and has request and received supplementary briefing on *Mallory*’s applicability.

23. *Fuld*, 82 F.4th at 91.

24. *Id.* at 90 (quoting *J. McIntyre Mach.*, 564 U.S. at 880–81).

25. *Id.* at 88.

26. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (holding that a non-negotiated forum-selection clause in a routine commercial cruise ticket is enforceable despite not being the subject of bargaining).

engaging in discovery abuses,²⁷ or mistakenly entering a general appearance.²⁸

The Court of Appeals did not recognize that the PSJVTA is actually a very particular assertion of jurisdiction. The PSJVTA is not really specific or general jurisdiction. Rather, the statute combines elements of both. The statute grounds jurisdiction in U.S. courts on contacts unrelated to the particular claim—that partakes of general jurisdiction. But the statute authorizes jurisdiction only for a small subset of claims, specifically claims under the ATA. That sort of specificity is quite different from general jurisdiction that authorizes a court to hear any and all claims. On that basis, the court could have held that the style of jurisdiction invoked in the PSJVTA is consistent with *International Shoe*.²⁹ Perhaps the Court of Appeals was wary of the Supreme Court’s dicta warning against conflation of general and specific jurisdiction.³⁰

The Court of Appeals also rejected the Government’s argument that the constraints imposed by the Fifth and Fourteenth Amendments to the Constitution differ. The Court of Appeals

27. *See* *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 705 (1982) (upholding imposition of personal jurisdiction as a legal consequence of the failure to comply with discovery orders intended to confirm contacts with the state).

28. *See* *York v. Texas*, 137 U.S. 15 (1890) (“It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right.”).

29. Aaron D. Simowitz, *Defining Daimler’s Domain: Consent, Jurisdiction, and the Regulation of Terrorism*, 55 WILLAMETTE L. REV. 581, 589-90 (2019); Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of “Registration” Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159, 179 (2018) (“The constitutionality of registration jurisdiction was implicitly accepted in *International Shoe Co. v. Washington*, later described by Justice Ginsburg as the ‘canonical opinion’ in the area of personal jurisdiction.”).

30. *See* *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017) (“Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough.”); *see also* *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (en banc) (“In Fourteenth Amendment vernacular, the plaintiffs’ proposed personal jurisdiction test appears to dress a general jurisdiction theory in specific jurisdiction garb . . . The plaintiffs’ conception of ‘related’ goes far beyond the Fourteenth Amendment’s ‘arise out of or relate to’ standard.”), *cert. denied*, 143 S. Ct. 1021 (2023).

reasoned, first, that the words of the Amendment are the same and, second, that “subjecting a nonresident defendant to the power of a particular forum implicates compelling concerns for fairness and individual liberty” equally regardless of whether the federal or the quasi-sovereign states are seeking to assert their adjudicative authority.³¹

The Court of Appeals rejected the Government’s argument that it was entitled to some deference, seeming hostile to the notion. The court reasoned that “consent cannot be found based solely on a government decree pronouncing that activities unrelated to being sued in the forum will be deemed to be consent to jurisdiction there. . . . A prospective defendant’s activities do not signify consent to personal jurisdiction simply because Congress has labeled them as such.”³² Instead of crediting the Government’s definition of consent to jurisdiction, the court imposed the novel requirement that consent is only reasonable for “litigation-related activities or reciprocal bargains,” an invention at odds with the *Mallory* plurality’s simple formulation that there are “various ways” in which “consent may be manifested,” either “by word or deed.” The Court of Appeals appeared to channel the district court’s offense at Congress’s chutzpah: “The Court cannot and will not acquiesce in what amounts to a legislative sleight of hand at the expense of a fundamental constitutional right”³³

This Essay seeks to lay out a different approach to personal jurisdiction in federal courts—an approach that is grounded in differences in constitutional authority between the federal and state sovereigns, rather than one that ignores them. The distinctions between the constitutional requirements of the Fifth and Fourteenth Amendments should reflect the relevant differences between the federal sovereign and the quasi-sovereign states, including differences in territorial authority, in interpretative authority, and in structural authority.

31. *Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 103 (2d Cir. 2023).

32. *Id.* at 88.

33. *Fuld v. Palestine Liberation Org.*, 578 F. Supp. 3d 577, 580 (S.D.N.Y. 2022), *aff’d*, 82 F.4th 74 (2d Cir. 2003).

