

## THE UNLIMITED JURISDICTION OF THE FEDERAL COURTS

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*Federal courts are courts of limited jurisdiction—but only in part. A federal court’s subject-matter jurisdiction is limited by the Constitution; its territorial, personal jurisdiction is not. Current doctrine notwithstanding, a federal court’s writ may run as far as Congress, within its enumerated powers, would have it go.*

*Today’s doctrine limits federal jurisdiction by borrowing Fourteenth Amendment principles thought to govern state courts. This borrowing blocks recoveries by injured plaintiffs, such as American victims of foreign terrorist attacks; and it’s become a font of confusion for procedure scholars, giving rise to incisive critiques of the Federal Rules.*

*It’s also a mistake. The Fourteenth Amendment didn’t impose new limits on state personal jurisdiction; it enabled federal enforcement of limits that already applied. Current doctrine retroactively forces the Fifth Amendment into the mold of the modern Fourteenth, transforming an expansion of federal power into a strict constraint on federal authority.*

*The federal courts’ territorial jurisdiction depends, in the first instance, on Congress’s powers. It may be that Congress can authorize fully global jurisdiction over any suit within Article III. If not, Congress may have ways to make better use of its jurisdictional powers at home. Either way, the existing mix of statutes and procedural rules seems fully valid. If the Constitution didn’t impose limits on Congress or on the federal courts, modern doctrine shouldn’t either.*

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INTRODUCTION

Everyone knows that “[f]ederal courts are courts of limited jurisdiction.”<sup>1</sup> But this is only half right. A federal court’s *subject-matter* jurisdiction is affirmatively limited by the Constitution. Its territorial, *personal* jurisdiction is not. A federal court’s writ may run as far as Congress, within its enumerated powers, would have it go.

That this view might seem unusual—even alarming—reflects profound and widespread confusion about personal jurisdiction. Under current doctrine, state-court jurisdiction is hemmed in by the Fourteenth Amendment’s Due Process Clause,<sup>2</sup> which requires “minimum contacts” that satisfy “traditional notions of fair play and substantial justice.”<sup>3</sup> The Fifth Amendment has a Due Process Clause too,<sup>4</sup> so it’s easy to imagine similar rules for federal courts. Without Supreme Court precedent on

<sup>1</sup> *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

<sup>2</sup> U.S. Const. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>3</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

<sup>4</sup> U.S. Const. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”).

point,<sup>5</sup> the courts of appeals all agree that the Fifth Amendment requires at least the sorts of national contacts that the Fourteenth Amendment requires of a state.<sup>6</sup> In other words, current doctrine treats the United States as a state, but larger; it takes the Fourteenth Amendment as given, and remakes the Fifth Amendment in its image.<sup>7</sup>

<sup>5</sup> See *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1783–84 (2017) (“leav[ing] open the question [which restrictions] the Fifth Amendment imposes . . . on the exercise of personal jurisdiction by a federal court”); *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (declining to decide whether “a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, 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”); *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 n.\* (1987) (“We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.”).

<sup>6</sup> See *Double Eagle Energy Servs., L.L.C. v. MarkWest Utica EMG, L.L.C.*, 936 F.3d 260, 264 (5th Cir. 2019); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54 (D.C. Cir. 2017); *Xilinx, Inc. v. Papst Licensing GmbH & Co. KG*, 848 F.3d 1346, 1352–53, 1353 n.2 (Fed. Cir. 2017); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330–31 (2d Cir. 2016), motion to recall the mandate denied, 925 F.3d 570 (2d Cir. 2019), vacated and remanded sub nom. *Sokolow v. Palestine Liberation Org.*, 140 S. Ct. 2714 (2020); *Trs. of the Plumbers & Pipefitters Nat’l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 443–44 (4th Cir. 2015); *Klein v. Cornelius*, 786 F.3d 1310, 1318 (10th Cir. 2015); *KM Enters., Inc. v. Glob. Traffic Techs., Inc.*, 725 F.3d 718, 731 (7th Cir. 2013); *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 370–71, 370 n.2 (3d Cir. 2002); *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567–68 (6th Cir. 2001); *In re Fed. Fountain, Inc.*, 165 F.3d 600, 601–02 (8th Cir. 1999) (en banc); *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 946–47 (11th Cir. 1997); accord *Brief for the United States as Amicus Curiae* at 15 & n.3, *Sokolow v. Palestine Liberation Org.*, 138 S. Ct. 1438 (2018) (No. 16-1071).

<sup>7</sup> See, e.g., 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1068.1, at 694–95, 695 n.10 (4th ed. 2015); Chimène I. Keitner, *Personal Jurisdiction and Fifth Amendment Due Process Revisited*, in *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* 231, 248 (Paul B. Stephan & Sarah H. Cleveland eds., 2020); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 Mich. L. Rev. 1205, 1210 (2018) (noting that “[o]ther authors have advocated a national-contacts approach in various contexts, including . . . under the Fifth but not the Fourteenth Amendment,” and collecting citations); Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 Lewis & Clark L. Rev. 769, 776 (2015); Leslie M. Kelleher, *Amenability to Jurisdiction as a “Substantive Right”: The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 Ind. L.J. 1191, 1216 (2000) (describing it as “generally . . . accepted” that the Fifth Amendment “requires sufficient affiliating contacts with the nation as a whole, rather than just the forum state”); Jonathan Remy Nash, *National Personal Jurisdiction*, 68 Emory L.J. 509, 523–24 (2019).

This is all backwards. The Fifth Amendment came first, and the Fourteenth was modeled on *it*. We need to understand how personal jurisdiction was supposed to work—before the Fourteenth Amendment—if we want to understand what the Due Process Clauses actually do.

For the first 150 years of the Republic, today’s conventional view of personal jurisdiction wasn’t so conventional. Though the early Congress refrained from exercising its full powers, the recognized doctrines of jurisdiction worked very differently for state and federal courts. The narrow limits on *state* jurisdiction discussed in *Picquet v. Swan*,<sup>8</sup> a widely cited opinion by Justice Story, were still influential a half-century later in *Pennoyer v. Neff*.<sup>9</sup> Yet *Picquet* maintained that a *federal* court’s ability to have “a subject of England, or France, or Russia . . . summoned from the other end of the globe to obey our process, and submit to the judgment of our courts,” was up to Congress.<sup>10</sup> If Congress wanted to exercise exorbitant jurisdiction, contrary to “principles of public law, public convenience, and immutable justice,” a federal court “would certainly be bound to follow it, and proceed upon the law.”<sup>11</sup>

The contrary modern assumption, that federal and state courts face roughly the same constitutional limits, has serious practical consequences. Two circuits recently invalidated, as applied, an act of Congress authorizing jurisdiction over foreign terrorists and sponsors for attacks on Americans abroad.<sup>12</sup> Responding to the murder of Leon Klinghoffer, the statute specifically sought to expand Americans’ right to sue over terrorist attacks in foreign countries.<sup>13</sup> But because the individual states lack jurisdiction in these cases,<sup>14</sup> and because the attacks weren’t

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<sup>8</sup> 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).

<sup>9</sup> 95 U.S. 714, 724 (1878); see also, e.g., *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (endorsing *Picquet*’s reasoning); *Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 298 n.4 (C.C.D. Conn. 1837) (No. 17,206) (citing *Picquet*) (date ascribed in Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 81 n.1 (1918)); *Dearing v. Bank of Charleston*, 5 Ga. 497, 515 (1848) (citing *Picquet*); *Steel v. Smith*, 7 Watts & Serg. 447, 450 (Pa. 1844) (same).

<sup>10</sup> 19 F. Cas. at 613.

<sup>11</sup> *Id.* at 614–15.

<sup>12</sup> See *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1118, 1128, 1131 (D.C. Cir. 2019) (applying the Anti-Terrorism Act, 18 U.S.C. §§ 2331, 2333–2334), vacated and remanded, 140 S. Ct. 2713 (2020); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 53 (D.C. Cir. 2017); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335–37 (2d Cir. 2016), motion to recall the mandate denied, 925 F.3d 570 (2d Cir. 2019), vacated and remanded sub nom. *Sokolow v. Palestine Liberation Org.*, 140 S. Ct. 2714 (2020).

<sup>13</sup> See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1010–11 (7th Cir. 2002).

<sup>14</sup> See *Walden v. Fiore*, 571 U.S. 277, 286–89 (2014).

specifically aimed at Americans, the defendants' U.S. contacts fell short. Congress has twice amended the statute to try different approaches, and these may yet succeed.<sup>15</sup> If, though, Congress really does have power to authorize these suits—if its powers haven't shrunk since Justice Story's day—then the courts have no business sending the plaintiffs home empty-handed, or letting the defendants off scot-free.

The assumption that jurisdiction works the same way in state and federal court has serious theoretical consequences too. Today federal personal jurisdiction is litigated primarily under the Federal Rules of Civil Procedure.<sup>16</sup> But the relevant rules' validity has been questioned since their adoption, and the skeptics have recently grown in number.<sup>17</sup> Limits on *state* jurisdiction stem from external principles of law, principles that can't be amended by state rules of practice and procedure. If similar limits apply to *federal* jurisdiction, then much current practice is unlawful. But if not—if all the federal courts really need is authorization to issue process, in a particular place and in a particular way—then the Federal Rules are still valid, and the Supreme Court can still address the issue via rulemaking.

Given the stakes, federal personal jurisdiction deserves another look. Many scholars have called for expanding federal jurisdiction through new rules or statutes,<sup>18</sup> or for reinterpreting present law for policy-adjacent reasons—say, because the federal government has broader interests in

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<sup>15</sup> See Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, § 903, 133 Stat. 3082, 3082–83; Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184; *Klieman*, 140 S. Ct. 2713; *Sokolow*, 140 S. Ct. 2714.

<sup>16</sup> See Fed. R. Civ. P. 4(k).

<sup>17</sup> See, e.g., Kelleher, *supra* note 7; A. Benjamin Spencer, Substance, Procedure, and the Rules Enabling Act, 66 UCLA L. Rev. 654 (2019); Patrick Woolley, Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction, 56 Hous. L. Rev. 565 (2019); accord Lumen N. Mulligan, Is Personal Jurisdiction Constitutionally Self-Enacting?, Jotwell (May 7, 2019), <https://courtslaw.jotwell.com/is-personal-jurisdiction-constitutionally-self-enacting/> [<https://perma.cc/E8G4-NVDR>].

<sup>18</sup> See, e.g., Robert Haskell Abrams, Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts, 58 Ind. L.J. 1, 32–49 (1982); Edward L. Barrett, Jr., Venue and Service of Process in the Federal Courts—Suggestions for Reform, 7 Vand. L. Rev. 608, 627–35 (1954); Allan Erbsen, Impersonal Jurisdiction, 60 Emory L.J. 1, 77–84 (2010); Geoffrey C. Hazard, Jr., Interstate Venue, 74 Nw. U. L. Rev. 711, 712–13 (1979); Arthur T. von Mehren & Donald T. Trautman, Jurisdiction To Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1123 (1966); Nash, *supra* note 7, at 557–61; Stephen E. Sachs, How Congress Should Fix Personal Jurisdiction, 108 Nw. U. L. Rev. 1301, 1315–46 (2014); A. Benjamin Spencer, Nationwide Personal Jurisdiction for Our Federal Courts, 87 Denv. U. L. Rev. 325, 329–34 (2010); A. Benjamin Spencer, The Territorial Reach of Federal Courts, 71 Fla. L. Rev. 979, 991–94 (2019).

foreign affairs,<sup>19</sup> or because principles of reciprocity or horizontal federalism no longer apply at the federal level.<sup>20</sup> Historical or formalist studies of jurisdiction tend to focus on state courts, not federal ones—and on due process, not congressional power.<sup>21</sup> (Justice Story’s striking discussion in *Picquet*, for example, has attracted virtually no scholarly interest.<sup>22</sup>)

This Article suggests a change of course. We should stop looking for jurisdictional limits in the Fifth Amendment’s Due Process Clause, and start thinking about Congress’s enumerated powers instead.

The argument proceeds as follows. 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

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<sup>19</sup> E.g., A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 *Colum. J. Transnat’l L.* 379, 409, 415–16, 428 (1997); Ariel Winawer, *Comment, Too Far from Home: Why Daimler’s “At Home” Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 *Emory L.J.* 161, 185–87 (2016).

<sup>20</sup> E.g., Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 *Nw. U. L. Rev.* 455, 461 (2004); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 *Va. J. Int’l L.* 325, 328 & n.13 (2018); cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (discussing the role of “interstate federalism”).

<sup>21</sup> See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 *U.C. Davis L. Rev.* 19, 24, 43–56 (1990); Jay Conison, *What Does Due Process Have To Do with Jurisdiction?*, 46 *Rutgers L. Rev.* 1071, 1073–74, 1140–58 (1994); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 *Sup. Ct. Rev.* 241, 262–81; John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 *U.C. Davis L. Rev.* 591, 596–97, 616–746 (1995); 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, 730–39 (2012); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 *Nw. U. L. Rev.* 1112, 1115–20 (1981); Stephen E. Sachs, *Pennoyer Was Right*, 95 *Tex. L. Rev.* 1249, 1273–78, 1287–1313 (2017); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 *Geo. Wash. L. Rev.* 849, 871–898 (1989); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 *Va. L. Rev.* 169, 191–230 (2004); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 *Creighton L. Rev.* 499, 570–89 (1981) [hereinafter Whitten, Part One]; Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 *Creighton L. Rev.* 735, 768–835 (1981) [hereinafter Whitten, Part Two].

<sup>22</sup> As of October 3, 2020, key phrases from the opinion such as “England, or France, or Russia,” “other end of the globe,” or “proceed upon the law” yield no relevant hits in Westlaw’s Secondary Sources: Law Reviews & Journals database, aside from this author.

general or international law that regulated the authority of separate sovereigns.<sup>23</sup> The Fourteenth Amendment changed this picture for state courts, because it enabled direct federal-question review of their jurisdictional rulings: as *Pennoyer* explained, “proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”<sup>24</sup>

The picture for federal courts, however, is very different. Federal courts generally look to state laws only “in cases where they apply.”<sup>25</sup> Yet *all* valid federal law is “the supreme Law of the Land,” with “the Judges in every State . . . bound thereby.”<sup>26</sup> A federal long-arm provision, if within Congress’s enumerated powers, *establishes* territorial jurisdiction to the satisfaction of the courts; the due process objection to a judgment-without-jurisdiction can never get started. The federal government can look past a state’s assertion of jurisdiction, but not the other way round.

The Article then examines what enumerated powers Congress might use to expand federal personal jurisdiction beyond what modern doctrine allows. Broad jurisdiction might be necessary and proper to carry into execution the federal courts’ subject-matter jurisdiction.<sup>27</sup> If a foreigner manages to breach a federal duty, or if a citizen of a state has a controversy with a citizen or subject of a foreign state, those cases and controversies may be heard in federal court.<sup>28</sup> So Congress may be within its rights to “summon[]” such defendants “from the other end of the globe to obey our process, and submit to the judgment of our courts.”<sup>29</sup> Or, if it can’t have process sent abroad, Congress might try unusual methods of serving foreign defendants here, parlaying what would ordinarily be limited jurisdiction into a general jurisdiction on any topic whatsoever.<sup>30</sup> Either way, we should leave the Fifth Amendment to its own work. Due process

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<sup>23</sup> See Sachs, *supra* note 21, at 1269–87.

<sup>24</sup> *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

<sup>25</sup> Rules of Decision Act, 28 U.S.C. § 1652 (2018).

<sup>26</sup> U.S. Const. art. VI, cl. 2.

<sup>27</sup> See *id.* art. I, § 8, cl. 18 (granting power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

<sup>28</sup> See *id.* art. III, § 2, cl. 1.

<sup>29</sup> *Picquet v. Swan*, 19 F. Cas. 609, 613 (C.C.D. Mass. 1828) (No. 11,134) (Story, Circuit Justice).

<sup>30</sup> See *id.* at 615 (suggesting that Congress could authorize unorthodox jurisdiction predicated on service by attachment of property in the United States).

may still require that defendants receive adequate notice,<sup>31</sup> that the forum not be so burdensome as to render the proceedings a sham,<sup>32</sup> and so on. But as to the scope of the courts' territorial jurisdiction, the Clause has nothing to say.

Finally, the Article turns to what Congress has actually done with its powers. A handful of statutes achieve universal jurisdiction through worldwide service of process, but most federal jurisdictional work is performed by the Federal Rules. And while the drafters of those Rules may not have fully understood their handiwork, its result appears to be lawful: the Rules Enabling Act's "power to prescribe general rules of practice and procedure"<sup>33</sup> encompasses the power to make rules for service of process, including rules for when that process will or won't be taken as asserting the court's jurisdiction.

So this Article may be less revisionist than first appears. If its arguments are correct, their most immediate consequence is to preserve the status quo, including the validity of the Federal Rules. The next result is to let the federal courts exercise the full breadth of the jurisdiction Congress has already conferred. And the final implication is to put Congress back in the driver's seat, with authority to redefine the federal courts' reach without regard to recently invented judicial barriers. If the Court adopts new standards via rulemaking, if Congress expands federal personal jurisdiction by statute, or if the President makes a jurisdictional treaty with the Senate's advice and consent, these policy decisions wouldn't—and shouldn't—be hampered by an ever-expanding vision of the Due Process Clause.<sup>34</sup>

### I. POWERS, NOT RIGHTS

Showing that Founding-era due process *didn't* limit federal personal jurisdiction is an exercise in proving a negative. Starting with the Judiciary Act of 1789, and for almost a century afterwards, Congress

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<sup>31</sup> See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 320 (1950).

<sup>32</sup> See *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (Easterbrook, J.).

<sup>33</sup> 28 U.S.C. § 2072 (2018).

<sup>34</sup> Cf. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) ("Turn it over, and turn it over, for all is therein." (quoting 8 *The Babylonian Talmud: Seder Nezikin, Tractate Aboth 76–77* (I. Epstein ed. & trans., 1935))).



strictly limited the venues in which a federal civil suit could be brought.<sup>35</sup> The result was to foreclose virtually any exercise of jurisdiction that might seem at all interesting today.<sup>36</sup> If Congress rarely pushed the jurisdictional envelope, how do we know what would have happened if it did?

Still, there's strong historical evidence that those who adopted the Fifth Amendment didn't see its Due Process Clause as "the only source of the personal jurisdiction requirement," as courts see the Fourteenth Amendment's Clause today.<sup>37</sup> Instead, early federal courts adhered to rules derived from general and international law—rules that could be altered by federal statute, with no obvious constitutional constraint.<sup>38</sup>

This approach fit well with the Founding-era understanding of personal jurisdiction. Limits on personal jurisdiction were limits on sovereign authority, imposed by international law.<sup>39</sup> Within its own courts, a sovereign might override such rules by statute. But the resulting judgments might go unrecognized in *other* sovereigns' courts—unless those courts also recognized the statute as valid and applicable, as a matter of choice of law.<sup>40</sup> The same approach applied domestically: American courts routinely invoked these principles to refuse recognition to state judgments that were valid under their home state's laws and in their home state's courts.<sup>41</sup>

<sup>35</sup> Ch. 20, § 11, 1 Stat. 73, 79 (providing that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court," and forbidding any actions "against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ"); see also Act of Aug. 13, 1888, ch. 866, sec. 1, § 1, 25 Stat. 433, 434 (eliminating venue where the defendant is "found," but permitting venue at the plaintiff's residence in diversity cases, assuming process could be served there).

<sup>36</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (approving general jurisdiction based on domicile); *Burnham v. Superior Ct.*, 495 U.S. 604, 612–13 (1990) (same, as to local service of process).

<sup>37</sup> *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982).

<sup>38</sup> See, e.g., *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); *Picquet v. Swan*, 19 F. Cas. 609, 612–13 (C.C.D. Mass. 1828) (No. 11,134) (Story, Circuit Justice); *Ex parte Graham*, 10 F. Cas. 911, 912–13 (C.C.E.D. Pa. 1818) (No. 5,657) (Washington, Circuit Justice); *Hollingsworth v. Adams*, 2 U.S. (2 Dall.) 396, 396 (C.C.D. Pa. 1798).

<sup>39</sup> See, e.g., *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 268–69 (1808).

<sup>40</sup> See, e.g., *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851); *Buchanan v. Rucker* (1808) 103 Eng. Rep. 546, 547; 9 East. 192, 194 (K.B.) (per curiam).

<sup>41</sup> See, e.g., *D'Arcy*, 52 U.S. at 176; *Elliott v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340–41 (1828); *Flower v. Parker*, 9 F. Cas. 323, 324–25 (C.C.D. Mass. 1823) (No. 4,891) (Story, Circuit Justice); *Bartlett v. Knight*, 1 Mass. (1 Will.) 401, 410 (1805) (opinion of Sedgwick, J.).

None of these territorial limits on jurisdiction had anything to do with due process. Plenty of states had equivalent clauses in their own constitutions,<sup>42</sup> but not until the Civil War did a single court, state or federal, hold a personal-jurisdiction statute invalid on due process grounds.<sup>43</sup> The Fourteenth Amendment imposed a new requirement on the states, but it was a requirement that their courts have *jurisdiction*, period, before depriving defendants of life, liberty, or property. The Amendment didn't constitutionalize the general rules; it made the federal courts' *view* of them conclusive, enabling federal-question review of any case in which the state courts got them wrong.<sup>44</sup>

(The Amendment did constitutionalize a separate requirement, discussed below, that a defendant receive adequate notice and an opportunity for a hearing.<sup>45</sup> This was indeed treated as a limit on judicial authority, state as well as federal. But it was distinct from personal-jurisdiction doctrine, and it'd have little impact on Congress's freedom of choice today.)

What implications this history might have for *state-court* jurisdiction is a hard question. With the waters muddied by cases like *Erie Railroad Co. v. Tompkins*<sup>46</sup> and *International Shoe Co. v. Washington*,<sup>47</sup> the general law of jurisdiction is no longer as crisp as it seemed to Justice Story. But the implications for *federal* jurisdiction are easy to see. If Congress has adequate enumerated power, it can override rules of general or international law. Jurisdictional questions at the Founding were fundamentally questions of powers, not rights, and nothing has happened since to change that.

#### A. The Origins of Federal Personal Jurisdiction

Federal personal jurisdiction at the Founding was a rather boring topic: the interesting questions were all settled by the Judiciary Act. No civil defendant could be "arrested in one district for trial in another"; a suit

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<sup>42</sup> Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L.J.* 1672, 1705 (2012).

<sup>43</sup> See *Beard v. Beard*, 21 *Ind.* 321, 324 (1863); see also *Ex parte Woods*, 3 *Ark.* 532, 536–37 (1841) (suggesting in dicta that a personal jurisdiction statute could violate the state constitution's "law of the land" clause).

<sup>44</sup> See *infra* Section I.C.

<sup>45</sup> See *infra* Section II.B.

<sup>46</sup> 304 U.S. 64 (1938).