II. THREE CURRENT APPROACHES

A. *The Minimalists*

Scholars have staked out the full spectrum of positions on the question of the difference between the two Amendments. On the one hand, the minimalists believe that the one and only difference between the jurisdictional analysis under the two Amendments is one of territorial scope.³⁴ Under the Fourteenth Amendment, each state is limited to assessing the jurisdictional contacts within its territorial ambit.³⁵ Under the Fifth Amendment, the United States may look to all jurisdictional contacts within its territorial ambit (the entirety of the United States).³⁶ No one now disputes that territorial scope is a valid and necessary difference between the two Amendments.³⁷

The minimalists insist that territorial authority is the only relevant difference between the state and federal sovereigns for purposes of the personal jurisdiction analysis. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, articulated this position in *Douglass v. NYK Lines*. In *NYK Lines*, the panel had criticized prior panel precedent holding that the Fifth and

34. See e.g., William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1210 (2018) (“Our contribution to this literature is the claim that the critical distinction is not between federal and state courts or between federal and state claims or between the Fifth Amendment and the Fourteenth Amendment, but rather between alien and domestic defendants.”); Robin J. Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. 123, 129–30 (2018) (“Although there are some isolated personal jurisdiction factors for which alien defendants are treated differently, ‘the conventional approach to the minimum-contacts requirement of personal jurisdiction is that . . . the same standard [applies] to both alien and domestic defendants.’”) (quoting Dodge & Dodson, *supra*, at 1207).

35. See Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1286 (2017) (“The reach of any court, whether state or federal, was presumed to be limited by ‘the general principles of law [that] must be presumed to apply to them all’—namely, that a court of a particular territory “is bounded in the exercise of its power by the limits of such territory.”).

36. Aaron D. Simowitz, *Defining Daimler’s Domain: Consent, Jurisdiction, and the Regulation of Terrorism*, 55 WILLAMETTE L. REV. 581 (2019); In *Omni Cap. Int’l v. Rudolf Wolff & Co.*, the Court seemed to invite Congress to expand the grounds for aggregation of national contacts—which Congress then did in Rule 4(k), which has never been questioned by the Court. 484 U.S. 97, 111 (1987) (“That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.”).

37. See *infra* at notes 38–43.

Fourteenth Amendment analyses were identical except for the bounds of territory.³⁸ The full court granted *en banc* review, only to reject the panel's pleas and to reaffirm that prior decision. Judge Ho, writing for the majority, observed that the "Fifth Amendment due process test for personal jurisdiction parallels the Fourteenth Amendment test, except that the Fifth Amendment test looks at contacts with the United States as a whole rather than any one state."³⁹ The Fifth Circuit joined panels of several other courts, including panels of the Eleventh Circuit⁴⁰ and the D.C. Circuit⁴¹ in holding that only territorial ambit separated the two Amendments. The panel in *Fuld* joined these minimalist courts. The panel considered itself bound by circuit precedent,⁴² but nonetheless observed that "[n]o basis exists

38. *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 231 (5th Cir. 2022).

39. *Id.* at 234. Judge Ho authored a concurrence in which he argued that this approach was the only one consistent with the "the doctrine of incorporation, [under which] the Supreme Court has repeatedly held that we should interpret the Due Process Clause of the Fourteenth Amendment coextensively with a number of the provisions contained in the Bill of Rights." *Id.* at 244. Five judges dissented, authoring among them three dissents. Judge Elrod argued that "[t]oday's result is as needless as it is confounding: The majority opinion fails to prove—as a matter of the Fifth Amendment's text, history, and structure—the existence of a principled limit on Congress's ability to authorize federal courts' personal jurisdiction over a foreign defendant." *Id.* at 282. Judge Higginson argued that "by importing Fourteenth Amendment constraints on personal jurisdiction, born out of federalism concerns, into process due to foreign corporations in global disputes, where those concerns don't exist, our court makes several mistakes." *Id.* at 282 (Higginson, J., dissenting). Judge Oldham argued: "[A]s originally understood, the Fifth Amendment did not impose any limits on the personal jurisdiction of the federal courts. Instead, it was up to Congress to impose such limits by statute. . . . That should've been the end of the case." *Id.* at 284 (Oldham, J., dissenting).