<sup>47</sup> 326 U.S. 310 (1945).

against a U.S. resident couldn't be brought "by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."<sup>48</sup> Other statutes allowed witness subpoenas and writs of execution to be sent nationwide,<sup>49</sup> but initial process was kept within district lines. In 1798, a circuit court straightforwardly held that initial process couldn't be served on the Pennsylvania property of a Delaware defendant: he was "an inhabitant of another district . . . not found in Pennsylvania at the time of serving the writ."<sup>50</sup> Likewise, in *Ex parte Graham*, a federal circuit court in Pennsylvania ordered the release of a local merchant arrested by order of a circuit court in Rhode Island: no defendant could be arrested in one district for trial in another.<sup>51</sup>

These statutory limits coexisted with broader common-law rules—what Justice Washington in *Graham* called the "general principles of law, which our courts acknowledge as rules of decision."<sup>52</sup> Under these principles, a court's writ ordinarily ran only within the territory for which it was created. A court of law or equity had "no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed, by some law of the United States."<sup>53</sup> After all, Congress had created separate districts for Pennsylvania and Rhode Island, with a marshal "appointed in and for each district . . . to execute throughout the district, all lawful precepts directed to him";<sup>54</sup> what was the point of separate districts if each court could operate on the other's turf? Congress had specially allowed subpoenas and executions to run into other districts, but without such provision, all process would ordinarily be hemmed in by district lines.<sup>55</sup>

The territorial limit on process functioned as a limit on personal jurisdiction. That wasn't because a federal court would lack authority to

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<sup>48</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

<sup>49</sup> See Act of Mar. 2, 1793, ch. 22, § 6, 1 Stat. 333, 335 (permitting subpoenas "for witnesses"—and not for commencing a suit in equity—to "run into any other district," so long as the witness wouldn't be forced to travel over one hundred miles); see also Act of Mar. 3, 1797, ch. 20, § 6, 1 Stat. 512, 515 (permitting writs of execution on judgments won by the United States to "run and be executed in any other state"); cf. Act of May 20, 1826, ch. 124, 4 Stat. 184 (expanding the latter rule to all writs of execution).

<sup>50</sup> *Hollingsworth v. Adams*, 2 U.S. (2 Dall.) 396, 396 (C.C.D. Pa. 1798).

<sup>51</sup> 10 F. Cas. 911, 911, 913 (C.C.E.D. Pa. 1818) (No. 5,657) (Washington, Circuit Justice).

<sup>52</sup> *Id.* at 912.

<sup>53</sup> *Id.*

<sup>54</sup> Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

<sup>55</sup> *Graham*, 10 F. Cas. at 912.

hear the cause, but because it couldn't issue a lawful command to the defendant to appear, which was a potential precondition to the *exercise* of its authority. A defendant could always show up voluntarily; if not, the court had to command him to appear. The Judiciary Act defined the courts' jurisdiction in terms of "the nature of the causes over which they are to decide, and not in any respect by place"; but Justice Washington considered it "nevertheless essential to the *exercise* of this jurisdiction by any particular court, that the person or thing against whom or which the court proceeds, should be within the local jurisdiction of such court."<sup>56</sup> The choice to create separate districts "necessarily confines the jurisdiction of the local tribunals," for if "the court of one district, could send compulsory process into any other, so as to draw to itself a jurisdiction over persons, or things, without the limits of the district," then "a clashing of jurisdiction" would result.<sup>57</sup> Still, these requirements were wholly open to legislative revision, having been inferred from statutes and from the general law. "[S]hould it be the will of congress to vest in the courts of the United States an extra-territorial jurisdiction in prize causes, over persons and things found in a district other than that from which the process issued," the courts would obey.<sup>58</sup>

When federal courts discussed the possibility of broader personal jurisdiction, they discussed it as a matter of general law and statute, not as something regulated by the Constitution. In *Picquet*, for example, the French plaintiff brought his suit by foreign attachment—that is, by attaching the Boston property of the Massachusetts defendant, then residing in Paris.<sup>59</sup> The plaintiff argued that this process was perfectly legal in Massachusetts courts, and that Congress had adopted these service methods when the Process Acts borrowed state "forms of writs" and "modes of process" in common-law actions.<sup>60</sup> Writing on circuit in 1828, Justice Story reiterated the "general principle, that a court created

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<sup>56</sup> Id. at 913 (emphasis added).

<sup>57</sup> Id. at 912.

<sup>58</sup> Id. at 913.

<sup>59</sup> *Picquet v. Swan*, 19 F. Cas. 609, 609–10 (C.C.D. Mass. 1828) (No. 11,134).

<sup>60</sup> Id. at 610; see Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93; accord Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276; see also Process Act of 1828, ch. 68, § 1, 4 Stat. 278, 278–81 (making accommodations for states admitted after 1789). Not every state had separate equity or admiralty procedures, see Lawrence M. Friedman, *A History of American Law* 110–13 (4th ed. 2019), so the Process Acts ordered those federal proceedings governed by the civil law. See Process Act of 1789, § 2, 1 Stat. at 93–94; Process Act of 1792, § 2, 1 Stat. at 276; Process Act of 1828, § 1, 4 Stat. at 280–81.

within and for a particular territory is bounded in the exercise of its power by the limits of such territory”—whether “a kingdom, a state, a county, or a city, or other local district.”<sup>61</sup> Had it wanted, Congress was “doubtless competent . . . to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union”; notwithstanding the Process Acts, it hadn’t done so yet.<sup>62</sup>

Justice Story’s reasoning was twofold. On the one hand, state courts were limited by international principles, even if they didn’t recognize those principles at home. Justice Story attributed this doctrine to “the common law,” with “a foundation also in universal jurisprudence.”<sup>63</sup> The state courts, he wrote, “are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations.”<sup>64</sup> A state might proceed against local property *in rem*, but not against absent non-residents *in personam*.<sup>65</sup> State statutes authorizing such extraterritorial process might still be accepted at home: “for aught I know, the local tribunals might give a binding efficacy to such judgments,”<sup>66</sup> and “it is not for us to say, that such legislation may not be rightful, and bind the state courts.”<sup>67</sup> But in any other courts, “they would be utterly void,” and held “incapable of binding such persons or property.”<sup>68</sup> Even if the state used an adequate means of notice, it wouldn’t “vary the legal result, that the party had actual notice of the suit; for he is not bound to appear to it.”<sup>69</sup>

On the other hand, the United States might always issue contrary instructions to *its* own courts; and for the same reasons, those instructions would be followed. Justice Story found it “repugnant to the general rights and sovereignty of other nations” to “summon[.]” a “subject of England, or France, or Russia . . . from the other end of the globe.”<sup>70</sup> But if “congress have, in an unambiguous manner, made it imperative upon” the

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<sup>61</sup> *Picquet*, 19 F. Cas. at 611.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 612.

<sup>64</sup> *Id.* at 611.

<sup>65</sup> *Id.* at 612.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 614.

<sup>68</sup> *Id.* at 612.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 613.

federal courts “to take cognizance of suits against non-residents,” simply by attaching “a farm or a debt, or a glove, or a chip”<sup>71</sup>—and to render judgment *in personam*, not just *in rem*<sup>72</sup>—the courts would obey. The question was one of legislative intent, whether one could infer “any such intention” from the general language of the Process Acts.<sup>73</sup> Justice Story thought not: an intention to violate the laws of nations so baldly “ought not to be presumed, unless it is established by irresistible proof.”<sup>74</sup>

In discussing these outlandish exercises of jurisdiction, Justice Story neither referenced due process as a barrier nor invoked any notion of constitutional avoidance. If an alien had “never been within the United States,” he wrote, but was “served with a summons or other process by any attachment of his property, however small,” a judgment *in personam* would depart “from the principles and practice of the common law,” as well as “the principles of public law, or general justice.”<sup>75</sup> If it violated due process too, now was the time to say so. But Justice Story instead made very clear that “[i]f congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law.”<sup>76</sup>

Justice Story’s reasoning was endorsed by the full Court a decade later in *Toland v. Sprague*.<sup>77</sup> A Pennsylvania plaintiff attached the Philadelphia property of a Massachusetts defendant living in Gibraltar.<sup>78</sup> Because the defendant wasn’t “an inhabitant of the United States, but residing in another country,” the plaintiff argued that the case fell outside the Judiciary Act’s limitations, and that the court should follow the Process Acts’ cross-reference and use Pennsylvania service methods.<sup>79</sup> The defendant responded that Congress hadn’t “give[n] the federal courts power to exercise jurisdiction over persons out of the[ir] districts”; until it did so, “no state law like this can be recognised in a federal court.”<sup>80</sup> The Court described *Picquet*’s reasoning “as having great force,” and concluded that, while “Congress might have authorized civil process from any circuit court, to have run into any state of the Union,” it “has not done

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<sup>71</sup> Id. at 614.

<sup>72</sup> Id. at 615.

<sup>73</sup> Id. at 613.

<sup>74</sup> Id.

<sup>75</sup> Id. at 615–16.

<sup>76</sup> Id. at 615.

<sup>77</sup> 37 U.S. (12 Pet.) 300 (1838).

<sup>78</sup> Id. at 302.

<sup>79</sup> Id. at 310–11 (argument of counsel).

<sup>80</sup> Id. at 316 (argument of counsel).

so.”<sup>81</sup> The Court agreed with Justice Story that if “congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction,”<sup>82</sup> then a federal court would enforce the statute, however “unjust”;<sup>83</sup> but this couldn’t be done “independently of positive legislation.”<sup>84</sup> As “congress had not those in contemplation at all, who were in a foreign jurisdiction,” its statutes shouldn’t be read to extend to “those whom the legislature did not contemplate, as being within the reach of the process of the courts.”<sup>85</sup>

### *B. Personal Jurisdiction in the Early Republic*

The federal courts’ understanding of their own personal jurisdiction was entirely of a piece with the early Republic’s general approach. Personal jurisdiction was primarily governed by rules of general or international law. A sovereign, acting by statute or otherwise, could displace those rules within its own courts; but it was a further question whether those statutes (or the resulting judgments) would ever be respected abroad.

This history has been discussed in more detail elsewhere;<sup>86</sup> for now, a brief summary will do. The American colonies inherited a tradition in which neither a suit in equity, nor a real or personal action at law, would be heard against a non-consenting defendant without a lawful command from the court to appear.<sup>87</sup> Early American courts were “remarkably uniform in their conclusion that a prerequisite for jurisdiction to support recognition was service of process upon the defendant while within the

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<sup>81</sup> Id. at 328 (opinion of the Court).

<sup>82</sup> Id. at 330.

<sup>83</sup> Id. at 329.

<sup>84</sup> Id. at 330.

<sup>85</sup> Id.

<sup>86</sup> See Sachs, *supra* note 21, at 1269–87; see, e.g., sources cited *supra* note 21.

<sup>87</sup> See Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 *Yale L.J.* 52, 79 (1968) (“The full exercise of jurisdiction in personal actions at common law did require the plaintiff to ‘catch’ his defendant in England in a very tangible sense.” (emphasis omitted)); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1559, 1570–71 (2002) (discussing comments in George Booth, *The Nature and Practice of Real Actions, in Their Writs and Process, Both Original and Judicial* 4–6 (John Anthon ed., N.Y., S. Gould 1st Am. ed. 1808) (real actions), and 3 William Blackstone, *Commentaries on the Laws of England* \*442–43 (subpoenas in equity)); see also Levy, *supra*, at 52–53 (contesting claims made by Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 *Yale L.J.* 289, 292–93 (1956), and later echoed by Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 *Sup. Ct. Rev.* 241, 271, that the need for service was a “myth”).

territorial limits of the rendering state.”<sup>88</sup> In 1777, when the Continental Congress was debating the Articles of Confederation, it considered requiring states to recognize each other’s judgment debts, but only so long as the original defendant had had “notice in fact of the service of the original writ upon which such judgment shall be founded.”<sup>89</sup> Cases under the Articles expressed similar views. In 1786, a Connecticut court rejected a Massachusetts foreign-attachment judgment as lacking “legal jurisdiction of the cause”—which turned on whether the parties were “within the jurisdiction of such courts at the time of commencing the suit, and [we]re duly served with the process, and ha[d] or might have had a fair trial of the cause.”<sup>90</sup> Likewise, in 1788, the Pennsylvania courts refused recognition to a Massachusetts judgment founded on the foreign attachment of a blanket; without personal service, the prior case could only be treated as “a proceeding *in rem*, and ought not certainly to be extended further than the property attached.”<sup>91</sup>

American courts drew these rules from what they understood to be the general common law and the law of nations. A judgment without jurisdiction was *coram non iudice*, not before a judge; it was null and void, a piece of “waste pape[r],”<sup>92</sup> with no more force than the pronouncement of “a mere stranger.”<sup>93</sup> Foreign judgments posed special problems of *recognition*: one state’s judgments might be received or rejected in another’s courts. In that sense, “whether a court ‘could’ or ‘could not’ legitimately exercise jurisdiction in the international sense was a matter of how other states would treat the resulting judgment.”<sup>94</sup> That’s why “[t]he jurisdiction of courts” was described by the Supreme Court as merely “a branch of that which is possessed by the nation as an

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<sup>88</sup> Weinstein, *supra* note 21, at 193 & n.96 (citing cases).

<sup>89</sup> 9 J. Cont’l Cong. 895–96 (1777).

<sup>90</sup> Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. Super. Ct. 1786).

<sup>91</sup> Phelps v. Holker, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (opinion of M’Kean, C.J.); see also Act of June 16, 1798, ch. 5, § 1, 1798 Mass. Acts 211 (discussing “such service of the original writ upon the principal as would have authorized the Court to proceed to render a judgment against him, in an action brought and commenced in the common and ordinary mode of process”).

<sup>92</sup> Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 474–75 (1836).

<sup>93</sup> Case of the Marshalsea (1612) 77 Eng. Rep. 1027, 1039; 10 Co. Rep. 68b, 76b (K.B.); accord Kempe’s Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 185 (1809) (Marshall, C.J.); William Baude, The Judgment Power, 96 Geo. L.J. 1807, 1828 (2008); Note, Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 87 Yale L.J. 164, 164 (1977).

<sup>94</sup> Conison, *supra* note 21, at 1108.



independent sovereign power.”<sup>95</sup> A judgment that “exercise[d] a jurisdiction which, according to the law of nations, its sovereign could not confer,” had no more weight than one “rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject”—something with “no legal effect whatever.”<sup>96</sup> As one state court explained in 1784, a judgment from another state would receive “due faith and credit” only if it were the judgment “of [a] court of competent jurisdiction”—whether under “common law rules,” “the law of nations,” or “[t]he act of confederation,” which contained its own Full Faith and Credit Clause.<sup>97</sup>

If a sovereign did order its courts to disregard the default rule of personal service, it could expect that order to be followed at home. But whether that order would be respected abroad was a choice-of-law question. In one widely cited English case, the Court of King’s Bench refused to recognize a judgment of Tobago against a non-resident, in which process had been posted “at the Court-House door,”<sup>98</sup> as “warranted by a law of the island” and “commonly practised there.”<sup>99</sup> How, the court asked, “could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world?”<sup>100</sup> American courts took the same view: “however available [a court’s] sentences may be within the dominions of the prince from whom the authority is derived,” the Supreme Court stated in 1808, judgments that defied the law of nations “are not regarded by foreign courts,” and laws that sought to extend jurisdiction “beyond [a government’s] own territory . . . can only affect its own subjects or citizens.”<sup>101</sup>

Even after the Constitution’s adoption, state courts still viewed each other’s judgments as bound by these general rules. The Full Faith and Credit Clause and its implementing statute demanded respect for valid

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<sup>95</sup> *The Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (emphasis omitted).

<sup>96</sup> *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 268–69, 276–77 (1808).

<sup>97</sup> *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8, 9–10 (1784) (per curiam); see Articles of Confederation of 1781, art. IV.

<sup>98</sup> *Buchanan v. Rucker* (1808) 103 Eng. Rep. 546, 546–47; 9 East. 192, 192–94 (K.B.) (per curiam).

<sup>99</sup> *Id.* at 546, 9 East. at 193.

<sup>100</sup> *Id.* at 547, 9 East. at 194.

<sup>101</sup> *Rose*, 8 U.S. at 276–77, 279.

judgments.<sup>102</sup> But whether a judgment was valid depended on general principles of jurisdiction and choice of law, which the Clause and statute had left intact.<sup>103</sup> In 1805, a particularly self-aware Massachusetts judge wrote that “many of the States, of which *this* is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him”; but he still refused to recognize a New Hampshire judgment, because it shared that very fault.<sup>104</sup> As the Supreme Court later put it, “the international law as it existed among the States in 1790” conditioned interstate recognition on meeting the traditional requirements, whether of “legislative jurisdiction” or “that of courts of justice”; as “Congress did not intend to overthrow the old rule,” it simply remained in force.<sup>105</sup>

Federal courts, too, refused to recognize state judgments rendered without international jurisdiction, even in the states in which they sat.<sup>106</sup> But they didn’t do so by invoking Fifth Amendment due process. In fact, the question could never properly come up. If the state judgment had valid jurisdiction (in the federal court’s eyes), then there was no due process problem with enforcing it. And if it didn’t have valid jurisdiction (again, in the federal court’s eyes), then the court would deny recognition on ordinary jurisdictional grounds, without reaching any due process questions. Federal courts did sometimes have to decide jurisdictional issues in constitutional cases: for example, if one state court refused to recognize another’s judgment, and the losing party appealed on Full Faith

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<sup>102</sup> See U.S. Const. art. IV, § 1; Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2018)).

<sup>103</sup> See, e.g., *Aldrich v. Kinney*, 4 Day 380, 386 (Conn. 1822); *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 416–17 (1808); *Bissell v. Briggs*, 9 Mass. (9 Tyng) 462, 469 (1813) (Parsons, C.J.); *Bartlett v. Knight*, 1 Mass. (1 Will.) 401 (1805); *Gerault v. Anderson*, 1 Miss. (1 Walker) 30, 33 (1818); *Curtis v. Gibbs*, 2 N.J.L. (1 Penning.) 399, 406 (1805) (Pennington, J.); *Kilburn v. Woodworth*, 5 Johns. 37, 38, 40–41 (N.Y. Sup. Ct. 1809) (per curiam); *Hitchcock v. Aicken*, 1 Cai. 460, 481 (N.Y. Sup. Ct. 1803) (opinion of Kent, J.); see also *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 244 (1828) (describing, perhaps too exuberantly, “almost every state court in the Union” as “unanimous” on the point). But see, e.g., *Lanning v. Shute*, 5 N.J.L. (2 Southard) 778, 779–80 (1820) (Kirkpatrick, C.J.) (resolving that the court is bound by a decision from the United States Supreme Court, having “settled” the issue, and that the court “ha[d] no further discretion”). See generally *Sachs*, supra note 21, at 1276–78 (describing the prevailing doctrine).

<sup>104</sup> *Bartlett*, 1 Mass. at 410 (opinion of Sedgwick, J.).

<sup>105</sup> *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851).

<sup>106</sup> See, e.g., *Elliott v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340–41 (1828); *Flower v. Parker*, 9 F. Cas. 323, 324–25 (C.C.D. Mass. 1823) (No. 4,891) (Story, Circuit Justice).

and Credit grounds.<sup>107</sup> But if a state simply overrode or misapplied the international rules in its own courts, no federal question was presented, and the federal courts couldn't intervene.<sup>108</sup>

Importantly, when reviewing these state judgments, the federal courts weren't bound by state laws asserting broader jurisdiction. The Rules of Decision Act made “the laws of the several states” into “rules of decision in trials at common law”—but only “*in cases where they apply*.”<sup>109</sup> And whether a state's law applied was a choice-of-law question.<sup>110</sup> The standard doctrine was that “[t]he legislative and judicial authority” of the state “were bounded by [its] territory”<sup>111</sup>—so that a state couldn't, for example, “pass estates lying in another state.”<sup>112</sup> Similarly, a state's jurisdictional statutes might have force in its own courts, but they might not apply in other courts. As Justice Story wrote on circuit, “the legislature of a state can bind no more than the persons and property within its territorial jurisdiction,” and so couldn't “compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals.”<sup>113</sup> In other circumstances, Justice Story noted, even a judgment that “tramples under foot all the doctrines of international law” might be held binding “upon the subjects of that particular nation,” if not upon “the rights or property of the subjects of other nations.”<sup>114</sup> But the Supreme Court made clear that a state judgment “assuming to bind the person of a citizen of another,” without proper service or consent,

<sup>107</sup> E.g., *Crapo v. Kelly*, 83 U.S. (16 Wall.) 610, 618–19 (1873); *Green v. Van Buskirk*, 74 U.S. (7 Wall.) 139, 145 (1869); see Whitten, Part One, *supra* note 21, at 585–89.

<sup>108</sup> See *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878) (describing prior law); *D'Arcy*, 52 U.S. at 174 (describing the force a New York judgment “had in New York”); cf. *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 287 (1876) (questions of general and international law aren't federal questions); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 325–26 (1818) (Story, J.) (same, as to common law).

<sup>109</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2018)) (emphasis added).

<sup>110</sup> See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 289–90 (1992); cf. *Guar. Tr. Co. v. York*, 326 U.S. 99, 103–04 (1945) (stating that the Rules of Decision Act was “deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts”).

<sup>111</sup> *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 655 (1829) (Story, J.).

<sup>112</sup> *Id.*; accord *Fall v. Eastin*, 215 U.S. 1, 12 (1909).

<sup>113</sup> *Flower v. Parker*, 9 F. Cas. 323, 324–35 (C.C.D. Mass. 1823) (No. 4,891).

<sup>114</sup> *Bradstreet v. Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1,793).

would be “void within the foreign State”—as “neither the legislative jurisdiction, nor that of courts of justice, had binding force.”<sup>115</sup>

Congress, by contrast, faced no such limits. A nation might always “exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world”; if it did so, it might “justly be considered as violating its faith,” but the rules would still be valid within that nation’s courts.<sup>116</sup> Congress might therefore override the general law or the law of nations on matters within its control. In 1815, for example, the Court noted that the power to “make Rules concerning Captures on Land and Water”<sup>117</sup> included the power to make rules contrary to international law—though, “[t]ill such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.”<sup>118</sup> Once Congress had acted “decisive[ly],” then “whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that Courts of justice are bound to obey and administer them.”<sup>119</sup> And while Congress didn’t actually try to override the traditional rules of jurisdiction, some recognized that the power was there. Justice Johnson, dissenting to the Court’s construction of a federal statute, described the principle “that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits,” as among the “eternal principles of justice . . . which Courts of justice never can dispense with *but when compelled by positive statute.*”<sup>120</sup>

### *C. Personal Jurisdiction and the Fourteenth Amendment*

The Fourteenth Amendment placed no new limits on federal personal jurisdiction. It expanded the federal courts’ power to review *state* jurisdiction, but it left the substance of the jurisdictional rules alone. A judgment without jurisdiction was void, and it wouldn’t count as “due process of law” to justify a “depriv[ation] . . . of life, liberty, or

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<sup>115</sup> D’Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1851).

<sup>116</sup> The Schooner Exch. v. M’Faddon, 11 U.S. (7 Cranch) 116, 137 (1812).

<sup>117</sup> U.S. Const. art. I, § 8, cl. 11.

<sup>118</sup> The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

<sup>119</sup> The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39–40 (1826).

<sup>120</sup> Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting) (emphasis added) (construing the Full Faith and Credit Clause’s implementing statute, Act of May 26, 1790, ch. 11, 1 Stat. 122).

property”;<sup>121</sup> but Congress still retained power to define federal jurisdiction.

To start with, the Fourteenth Amendment didn’t speak to personal jurisdiction directly. Its due process clause was modeled on that of the Fifth; when one congressman asked “what you mean by ‘due process of law,’” Rep. John Bingham famously replied that “the courts have settled that long ago, and the gentleman can go and read their decisions.”<sup>122</sup> Even by the time of the Civil War, only a few state courts treated jurisdictional rules as having *any* state-constitutional force;<sup>123</sup> only one phrased its holding in terms of due process,<sup>124</sup> while the majority adhered to the traditional approach.<sup>125</sup> So there’s little reason to read the subsequent Fourteenth Amendment caselaw back into the Fifth.

Rather than adopting jurisdictional rules that might have bound federal courts, the Fourteenth Amendment offered a new basis for federal *review* of state jurisdiction. As is argued in more detail elsewhere,<sup>126</sup> *Pennoyer* was a standard-issue diversity case about the validity of an Oregon state judgment; most of the opinion offered an unremarkable recitation of the “principles of public law” (that is, international law) governing judgment recognition in state and federal courts.<sup>127</sup> Only after concluding that the state judgment deserved no recognition in a federal court—a “tribunal[] of a different sovereignty, exercising a distinct and independent jurisdiction, and . . . bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them”<sup>128</sup>—did the Court identify another ground for objection:

<sup>121</sup> U.S. Const. amend. XIV.