40. *See Herederos de Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303, 1308 (11th Cir. 2022) ("We think it makes eminent sense to apply the same basic personal-jurisdiction standards in cases arising under the Fifth Amendment as in those arising under the Fourteenth Amendment."), *cert. denied sub nom. Gomez v. Teck Res. Ltd.*, No. 22-466, 2023 WL 192008 (U.S. Jan. 17, 2023).

41. *See GSS Group Ltd v. Nat'l Port Auth.*, 680 F.3d 805 (D.C. Cir. 2012) (holding that the corporation lacked the minimum contacts with the United States required for due process).

42. *See Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 103 (2d Cir. 2003) (citing *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2d Cir. 2016) ("This Court's precedents clearly establish the congruence of due process analysis under both the Fourteenth and Fifth Amendments.")).

to conclude that the same argument, rooted in the absence of federalism-related restrictions on national power, would warrant relaxing due process constraints.⁴³

Several commentators have also defended the minimalist position. Professors Dodge and Dodson argued that the expansion in territorial ambit is the only necessary difference between the Amendments (though they also argued, more controversially, that the federal Congress could empower state courts to use the broader territorial ambit of the whole nation).⁴⁴ In response, Professor Effron argued that the distinction of territorial ambit was the quintessential distinction between the two Amendments, though not necessarily the exclusive distinction.⁴⁵

B. *The Maximalist*

At the other end of the spectrum is the maximalist, Professor Sachs, who argues on originalist grounds that the Fifth Amendment imposes no jurisdictional constraints whatsoever.⁴⁶ He argues that in the period from the framing to the ratification of the Fourteenth Amendment, the Fifth Amendment was never understood to impose any restraints on personal jurisdiction and that it is precisely backwards to interpret the Fifth Amendment in light of the Fourteenth Amendment.⁴⁷ Sachs also believes that the Fourteenth Amendment imposes

43. Fuld, 82 F.4th at 103.

44. Dodge & Dodson *supra* note 34, at 1211 (“Congress can authorize a national-contacts approach in federal court for federal claims, even under existing constitutional law, but whether Congress may do so for state courts and state claims presents issues that deserve more sustained analysis of the proper scope of the Due Process Clauses.”).

45. Effron *supra* note 34, at 130 (“The application of the same constitutional standard to foreign and domestic defendants has given rise to something of a due process paradox. This paradox, namely, is that a litigant’s alien status is often a barrier to a full or robust assertion of many due process rights, but alien status is simultaneously the foundation of the strongest possible assertion of the due process protection of resisting the personal jurisdiction of an American court.”).

46. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703 (2020) (“Jurisdictional limits have always been with us, but Fifth Amendment limits are a recent innovation. When American courts first began articulating limits on personal jurisdiction, they didn’t look to state or federal due process clauses, but to rules of general or international law that regulated the authority of separate sovereigns.”).

47. *Id.* at 1706.

no constraints on the content of jurisdictional rules, so it is not exactly a long walk to make a similar argument about the Fifth Amendment.⁴⁸

Nonetheless, Sachs is clear that the “absence of territorial due process limits on federal jurisdiction doesn’t mean there are no limits at all” on assertions of judicial authority by federal courts.⁴⁹ Sachs notes that there is a “*very* long tradition, associated with the [Due Process] Clause or similar provisions, of requiring American courts to provide the defendant with notice and an opportunity to be heard.”⁵⁰ Courts have often conflated these requirements because the notice and the assertion of judicial authority come packaged in the same act and documents—service of process—they remain, however, distinct requirements.⁵¹

C. *The Middlers*⁵²

Other scholars, including Professor Morrison, have suggested a middle path approach to the distinction between the Fifth and the Fourteenth Amendments.⁵³ In their brief in the *NYK Lines* case, Morrison and others argued that, “[t]o the extent that personal jurisdiction doctrine serves as an instrument of inter-state federalism, it protects the equal dignity of all states by ensuring that one state does not infringe the adjudicative prerogatives of any other state,” and that the constraints imposed by the two clauses must differ because “[t]hat concern is absent when Congress or the Supreme Court establishes the

48. *Id.* at 1722.

49. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1735 (2020).

50. *Id.* at 1738.

51. See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 28 (2018) (“[W]hen the Court wanted to engage in a more functional mode of analysis, notice allowed the Court to continually tie personal jurisdiction to due process because of the intuitive fairness appeal of the ideas of notice and opportunity to be heard.”).

52. No relation to the star of stage and screen.

53. Brief Amicus Curiae for Civil Procedure Law Professors in Support of Plaintiffs-Appellants at *2, *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (Nos. 20-30379, 20-30382), 2021 WL 3406691.

jurisdiction of the federal courts.”⁵⁴ So far, so much on par with the argument made in this essay and elsewhere.⁵⁵

However, the Morrison brief undermined its argument in two ways. First, the Morrison brief argued that the *NYK Lines* district court’s analysis would neuter Federal Rule of Civil Procedure 4(k)(2), the so-called “federal long-arm statute,” which authorizes a federal district court to aggregate national jurisdictional contacts when a claim arises under federal law and the defendant is not subject to personal jurisdiction in any state court.⁵⁶ The Morrison brief pointed out that “general” all-purpose jurisdiction would be unavailable under Rule 4(k)(2). That argument is accurate, as a defendant would either be “at home” in a U.S. state—in which case Rule 4(k)(2) would not apply—or a defendant would be “at home” in a foreign nation—in which case the Court’s decisions in *Goodyear*⁵⁷ and *Daimler*⁵⁸ (decided under the Fourteenth Amendment) would constitutionally bar assertion of personal jurisdiction. However, the Morrison brief also argued that the district court’s approach would also bar assertion of specific jurisdiction under Rule 4(k)(2) by preventing aggregation of national contacts.⁵⁹ The district court did not consider specific jurisdiction as the plaintiff did not allege specific jurisdiction as a jurisdictional basis.⁶⁰ Indeed, nothing in the district court’s decision suggested that it was deviating from the authority holding that the *only* difference between the two Amendments is the breadth of territorial authority—in other words, the minimalist position. The district court was not embracing the position that there was *no* difference at all between the Amendments. The Fifth Circuit *en banc* majority therefore noted that amici’s argument on the effective

54. *Id.* at *3.

55. *Id.* at *11.

56. FED. R. CIV. P. 4(k)(2).

57. *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (holding that mere sales of products into the forum state could not subject that foreign subsidiaries of United States tire manufacturer to general jurisdiction).

58. *See* *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (holding that general jurisdiction over a foreign corporation exists only where it is “essentially at home”).

59. Brief Amicus Curiae for Civil Procedure Law Professors, *supra* note 53, at *15.

60. *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 234–35 (5th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 1021 (2023).

overruling of Rule 4(k)(2) was overstated.⁶¹ Second, the Morrison brief proposed a test that melded general and specific jurisdiction, prompting the Fifth Circuit to dismiss the proposal as inconsistent with Supreme Court dicta.⁶²

The Morrison brief ran into the difficult questions faced by all proposals to differentiate the constraints imposed on personal jurisdiction by the two Amendments: What should the new test be? How is it justified? And how is any proposed test less susceptible to the criticisms leveled against the current test? A reluctance to derive a new test seems to drive courts' hesitance to endorse a difference between the two Amendments, sometimes explicitly,⁶³ sometimes not.⁶⁴ The Morrison brief begins from a point consistent with the approach taken here—look to the statutes that represent the constitutional judgment of the elected branches as to the proper constraint imposed by the Fifth Amendment.⁶⁵ The Court's analysis in *Burnham*, unanimously adopted in *Mallory* (albeit in different formulations by the majority and the dissent), supports this look to long-arm statutes as evidence of legislative judgment on “what process is due.”⁶⁶ The Morrison brief looked to Rule 4(k)(2), arguing that it represented a Congressional endorsement of the state of personal jurisdiction as it existed in 1993, before *Daimler*. From this premise, the Morrison brief jumped to a novel “national

61. *Id.* at 240–41. Rule 4(k)(2) offers plaintiffs no assistance where defendants have neither targeted an individual state nor targeted the United States as a whole, as was arguably the case in *NYK Lines*. Rule 4(k)(2) would nonetheless authorize specific jurisdiction in cases like *J. McIntyre v. Nicastro* where the defendant plainly targeted the entire United States without targeting any individual state (supposedly). *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Unfortunately, Mr. Nicastro did not have a federal claim that would permit application of Rule 4(k)(2).)

62. *Douglass*, 46 F.4th at 235–36.

63. *Id.* at 237 (“In any event, the plaintiffs’ focus on ‘federalism’ concerns in the Supreme Court’s Fourteenth Amendment jurisprudence is beside the point.”).

64. *Id.* at 235 (“Both Due Process Clauses use the same language and serve the same purpose, protecting individual liberty by guaranteeing limits on personal jurisdiction.”).