<sup>122</sup> Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (statements of Reps. Bingham and Rogers).

<sup>123</sup> See, e.g., *Oakley v. Aspinwall*, 4 N.Y. (4 Comst.) 513, 521–22 (1851) (raising the issue); *Jarvis v. Barrett*, 14 Wis. 591, 592, 594–95 (1861) (same); see also *Weil v. Lowenthal*, 10 Iowa 575, 578 (1860) (stating, in dicta, that the legislature was so bound).

<sup>124</sup> *Beard v. Beard*, 21 Ind. 321, 324 (1863); see also *Ex parte Woods*, 3 Ark. 532, 536 (1841) (dicta); *Oakley v. Aspinwall*, 8 N.Y. Super. Ct. (1 Duer) 1, 27 (1852) (quoting a judge’s personal letter which expressed this view); cf. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 404–05 (Bos., Little, Brown, & Co. 1868) (adopting this view).

<sup>125</sup> E.g., *Melhop v. Doane & Co.*, 31 Iowa 397, 406–07 (1871); *Sim v. Frank*, 25 Ill. 125, 127 (1860); *Phelps v. Brewer*, 63 Mass. (9 Cush.) 390, 395–96 (1852); *Dearing v. Bank of Charleston*, 5 Ga. 497, 511 (1848); see also *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878) (recognizing the majority view).

<sup>126</sup> See, e.g., *Perdue*, *supra* note 21, at 731; *Sachs*, *supra* note 21, at 1297–1313.

<sup>127</sup> 95 U.S. at 722.

<sup>128</sup> *Id.* at 732–33.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.<sup>129</sup>

It's possible, though mistaken, to read *Pennoyer* as somehow deriving all the traditional rules of jurisdiction from the phrase “due process of law.” The Court described “due process” as requiring “a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights”<sup>130</sup>—the seeds of the later formula of “traditional notions of fair play and substantial justice.”<sup>131</sup> And the Court did note that, “[t]o give such proceedings any validity,” a defendant in an *in personam* action “must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.”<sup>132</sup>

But this reading mistakes the *consequences* of the Clause for its *content*. Due process had long required that certain deprivations of life, liberty, or property be supported by a judicial judgment,<sup>133</sup> not just by a piece of “waste pape[r].”<sup>134</sup> As the Court reiterated in later cases, the Clause requires *jurisdiction*, period,<sup>135</sup> without setting out particular rules for obtaining it. If, in a particular case and under a particular legal regime, jurisdiction requires service of process in Hawaii, it'd be true that “due process requires personal service in Hawaii”—but not *always* true, as if Hawaii were somehow part of the Due Process Clause. On the facts of a particular case, due process might turn out to require service within a

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<sup>129</sup> *Id.* at 733.

<sup>130</sup> *Id.*

<sup>131</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>132</sup> *Pennoyer*, 95 U.S. at 733.

<sup>133</sup> See, e.g., *Chapman & McConnell*, *supra* note 42, at 1679, 1688.

<sup>134</sup> *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 475 (1836).

<sup>135</sup> See, e.g., *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 609 (1899) (“The Federal question with which we are now concerned is whether the [state] court obtained jurisdiction to render judgment in the case against the company so that to enforce it would not be taking the property of the company without due process of law.”); *Scott v. McNeal*, 154 U.S. 34, 46 (1894) (“No judgment of a court is due process of law, if rendered without jurisdiction in the court . . .”).

particular state; but that doesn't make in-state service a due process requirement, *tout court*.<sup>136</sup>

Other clues to *Pennoyer*'s reasoning point in the same direction. First, the same passage of *Pennoyer* says that, “[t]o give such proceedings any validity,” the tribunal must be “competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit.”<sup>137</sup> The Fourteenth Amendment plainly says nothing about state-court subject-matter jurisdiction; as *Pennoyer* notes, that’s a question of state law. Rather, the traditional “rules and principles” of “our systems of jurisprudence” simply require that there *be* subject-matter and personal jurisdiction (both of which the Court listed in the same sentence), the particular rules of each being supplied by other sources.<sup>138</sup> Second, contemporary courts and commentators understood the Court to be enforcing, rather than constitutionalizing, a general law of jurisdiction. While state and federal courts could previously disagree on matters of general law,<sup>139</sup> they couldn’t disagree any longer about personal jurisdiction, because due process issues were subject to federal-question review on direct appeal.<sup>140</sup> *Pennoyer* emphasized that a state’s exercise of personal jurisdiction could now be “directly questioned”—that is, on direct appeal, and not just in a subsequent recognition action—when

<sup>136</sup> Cf. Michael Nelson, The De Re/De Dicto Distinction, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/prop-attitude-reports/dere.html> [https://perma.cc/6RAD-BP7T] (last visited Aug. 21, 2020) (noting that “Ralph believes that he [pointing at the man in the dark] is a spy” might be true, while “Ralph believes that [the mayor] is a spy” might be false, even if the man in question turns out to be the mayor (first alteration in original)).

<sup>137</sup> *Pennoyer*, 95 U.S. at 733; see also Wendy Collins Perdue, Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and *Pennoyer* Reconsidered, 62 Wash. L. Rev. 479, 505–06 (1987) (noting discussion of “both personal jurisdiction and subject matter jurisdiction as prerequisites to a valid and enforceable judgment”); Sachs, *supra* note 21, at 1299 (same).

<sup>138</sup> *Pennoyer*, 95 U.S. at 733.

<sup>139</sup> See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842).

<sup>140</sup> See, e.g., *Belcher v. Chambers*, 53 Cal. 635, 642–43 (1879); *Barrett v. Oppenheimer*, 59 Tenn. (12 Heisk.) 298, 304–06 n.\* (1873) (reporter’s note, published in 1878); A.C. Freeman, A Treatise on the Law of Judgments, Including All Final Determinations of the Rights of Parties in Actions or Proceedings at Law or in Equity § 561, at 591 (S.F., A.L. Bancroft & Co. 3d ed. 1881); see also E. Merrick Dodd, Jr., The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533, 533–34 (1926) (discussing jurisdictional questions as a “class[] of case” in which “the Federal Constitution imposes upon the state courts a duty to conform their decisions to what the Supreme Court regards as correct principles”).

previously there had been “no mode of directly reviewing such judgment or impeaching its validity within the State where rendered.”<sup>141</sup>

This meant that the federal *view* of jurisdictional law now controlled in the state courts, not that the law of jurisdiction was *itself* federal constitutional law. If a state court, following a state statute, exceeded the general limits on jurisdiction, a federal court could look past its assertion of authority to see whether, under the general rules governing a state’s “legislative jurisdiction, [and] that of courts of justice,”<sup>142</sup> the defendants were actually bound. An execution of the judgment would “deprive[]” the defendant of liberty or property, without any valid judgment that might count as “due process of law”;<sup>143</sup> a judgment ordering that unconstitutional deprivation could be corrected on Supreme Court review.<sup>144</sup>

Yet *Pennoyer* essentially left federal exercises of jurisdiction alone. If a *federal* court, following a federal statute, exceeded the general jurisdictional limits in precisely the same way, other American courts couldn’t look past the federal statute—except to confirm that it fell within some constitutional grant of power. If so, then the federal court had all the jurisdiction it could need; there would be no jurisdictionless judgment, and a Fifth Amendment due process argument would never get started. (Or, if the court *had* departed from the federal statute, then the judgment would be void on statutory grounds, again without any need to get the Fifth Amendment involved.<sup>145</sup>)

This explains why effective due process challenges to federal jurisdiction seem to be absent from the historical record, even after *Pennoyer*. For example, after the *Crédit Mobilier* scandal, Congress

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<sup>141</sup> 95 U.S. at 732–33.

<sup>142</sup> *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851).

<sup>143</sup> See *York v. Texas*, 137 U.S. 15, 20–21 (1890).

<sup>144</sup> See *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 604, 609 (1899) (agreeing that “the [state] judgment, if enforced, would result in taking complainant’s property without due process of law, and would violate the Fifth and Fourteenth Amendments of the Constitution of the United States,” and that this presented a “Federal question”); *Scott v. McNeal*, 154 U.S. 34, 45 (1894); accord *Sachs*, *supra* note 21, at 1307; see also *Oakley*, *supra* note 21, at 738–39 & nn.485–86 (noting the *Scott* Court found a constitutional due process violation when *Scott* was “deprived of his property”); *Perdue*, *supra* note 21, at 731 (“The Due Process Clause provided a hook to allow an intra-state challenge to a judgment rendered in violation of the principles of sovereignty and international law that [Justice Field] had earlier described.”).

<sup>145</sup> See, e.g., *Harkness v. Hyde*, 98 U.S. 476, 476–79 (1879) (invalidating, without reference to due process, a territorial judgment in which process was served on the land of the Shoshone Tribe, defined by statute as outside the Idaho Territory and thus “beyond the jurisdiction, legislative or judicial, of the government of Idaho”).



passed a special statute to recover lost funds,<sup>146</sup> directing the Attorney General to sue the Union Pacific Railroad (and various preferential transferees) in a single circuit court with nationwide service.<sup>147</sup> The defendants in *United States v. Union Pacific Railroad Co.* raised a due process objection, arguing that each defendant might “be compelled to appear . . . in a district remote from his home and his means of defence”—even one “where, by general law, no one of the defendants was subject to the jurisdiction.”<sup>148</sup> But they didn’t claim that the exercise of jurisdiction, per se, raised a due process problem: they “admit[ted] the power of Congress to confer additional jurisdiction on any one or on all the inferior courts it has established, in such manner as to include the present suit.”<sup>149</sup> They merely argued that the statute violated a principle of “equality before the law,” treating the railroad and its transferees differently than ordinary defendants who had to be sued at home.<sup>150</sup> For its part, the government conceded that Congress couldn’t discriminate among individual citizens “as regards the process to which these are either entitled or amenable”; but it maintained that Congress could “make any provision as to process for a particular suit which does not materially affect the parties thereto.”<sup>151</sup> The Court came down strongly on the side of congressional power: Congress had complete discretion as to which lower federal courts to create and how “much or little of the judicial power” to confer on them—a discretion “unlimited by the Constitution.”<sup>152</sup> Under then-current law, the Supreme Court and the Court of Claims could already serve process “anywhere within the limits of the territory over which the Federal government exercises dominion,” and Congress could have done the same for “all original jurisdiction.”<sup>153</sup> As to “the number, the character, [and] the territorial limits” of the inferior courts, Congress’s choice was “unrestricted.”<sup>154</sup>

<sup>146</sup> John P. Davis, *The Union Pacific Railway*, 8 *Annals Am. Acad. Pol. & Soc. Sci.* 47, 56 (1896).

<sup>147</sup> Act of Mar. 3, 1873, ch. 226, § 4, 17 Stat. 485, 509.

<sup>148</sup> 98 U.S. 569, 590, 592–93 (1879) (argument of counsel).

<sup>149</sup> *Id.* at 594.

<sup>150</sup> *Id.* at 590, 592.

<sup>151</sup> *Id.* at 581.

<sup>152</sup> *Id.* at 603 (opinion of the Court).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 602.

## II. WHAT CONGRESS CAN DO

If the Fifth Amendment places no territorial limits on federal jurisdiction, then how far can the courts go? Under current doctrine, the government's authority is already quite broad. Congress can provide for jurisdiction over anyone served with process here,<sup>155</sup> any U.S. citizen or resident abroad,<sup>156</sup> and anyone with adequate contacts with the United States (which give rise to the episode-in-suit and make jurisdiction fair and reasonable).<sup>157</sup> But other nations have gone much further. At one time, France claimed authority to hear "virtually any case in which the plaintiff or defendant is a French citizen"; Germany would issue an *in personam* judgment against "a Russian [who left] his galoshes in a hotel in Berlin," based on the "presence of assets within the jurisdiction"; and Belgium would let its residents obtain "retaliatory" jurisdiction against foreigners whenever "the courts of the foreigner's domicile would entertain a comparable action against a Belgian defendant."<sup>158</sup> Could the United States do the same? And what sources of law would tell us either way?