65. Simowitz, *supra* note 14, at 328 (“Some have assumed that, with these statutes seemingly beyond the constitutional outer bounds of jurisdiction as interpreted by the Court, they must fall. This is not necessarily so. Many scholars have observed that Congress interprets the Constitution.”).

66. *See Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 613 (1990) (noting that no states had prohibited in-state service as a basis of personal jurisdiction under their long-arm statutes).

contacts” approach that seemed to meld specific and general jurisprudence, running afoul of the Court’s comment in *Bristol-Myers Squibb* that specific and general jurisdiction must be kept distinct.⁶⁷

III. THE FEDERAL DIFFERENCES

This Essay’s proposed approach overlaps some with that of the Morrison brief in *NYK Lines*—both are somewhere in the mushy middle between the relative simplicity of the minimalists (i.e. maintain the status quo, mostly) and the maximalist (i.e. burn it all down). This Essay seeks to make an important addition to the middlers’ path—a theory grounded in constitutional authority that guides the differences between the two Amendments and ties them to differences between the two types of sovereigns, state and federal. This Essay’s approach avoids the main difficulty faced by the Morrison brief by looking to federal statutes that state a more definite view of personal jurisdiction, such as the PSJVTA.

A. Territorial Authority

The first difference between the sovereigns is their scope of territorial authority. Before Rule 4(k)(2), the Federal Rules of Civil Procedure largely tied the jurisdictional reach of federal courts to the reach of the states where the federal courts sat. This arrangement raised the question of whether this limitation was a function of constitutional command or of legislative sub-constitutional rules. The Court essentially settled that question in its *Omni Capital* decision, opening the door for the creation of Rule 4(k)(2) itself.

In *Omni*, Louisiana residents bought tax shelters that turned out to be ineffective and sued the New York company that they alleged induced them to purchase the shelters.⁶⁸ The plaintiffs commenced the suit under federal law in federal court in

67. See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (“Since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”); *Douglass*, 46 F.4th at 234.

68. *Omni Cap. Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 100 (1987).

the Eastern District of Louisiana. The defendants attempted to implead the British company responsible for their trading activity.⁶⁹ The Court held that, because no federal law authorized the federal court's exercise of jurisdiction, the court was limited by the Louisiana long-arm statute.⁷⁰ However, the Court invited Congressional action by noting that a "narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the [relevant] federal statutes. . . . That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress."⁷¹ Those bodies produced Rule 4(k) (2). The dicta of *Omni*, combined with the longstanding vitality of 4(k) (2), as well as other portions of the rules that extend the reach of federal courts beyond state boundaries, have combined to settle the question of whether territorial authority differs between the two Amendments.

B. *Interpretive Authority*

The second difference between the sovereigns is one of constitutional interpretative authority. The elected branches of the quasi-sovereign states have a far weaker claim to interpret the U.S. Constitution than the elected branches of the federal sovereign. Certainly, the elected branches of the quasi-sovereign states do interpret the U.S. Constitution and, at various times their interpretations have carried some weight with federal courts. In Justice Scalia's opinion in *Burnham v. Superior Court*, he noted that every state legislature had declined to remove so-called "tag" jurisdiction from their long-arm statutes and, that being so, the Court therefore had no business looking further into what process was due.⁷² At least eight justices in *Mallory* approved of *Burnham's* approach of looking to long-arm statutes as the best evidence of what constitutes traditional notions

69. *Id.* at 97.

70. *Id.* at 101.

71. *Id.* at 111.

72. *See Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 613 (1990) ("Decisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there.").

of fair play and substantial justice.⁷³ The elected branches of the federal sovereign have a far greater claim to interpret the U.S. Constitution and for their interpretations of the Constitution to be assigned some weight by the courts.⁷⁴

Theories of constitutional departmentalism differ on how and when exactly the elected branches' interpretation of the Constitution should be entitled to deference by the courts.⁷⁵ But all approaches to this question seem to agree that the deference owed by the courts to the elected branches' constitutional interpretation is at its height when the elected branches have engaged in actual deliberation on the meaning of the

73. See Robin Effron & Aaron Simowitz, *The Long Arm of Consent*, 80 N.Y.U. ANN. SURV. AM. L. __ (forthcoming 2024). The justices in *Mallory* disagreed only as to which statutes were relevant, only statutes at the time of ratification or statutes up to the current day.

74. Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 380–81 (2018).

75. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1982–84 (2003) (“In the American tradition, the authority of the Constitution is sustained through attitudes of veneration and deference, but it is also sustained through the quintessentially democratic attitude in which citizens know themselves as authorities, as authors of their own law.”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 219, 221 (1994) (“If the judiciary is the least dangerous branch, then, by these same criteria, the executive is the most dangerous branch. The executive possesses Force, Will, and Judgment”—the power to interpret the law.”); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 173 (1997) (“To illustrate, let us transpose the names of the branches in the sentence: “If the Supreme Court could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be superior paramount law.”); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 472 (1989) (“Courts in this country are obliged every day to mediate the tension between democracy and rights as they determine whether one or another statute satisfies the Constitution. The sharp split between the two schools mimics the split between plaintiff and defendant in the typical lawsuit—the plaintiff insisting that a statute has violated her fundamental rights, while the defendant insists that the court defer to the democratic authority of Congress.”); see also Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming Coordinate Branch*, 4 GREEN BAG 2d 351, 351–52 (2001) (exploring the relationship between the Court and Congress in interpreting the constitution). See generally William N. Eskridge Jr. & John Ferejohn, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

Constitution and when the existence or nature of the asserted constitutional right is uncertain.⁷⁶

C. *Structural Authority*

The third difference between the sovereigns is one of institutional competence. The Court has long been an arbiter of issues of interstate federalism among the quasi-sovereign states, though it shares that responsibility with the federal elected branches.⁷⁷ In the context of personal jurisdiction, the Full Faith and Credit Clause of the U.S. Constitution arguably requires that the Court police state assertions of jurisdiction.⁷⁸

The Court is emphatically not an effective arbiter of foreign relations.⁷⁹ In transnational cases, expansive exercise of adjudicative jurisdiction can cause international tension.⁸⁰ However,

76. Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., 105, 115 (Summer 2004) (“Practice thus establishes that the political branches at times provide a necessary source of interpretation in the absence of judicial resolution and a valuable alternative or supplemental voice when the Court has spoken.”).

77. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 279 (2004) (“As suggested by the text of the Full Faith and Credit Clause and the Court’s dormant Commerce Clause jurisprudence, the final authority to adjust matters of interstate federalism such as those vindicated under current personal jurisdiction doctrine lies with Congress rather than the federal judiciary. To the extent, however, that such federalism-based limitations are conceptualized as a matter of individual liberty protected by the Due Process Clause of the Fourteenth Amendment rather than federal common law derived from constitutional structure, Congress is powerless to override them.”); Brief of Scholars on Corporate Registration and Jurisdiction as Amici Curiae in Support of Neither Party, *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023) (No. 21-1168), 2022 WL 2783734 (reviewing prior jurisprudence on interstate federalism).

78. Const. Art. IV, § 1

79. William S. Dodge, *International Comity In American Law*, 115 COLUM. L. REV. 2071, 2072 (2004) (“For a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion.”).

80. Professor Dodge acknowledges that “judicial unilateralism” can lead to international friction, but argues that “[a]lthough too much conflict can indeed cause a breakdown in international cooperation, conflict can also create an incentive to negotiate.” William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101 (1998).

where the elected branches have explicitly balanced those concerns in enacting in a federal statute, the Court has no cause to relitigate that determination. In striking down the PSJVTA, the Court of Appeals for the Second Circuit bluntly rejected this notion, stating that “[b]ecause the PSJVTA purports to provide consent-based jurisdiction in a manner at odds with constitutional due process, the statute cannot stand, notwithstanding the policy concerns that motivated its enactment.”⁸¹ The court did not consider that the elected branches should have some input on the content of constitutional due process by virtue of their unique position as the arbiters of foreign affairs.

IV. CONCLUSION

The question is not *whether* there are differences between constraints imposed on personal jurisdiction by the Fifth and the Fourteenth Amendment. The question is *how many* differences. To this point, courts have uniformly held that the only difference is that of territorial authority. But an approach that looks to the overall differences in the constitutional authority of the federal and state sovereigns mandates a different perspective that encompasses differences in interpretative and structural authority as well. Putting these differences in authority together, the federal elected branches should generally be able to authorize federal court to exercise personal jurisdiction without further scrutiny by courts enforcing the Due Process Clause of the Fifth Amendment.

81. *Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 102 (2d Cir. 2023).