The enumerated powers of Congress over personal jurisdiction are woefully understudied, and this Article won't attempt a definitive account. Instead, it identifies a few potential sources of authority, along with a few potential limits. In short, the United States may well have authority to extend federal personal jurisdiction across our borders and beyond the scope of "minimum contacts" doctrine. This authority flows not only from Congress's power to carry the judicial power into execution, but also from its other substantive powers, from the President's power to make treaties, and from Congress's ability to make broader use of domestic methods of service. These powers don't appear to be limited by any implicit features of the judicial power vested in Article III. And while it's conceivable that *some* exercises of jurisdiction would be so unreasonable or burdensome as to violate Fifth Amendment due process,

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<sup>155</sup> *Burnham v. Super. Ct.*, 495 U.S. 604, 619 (1990).

<sup>156</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 136–37 (2014) (domiciliaries); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (citizens).

<sup>157</sup> *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017); see sources cited *supra* note 7.

<sup>158</sup> Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 *Ga. J. Int'l & Compar. L.* 1, 14–15 (1987) (internal quotation marks omitted); cf. Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 *Harv. Int'l L.J.* 373, 388 & n.56 (1995) (discussing France's Article 14).

these would be rather few and far between. In general, Congress can extend the federal courts' personal jurisdiction as far as it wants.

### A. Powers

#### 1. Jurisdiction Abroad

The Necessary and Proper Clause is the most obvious candidate for a federal power to assert jurisdiction. Congress already has power to “constitute Tribunals inferior to the supreme Court”; specifying how those tribunals assert jurisdiction over defendants, including outside our borders, seems plausibly “necessary and proper for carrying [that power] into Execution.”<sup>159</sup> More importantly, the Clause applies not only to “the foregoing Powers” in Article I, but also to “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>160</sup> Those “other Powers” include the judicial power itself, equally vested in the “supreme” and “inferior Courts.”<sup>161</sup> That “judicial Power shall extend,” among other things, to “all Cases, in Law and Equity, arising under [federal law],” or to “Controversies . . . between a State, or the Citizens thereof, and foreign . . . Citizens or Subjects.”<sup>162</sup> So whenever the plaintiff is a citizen of a state or raises a federal question, providing for federal personal jurisdiction over *any* foreign defendant is an obvious (if breathtaking) means of carrying the judicial power into execution.<sup>163</sup> Likewise, Congress might authorize U.S. subpoenas to travel abroad, the better to carry into execution the judicial power at home.<sup>164</sup> That’s how the Court analyzed a foreign-bound subpoena in *Blackmer v. United States*—treating its validity as a matter of “legislative power,” and looking to the

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<sup>159</sup> U.S. Const. art. I, § 8, cl. 9, 18.

<sup>160</sup> Id. art. I, § 8, cl. 18. See generally John Mikhail, *The Necessary and Proper Clauses*, 102 *Geo. L.J.* 1045 (2014) (emphasizing the three distinct provisions of the Clause).

<sup>161</sup> U.S. Const. art. III, § 1.

<sup>162</sup> Id. art. III, § 2, cl. 1.

<sup>163</sup> See Samuel L. Bray, “Necessary and Proper” and “Cruel and Unusual”: Hendiadys in the Constitution, 102 *Va. L. Rev.* 687, 750 (2016) (describing Congress’s incidental powers as those “ordinarily needed to carry [the] enumerated powers into execution”).

<sup>164</sup> See Act of July 3, 1926, ch. 762, § 2, 44 Stat. 835, 835 (authorizing subpoenas ordering any “witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States,” to attend a criminal trial here).

Fifth Amendment only for “appropriate notice of the judicial action and an opportunity to be heard.”<sup>165</sup>

Broad assertions of jurisdiction might also be necessary and proper to carrying other, more substantive powers into execution. Should Congress have power to forbid terrorist attacks on our citizens abroad, under its power to “define and punish . . . Offences against the Law of Nations,”<sup>166</sup> then it arguably carries that regulation into execution to allow the injured citizens to sue in U.S. courts. The issue of judicial jurisdiction might then reduce to a question of legislative power: for example, whether the Offences Clause has to be read with a presumption against extraterritoriality.<sup>167</sup>

Alternatively, the extraterritorial exercise of jurisdiction might be authorized by treaty, or perhaps by legislation exercising powers conveyed by treaty. If, say, the United States were to join the Lugano Convention, agreeing that tort suits would be heard “in the courts for the place where the harmful event occurred,”<sup>168</sup> that agreement would be effective to confer personal jurisdiction on a federal court for that district, and the Fifth Amendment would impose no territorial bar.<sup>169</sup> Or if a foreign nation authorized the United States to exercise jurisdiction within its borders (as was the case for the United States Court for China), then depending on the scope of the Treaty Power, Congress might be able to take them up on the offer.<sup>170</sup>

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<sup>165</sup> 284 U.S. 421, 437–38 (1932).

<sup>166</sup> U.S. Const. art. I, § 8, cl. 10.

<sup>167</sup> See Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 335 (2001) (suggesting not); cf. Restatement (Fourth) of The Foreign Relations Law of the United States § 411 (Am. L. Inst. 2018) (describing the principle of “passive personality”).

<sup>168</sup> Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), art. 5(3), 2007 O.J. (L 339) 5.

<sup>169</sup> Cf. Hague Conference on Private International Law, *Jurisdiction Project*, <https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project> [https://perma.cc/6T5F-6G2F] (last visited Aug. 23, 2020) (proposing a multilateral treaty on the exercise of judicial jurisdiction).

<sup>170</sup> See An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, ch. 3934, § 1, 34 Stat. 814, 814 (1906) (repealed 1948); David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 Va. J. Int'l L. 451, 462–63 (1988); Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, *Law & Contemp. Probs.*, Summer 2008, at 217, 220–21. Compare *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that a treaty may validly expand legislative power), with *Bond v. United States*, 572 U.S. 844, 877 (2014) (Scalia, J., concurring in the judgment) (arguing that it may not).

Letting Congress authorize jurisdiction over contactless foreigners would likely comply with today's necessary-and-proper doctrine. If "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional,"<sup>171</sup> then it's hard to say that worldwide service of process doesn't count: nothing could be more "plainly adapted" to the goal of Article III adjudication or extraterritorial regulation. And the power to call a defendant to answer in an Article III case or controversy is an "authority derivative of, and in service to, a granted power,"<sup>172</sup> not one exercised for its own sake.

Yet the necessary-and-proper case isn't open-and-shut. The general rule at the Founding was that process was "necessarily confined to the territorial limits of the state."<sup>173</sup> "Even the court of king's bench in England, though a court of general jurisdiction, never imagined, that it could serve process [abroad] . . . to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit."<sup>174</sup> Early sources sometimes referenced a power to send civil process "into any state of the Union";<sup>175</sup> but except for Justice Story's dictum, they don't seem to have envisioned sending process overseas. *Union Pacific* similarly thought it possible for a federal trial court to "exercise [its] jurisdiction throughout the limits of the Federal government," but it said nothing about jurisdiction outside those limits.<sup>176</sup> If "no sovereignty can extend its process beyond its territorial limits," and if "[e]very exertion of authority beyond this limit is a mere nullity,"<sup>177</sup> can we be sure that transnational service and jurisdiction are "appropriate" means? Would such service give Congress "the extraordinary ability to create the necessary predicate to the exercise of an enumerated power," or let it "reach beyond the natural limit of its

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<sup>171</sup> *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>172</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (Roberts, C.J.).

<sup>173</sup> *Picquet v. Swan*, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11,134) (Story, Circuit Justice).

<sup>174</sup> *Id.*

<sup>175</sup> *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

<sup>176</sup> 98 U.S. 569, 603 (1879); accord *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States."); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States.")

<sup>177</sup> *Picquet*, 19 F. Cas. at 612.

authority and draw within its regulatory scope those who otherwise would be outside of it”<sup>178</sup>

Put another way, is asserting jurisdiction over contactless non-citizens merely “incidental to those powers which are expressly given,” or is it “a great substantive and independent power,” of the sort “which cannot be implied as incidental to other powers, or used as a means of executing them”<sup>179</sup> For example, the power to abrogate state sovereign immunity—to extend federal personal jurisdiction over state governments, making them amenable to compulsory process at the instance of private plaintiffs—might be the sort of power the Constitution only confers explicitly, and not by implication.<sup>180</sup> Abrogating state immunity might be useful or convenient for executing a variety of federal powers,<sup>181</sup> but so is declaring war to protect the U.S. Postal Service; some powers, the argument goes, are too significant not to be listed on their own.

As applied to cross-border service, this argument has force, but perhaps not enough. Unlike suits against states, practices like foreign attachment were rather widespread at the Founding.<sup>182</sup> States authorized exorbitant

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<sup>178</sup> NFIB v. Sebelius, 132 S. Ct. 2566, 2592 (2012) (Roberts, C.J.).

<sup>179</sup> M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819).

<sup>180</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that the Commerce Clause doesn’t authorize such abrogation); Nelson, *supra* note 87, at 1639–40 (stating the argument in terms of “great substantive and independent power”); see also William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 14–15 (2017) (describing the power to abrogate state sovereign immunity as a “plausible candidate” for a “great and important” power “that falls outside of the implied powers of Article I”); Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1874–75 (2012) (noting that this power might be of the kind “which would have been granted explicitly if granted at all”); cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449–50 (1793) (Iredell, J., dissenting) (doubting that Article III abrogated state immunities, as “every word in the Constitution may have its full effect without involving this consequence, and . . . nothing but express words, or an insurmountable implication . . . would authorise the deduction of so high a power”); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1819, 1838–39 (2010) (suggesting that the Constitution generally avoided coercing the states, acting directly on individuals instead). See generally William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. (forthcoming 2021) (manuscript at 12–13, 36–39), <http://ssrn.com/id=3466298> [<https://perma.cc/J68E-RCNV>] (distinguishing this question of power from the Eleventh Amendment’s text).

<sup>181</sup> See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989) (plurality opinion), overruled by *Seminole Tribe*, 517 U.S. at 66.

<sup>182</sup> Compare, e.g., *Bartlett v. Knight*, 1 Mass. (1 Will.) 401, 410 (1805) (opinion of Sedgwick, J.) (stating that “many of the States . . . proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him”), with *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n., 78 n. (Pa. C.P. 1781) (argument of counsel) (noting “that there [was] no instance in our law books, of any process against a sovereign”).

judgments within their own courts all the time, even if this was viewed as unfortunate or even as an abuse. And Congress's ability to abrogate international law, when acting within the scope of an otherwise-available power, was taken for granted by early courts.<sup>183</sup> (That's why Justice Story assumed that Congress could reach defendants in England or Russia, not that Congress would lack enumerated power if it tried.<sup>184</sup>) So while there's little Founding-era evidence of truly extraterritorial service of process, the idea that such process could *never* be "necessary and proper"—or that the Founders would have expected a special enumerated power for cross-border jurisdiction—seems uncertain in context. Haling into court the states of the Union was one thing; individuals abroad, another. If exorbitant jurisdiction was a power that governments usually pledged not to exercise, but usually exercised anyway (like, say, spying on friendly nations), it's harder to say that the Constitution ruled it out.

## 2. *Jurisdiction at Home*

Should the Necessary and Proper Clause not stretch far enough, Congress might still do a good deal more with its ability to serve process at home. The plaintiffs in some of the recent antiterrorism cases served process in Virginia, at the home of the defendant's chief representative in the United States, under a statute authorizing service "in any district where the defendant resides, is found, or has an agent."<sup>185</sup> Why wasn't that service, like the historical "tag jurisdiction" approved in *Burnham v. Superior Court*, enough to establish general jurisdiction?<sup>186</sup> The current doctrine's answer—by no means settled—would have something to do with *Daimler AG v. Bauman*, which limited general jurisdiction to fora in which the defendant is "at home."<sup>187</sup> But whether or not *Daimler* is correct as to state courts, its Fourteenth Amendment test has no application to federal courts.

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<sup>183</sup> See *supra* text accompanying notes 116–19.

<sup>184</sup> See *supra* text accompanying notes 8–11.

<sup>185</sup> 18 U.S.C. § 2334(a) (2018); see *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 325 (2d Cir. 2016).

<sup>186</sup> 495 U.S. 604, 619 (1990).

<sup>187</sup> 571 U.S. 117, 122 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Compare *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127–28 (Del. 2016) (questioning whether, post-*Daimler*, appointing an agent for service is enough to establish jurisdiction), with *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, 817 F.3d 755, 766–67 (Fed. Cir. 2016) (O'Malley, J., concurring) (suggesting that it is).

Under the rules of general law cited in *Pennoyer* and thereafter applied by federal courts, the effect of serving a corporate agent in a state depends in part on what the corporation is doing there.<sup>188</sup> (Serving the CEO while she vacations in Florida isn't enough.<sup>189</sup>) But these rules are rules of general law, so Congress can override them, adopting other provisions on domestic service. If a foreign defendant has a U.S. agent, such that serving the agent will reliably notify the principal,<sup>190</sup> that agent could be authorized by statute to receive service—even if the defendant's contacts wouldn't ordinarily support jurisdiction.

Indeed, Congress might routinely parlay specific jurisdiction into general, using whatever regulatory powers it has to extract agreements from foreign parties to appoint agents and consent to jurisdiction within the United States.<sup>191</sup> Doing so might land the U.S. in diplomatic hot water, but that's precisely why the political branches are well suited to make the decision. If a state were to try the same thing, it might have to worry about unconstitutional conditions, dormant commerce limits, the privileges-and-immunities “right to travel,” and so on; Congress has none of these worries. So its power to serve process on foreign defendants might be astonishingly broad, whether or not it's limited by U.S. borders.

And *in personam* jurisdiction isn't the only game in town. Acting within its enumerated powers, Congress could plausibly establish a domestic situs, appropriate for *in rem* jurisdiction, for a variety of intangible property interests subject to federal regulation. If someone registers an Internet domain name infringing a registered trademark, the Anticybersquatting Consumer Protection Act provides that the mark's owner “may file an *in rem* civil action against a domain name” in the district of “the domain name registrar, domain name registry, or other domain name authority,”<sup>192</sup> which is declared to be the relevant situs.<sup>193</sup> For dot-com domains, that situs conveniently turns out to be in the Eastern

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<sup>188</sup> See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 107–11 (1898); *Pennoyer v. Neff*, 95 U.S. 714, 735–36 (1878).

<sup>189</sup> See *St. Clair v. Cox*, 106 U.S. 350, 354, 360 (1882).

<sup>190</sup> On the notice requirement, see *infra* Subsection II.B.2.

<sup>191</sup> See, e.g., Foreign Manufacturers Legal Accountability Act of 2019, H.R. 3737, 116th Cong. § 5 (requiring the makers of certain imported products to appoint agents for service in the United States).

<sup>192</sup> 15 U.S.C. § 1125(d)(2)(A) (2018) (emphasis added).

<sup>193</sup> *Id.* § 1125(d)(2)(C)(i).



District of Virginia, where the registry Verisign Inc. is headquartered.<sup>194</sup> So federal courts can assert *in rem* jurisdiction, good against the world, over foreign-owned dot-com domains without ever needing to send process outside our borders. If a state tried this, it might find itself at the wrong end of a due process claim;<sup>195</sup> certainly the *Pennoyer*-era rules of *in rem* jurisdiction wouldn't have respected a self-interested reassignment of situs.<sup>196</sup> But Congress, within its enumerated powers, can abrogate those rules when it chooses.

To the extent that Congress's power over jurisdiction is less than plenary, its power to declare a situs won't be plenary either. (If Congress can't summon a contactless defendant from Paris, it also can't declare the Eiffel Tower to be in Maryland.<sup>197</sup>) But if Congress can regulate intangible domain names to begin with, then it may also be able to say something about where they are—from which the exercise of various other powers might follow.

### *B. Limits*

The absence of *territorial* due process limits on federal jurisdiction doesn't mean there are no limits at all. Congress might be restricted in its ability to vest jurisdiction by some implicit feature of Article III—though the historical case for such limits is questionable. Or Congress might violate the Fifth Amendment by adopting rules that are sufficiently irrational or unlawful for other reasons (say, jurisdiction for Presbyterians, but not for the six-fingered). Due process likely does require that the defendant receive adequate notice of the suit and an opportunity to respond. But the widespread view that due process takes account of the defendant's convenience, assessing whether the opportunity to respond is a *meaningful* opportunity, may carry little weight for personal jurisdiction.

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<sup>194</sup> See Contact Us, Verisign, [https://www.verisign.com/en\\_US/company-information/-contact-us/index.xhtml](https://www.verisign.com/en_US/company-information/-contact-us/index.xhtml) [<https://perma.cc/DV5Y-NLHG>] (last visited Oct. 5, 2020).

<sup>195</sup> See Michael P. Allen, In Rem Jurisdiction from *Pennoyer* to Shaffer to the Anticybersquatting Consumer Protection Act, 11 *Geo. Mason L. Rev.* 243, 245, 253–87 (2002).

<sup>196</sup> See *Haddock v. Haddock*, 201 U.S. 562, 576–77 (1906).

<sup>197</sup> But cf. *Mostyn v. Fabrigas* (1774) 98 Eng. Rep. 1021, 1022, 1030–31; 1 Cowp. 160, 162, 177–78 (K.B.) (declaring the island of Minorca to be in Cheapside, “in the parish of St. Mary le Bow”).

### 1. Article III

Whatever powers Article I might vest in Congress, Article III defines the federal courts' "judicial Power."<sup>198</sup> There are early references to the "judicial power of a nation" as not unlimited—for example, as extending specifically "to every person and every thing in its territory," as a matter of "the general laws of nations," among other sources.<sup>199</sup> So were these law-of-nations limits baked into Article III?

Some scholars read Article III as requiring personal jurisdiction on its own. On this account, "the subject matter jurisdiction of the federal courts is triggered only when certain procedural prerequisites are met," including "personal jurisdiction and notice for all defendants."<sup>200</sup> Thus, "[t]o have 'judicial power' over a 'case' requires both personal jurisdiction and notice."<sup>201</sup> Consider, for example, John Marshall's speech on the Jonathan Robbins affair, which construed Article III's "all cases in law and equity" as confined to properly presented judicial questions, excluding "any political power whatever."<sup>202</sup> Before the courts could act, Marshall explained, the "question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit."<sup>203</sup> This passage can easily be read to treat proper service of process as a requirement of Article III.

Yet like the passages of *Pennoyer* discussed above,<sup>204</sup> these sources don't seem to articulate a *definition* of Article III "Cases," so much as an

<sup>198</sup> U.S. Const. art. III, § 1.

<sup>199</sup> Serv. of Process on a British Ship-of-War, 1 Op. Att'y Gen. 87, 87–88 (1799).

<sup>200</sup> Ingrid Wuerth, The Due Process and Other Constitutional Rights of Foreign Nations, 88 Fordham L. Rev. 633, 661–62 (2019).

<sup>201</sup> Id. at 638; see also id. at 653 (noting that such requirements extend to foreign litigants as well).

<sup>202</sup> John Marshall, Speech of the Hon. John Marshall, Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (1800), reprinted in 4 The Papers of John Marshall 82, 95 (Charles T. Cullen ed., 1984) (emphasis omitted); see Wuerth, supra note 200, at 662 & n.183. On the Robbins affair generally, see Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990).

<sup>203</sup> Marshall, supra note 202, at 95–96; cf. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (describing Article III's federal-question head of jurisdiction as "enabl[ing] the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it").

<sup>204</sup> See supra text accompanying notes 132–36136.

independent requirement that any “Case[]” would eventually have to meet.<sup>205</sup> The claim is synthetic, not analytic. By way of comparison, in the ratification debates Madison explained that diversity jurisdiction would let “citizens of different states . . . be carried to the federal courts,” but that “this will not go beyond the cases where they may be parties”: a “*femme covert* . . . cannot be a party in this court,” and “an alien enemy cannot bring suit at all.”<sup>206</sup> Madison wasn’t arguing that Article III constitutionalizes the law of coverture or of alienage, only that it takes such doctrines as it finds them. In the same way, Article III “Cases” may well require parties,<sup>207</sup> and some of those parties may well have to be forced into court; but this doesn’t constitutionalize the doctrines of personal jurisdiction, as opposed to leaving those doctrines alone. Nor does Justice Story’s description of a “case” as “a suit in law or equity, instituted according to the regular course of judicial proceedings,”<sup>208</sup> turn every ordinary defect in procedure into a lack of Article III subject-matter jurisdiction.

As Caleb Nelson suggests, rules that alter the circumstances which produce a proper case (capacity, personal jurisdiction, proper pleading, etc.) merely prevent plaintiffs from making someone “party to a ‘Case’ or ‘Controversy’ in the first place.”<sup>209</sup> Members of the Founding generation who expected narrow limits on personal jurisdiction were not thereby ascribing those limits to Article III.<sup>210</sup> As was argued to the Supreme Court in 1812, when it comes to personal jurisdiction, “[t]he constitution of the United States, decides nothing—it only provides, a tribunal, if a case can by possibility exist.”<sup>211</sup>

<sup>205</sup> U.S. Const. art. III, § 2.

<sup>206</sup> 3 Jonathan Elliot, *The Debates in the Several State Conventions* 533 (Phila., J.B. Lippincott Co. 2d ed. 1891).

<sup>207</sup> Cf. James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *Yale L.J.* 1346, 1355–56, 1402–40 (2015) (arguing that two parties might be optional).

<sup>208</sup> 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1640, at 507 (Bos., Hilliard, Gray & Co. 1833).

<sup>209</sup> Nelson, *supra* note 87, at 1587, 1590 n.149.

<sup>210</sup> See, e.g., 3 Elliot, *supra* note 206, at 549 (statement of Edmund Pendleton) (“I have before supposed that there would be an inferior federal court in every state. Now, this citizen of Maryland, to whom this bond is assigned, cannot sue out process from the supreme federal court to carry his debtor thither. He cannot carry him to Maryland. He must sue him in the inferior federal court in Virginia.”).

<sup>211</sup> *The Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116, 133 (1812) (argument of counsel).

## 2. *Due Process*

Courts in the early Republic recognized different kinds of limits on personal jurisdiction. Not only did a court need authority to command the defendant to appear, but that authority had to be asserted, with the defendant given adequate notice of the suit. The notice and authority requirements have often been conflated, as notice usually took the form of service of process—the delivery of a lawful command to appear.<sup>212</sup> This requirement of notice (and the corresponding opportunity for a hearing) reflects a distinct due process constraint, as applicable in federal court as anywhere else. But that constraint, taken seriously, won't do much to constrain federal personal jurisdiction.

Without offering a definitive account of the Due Process Clause, it's fair to say that there's a *very* long tradition, associated with the Clause or similar provisions, of requiring American courts to provide the defendant with notice and an opportunity to be heard. Even before the Revolution, Americans had argued that “Parliament could not act like a court by passing a special bill that deprived a certain party of rights without providing basic common law procedures such as notice and a hearing.”<sup>213</sup> The 1777 Articles of Confederation proposal, discussed above, demanded “notice in fact of the service of the original writ” before holding a party bound by the judgment of another state.<sup>214</sup> In the Supreme Court, Chief Justice Marshall in 1815 described it as “a principle of natural justice,” and “of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him.”<sup>215</sup> Similar language is all over the state reports; for example, Connecticut's high court in 1822 found it “preposterous” that “a person shall be invincibly bound, by a judgment, obtained against him, without notice.”<sup>216</sup> Indeed, *every* proposal to accord specific “substantive effect to [state] judgments—in the drafting of the Articles of [Confederation], the Philadelphia Convention, and in the first

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<sup>212</sup> See generally Robin J. Efron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. Ann. Surv. Am. L. 23 (2018) (discussing the link between personal jurisdiction and notice).

<sup>213</sup> Chapman & McConnell, *supra* note 42, at 1762.

<sup>214</sup> 9 J. Cont'l Cong. 895–96 (1777).

<sup>215</sup> *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815) (Marshall, C.J.).

<sup>216</sup> *Aldrich v. Kinney*, 4 Day 380, 386 (Conn. 1822); accord *Bartlett v. Knight*, 1 Mass. (1 Will.) 401, 407 (1805) (opinion of Sewall, J.) (objecting to the “want of notice”).

several decades of the federal Congress—restricted the substantive effect of judgments rendered without notice.”<sup>217</sup>

Together with notice went an opportunity for a hearing; the notice would be useless if the defendant couldn’t respond. Even as the Court approved summary procedures for debt collection in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, it maintained that “‘due process of law’ generally implies and includes *actor, reus, judex*, regular allegations, *opportunity to answer*, and a trial according to some settled course of judicial proceedings.”<sup>218</sup> Modern doctrine still holds “that due process requires the government to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”<sup>219</sup>

That notice requirement was related to, but not the same as, the requirement that a court possess lawful authority to make the defendant appear. Early Americans knew how to send letters across state lines (they had “Post Offices and post Roads”);<sup>220</sup> they just refused to deliver judicial process that way,<sup>221</sup> because their doctrines of service-as-notice and service-as-authority were distinct. In *Picquet*, for example, Justice Story argued that it wouldn’t “vary the legal result, that the party had actual notice of the suit; for he is not bound to appear to it.”<sup>222</sup> Likewise, in *Lafayette Insurance Co. v. French*, the Court carefully separated the notice requirement, “that principle of natural justice which requires a person to have notice of a suit,” from territorial jurisdiction, those “rules

<sup>217</sup> Stephen E. Sachs, Full Faith and Credit in the Early Congress, 95 Va. L. Rev. 1201, 1236 (2009) (footnotes omitted).

<sup>218</sup> 59 U.S. (18 How.) 272, 280 (1856) (last emphasis added); accord *Mason v. Messenger*, 17 Iowa 261, 267 (1864) (interpreting “the phrase, ‘judicial proceedings according to the course of the common law,’” drawn from the Northwest Ordinance and taken to have “the same meaning, in substance, as the phrase ‘due process of law,’” as including “a judicial determination after due notice”); *U.S. Tr. Co. of N.Y. v. U.S. Fire Ins. Co.*, 18 N.Y. (4 E.P. Smith) 199, 215 (1858) (requiring that “the party proceeded against . . . be apprised of what is going on against him, and an opportunity [be] afforded him to defend”); see also *Chapman & McConnell*, supra note 42, at 1775 (“[T]he traditional procedures of the common law are by definition sufficient to satisfy due process. Only departures from the traditional common law procedures must be scrutinized for fairness under the Due Process Clause.”).

<sup>219</sup> *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

<sup>220</sup> U.S. Const. art. I, § 8, cl. 7.

<sup>221</sup> See Weinstein, supra note 21, at 198 n.119 (noting that there’s neither “any practice [nor] even the suggestion in the decisions of allowing out-of-state service”).

<sup>222</sup> *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134) (Story, Circuit Justice).

of public law which protect persons and property within one State from the exercise of jurisdiction over them by another.”<sup>223</sup> These two requirements remained distinct after the Fourteenth Amendment, with the Court explaining that “[n]o judgment of a court is due process of law, if rendered without jurisdiction in the court, *or* without notice to the party.”<sup>224</sup>

These requirements are still distinct today. If Fifth Amendment due process requires notice and an opportunity for a hearing, maybe Congress could still find a way to abridge that right, requiring a forum *so* inconvenient and arbitrary that the opportunity for a hearing becomes illusory. (On an inaccessible mountaintop, at the bottom of Lake Minnetonka, etc.) The Seventh Circuit has suggested that “Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage.”<sup>225</sup> But arbitrariness, not inconvenience, is doing the work here. Even with courthouses conveniently located across the nation, “only a lunatic or a fanatic sues for \$30.”<sup>226</sup> We don’t see this as a due process violation, even if the taxi ride to the courthouse costs more than the amount in controversy, because these costs aren’t arbitrary or intentional. If Congress had good reasons for placing a single trial court in Adak (or, indeed, in Washington, D.C., a forum wildly inconvenient for those in Adak), why would the Due Process Clause get in the way?

Courts have repeatedly suggested that the Due Process Clause takes special care of foreign defendants, given “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system.”<sup>227</sup> Consider Justice Breyer’s parade of horrors in *J. McIntyre Machinery, Ltd. v. Nicaastro*—the “Egyptian shirtmaker” or “Kenyan coffee farmer” dragged into New Jersey.<sup>228</sup> Not only are these possibilities irrelevant for defendants like Daimler AG (2018 revenue: €167.4 billion),<sup>229</sup> but the

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<sup>223</sup> 59 U.S. (18 How.) 404, 406 (1856).

<sup>224</sup> *Scott v. McNeal*, 154 U.S. 34, 46 (1894) (emphasis added).

<sup>225</sup> *Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (Easterbrook, J.); see Nash, *supra* note 7, at 532.

<sup>226</sup> *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

<sup>227</sup> *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987).

<sup>228</sup> 564 U.S. 873, 892 (2011) (Breyer, J., concurring).

<sup>229</sup> Daimler AG, Annual Report 2018, at 39 (Feb. 2019), <https://www.daimler.com/documents/investors/reports/annual-report/daimler/daimler-ir-annual-report-2018.pdf> [<https://perma.cc/NV2H-AL39>].

focus on the defendant's country of origin—the *Kenyan* coffee farmer, the *Egyptian* shirtmaker—sneaks in sovereignty concerns through the back door. Traveling from Kenya or Egypt is burdensome, certainly; but as a matter of degree, and not of kind. For any given level of inconvenience facing a foreign defendant, there's *someone* within the United States so destitute, disadvantaged, and disabled that being sued in a federal court in Washington, D.C., is no less of a burden than it'd be for a prosperous Nairobi coffee concern.<sup>230</sup> For the truly unfortunate—bedridden, impoverished, unfamiliar with legal rules—litigation expenses of \$1500 or \$150,000 might be equally out of reach, and the District of Columbia courthouse might as well be on the Moon. If due process looks to the defendant's burden, period, then these perfectly ordinary exercises of jurisdiction can't possibly pass muster. That's not to say that these burdens shouldn't bother us, or that we can ignore them; it's just to say that the current focus of our doctrine seems misplaced, and that the argument from convenience is ill-suited to limiting the territorial jurisdiction of federal courts.

The argument from convenience also misunderstands what's at stake for foreign defendants. These defendants present a doctrinal puzzle: one line of caselaw makes very clear that foreigners abroad have no due process rights,<sup>231</sup> while another holds that *only* foreigners are protected by

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<sup>230</sup> See Erbsen, *supra* note 18, at 30 (“If the Constitution truly addresses the burdens that fish-out-of-water defendants face in unfamiliar locales, then constitutional doctrine should scrutinize burdens whenever a court attempts to compel a defendant's appearance, even when jurisdiction clearly exists because the case involves in-state parties, in-state service, and in-state conduct.”); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 *Nw. U. L. Rev.* 1, 4 (1984) (“Even though a defendant is present in or has minimum contacts with the United States, requiring him to litigate a case in a particular location within the United States may be an unreasonable burden. In those instances, the due process clause of the fifth amendment should prevent a federal court from asserting personal jurisdiction.”); Weinstein, *supra* note 21, at 256 n.328 (“[I]f due process truly imposed meaningful convenience-based limitations . . . one would expect there to be significant constitutional restrictions on assertions of intrastate jurisdiction, especially in geographically large states such as Texas, Alaska, and California.”).

<sup>231</sup> See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) (“[I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (attributing to *Verdugo-Urquidez* the rule that the “Fifth Amendment's protections do not extend to aliens outside the territorial boundaries”); cf. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 *Wake Forest L. Rev.* 1, 28 (2006) (arguing that

due process from federal jurisdiction.<sup>232</sup> The solution to this puzzle is to pay closer attention to what the due process violation would be. When a *state* court issues a judgment without proper jurisdiction, it's loose talk (though understandable) to say that this "violates" the Fourteenth Amendment's Due Process Clause: that Clause only forbids "depriv[ations] . . . of life, liberty, or property, without due process of law," and filing a lawsuit doesn't deprive anyone of anything yet.<sup>233</sup> If the summons exceeds the court's authority, then no one is actually forced to show up; it's an empty command, a worthless piece of paper, issued on pain of an unenforceable default judgment. A jurisdictionless judgment may not count as due process, but its mere existence isn't a deprivation of liberty.<sup>234</sup> Maybe the inconvenience involved in *contesting* jurisdiction reflects a deprivation of the defendants' "liberty" to ignore the lawsuit; but once the defendants appear and move to dismiss, that liberty is already lost, and the Due Process Clause can't bring it back.

Instead, due process functions as a kind of safe harbor for the state: a violation occurs when the state actually *takes* someone's life, liberty, or property, without the sanction of a constitutionally adequate judgment. As the Supreme Court explained in *York v. Texas*, when the Kenyan coffee farmers or Egyptian shirtmakers are first called to appear in state court, they haven't been deprived of anything yet: they can always choose to stay home, default, and fight recognition later on.<sup>235</sup> The due process

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"nonresident aliens obtain constitutional protections only when they have some substantial connection to the United States or are physically present here" (footnotes omitted)). But see Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U. L. Rev. 377, 413–37 (2017) (arguing that Founding-era due process applied to federal law enforcement abroad).

<sup>232</sup> E.g., *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (noting that certain "affiliations with a forum," such as domicile, "will render a defendant amenable to all-purpose jurisdiction there"); see also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (stating that, in the jurisdictional context, "there has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause"); cf. Simowitz, *supra* note 20, at 329 (describing the assumption "that foreign parties enjoy Due Process jurisdictional protections" as "in tension with the general rule that foreign parties acquire constitutional rights in proportion to their connections to the United States").

<sup>233</sup> See *York v. Texas*, 137 U.S. 15, 20 (1890); Sachs, *supra* note 18, at 1304.

<sup>234</sup> See *Scott v. McNeal*, 154 U.S. 34, 46 (1894) ("No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."). Compare *York*, 137 U.S. at 20 ("[T]he mere entry of a judgment for money, which is void for want of proper service, touches neither [liberty nor property]."), with *Dodge & Dodson*, *supra* note 7, at 1222 ("[A]n American court exercising adjudicatory authority over an alien in violation of one of the Constitution's Due Process Clauses is by definition violating the Constitution within the United States.").

<sup>235</sup> 137 U.S. at 20–21.



violation occurs *here*, after the case is over. If a judgment does issue, and if it's actually executed on property within the state, then the defendants really will have been "deprive[d]" of "property," well within the reach of the Fourteenth Amendment. And should the defendants appear in advance to contest jurisdiction, they can legitimately raise this issue as a matter of due process, urging the court not to award an erroneous judgment that would lead to a constitutional violation if carried out.<sup>236</sup>

But none of this analysis applies in federal court. The Fifth Amendment bars the execution of a federal judgment only if the federal court lacked jurisdiction. And Congress gets to answer that latter question, without judges second-guessing it as a matter of international law. If Congress wants to summon the coffee farmers and shirtmakers of the world, it can.

### III. WHAT CONGRESS HAS DONE

So what has Congress done with its powers? Reviewing existing law with the proper framework in mind suggests that, in certain areas, current law already permits the global exercise of federal jurisdiction. Numerous statutes and rules of court authorize the service of process abroad. And because the Fifth Amendment doesn't restrict the federal courts' territorial jurisdiction, these provisions suffice for jurisdiction in more cases than one might think.

But this claim might be too quick. A number of scholars have argued that the Supreme Court exceeded its rulemaking authority when it adopted the Federal Rules.<sup>237</sup> The Court's power to make rules of "practice and procedure,"<sup>238</sup> the argument goes, isn't a power to make rules of substance or of jurisdiction. Thus, the Court erred in 1938, when its rules first allowed service across district lines;<sup>239</sup> in 1963, when it authorized service across state lines;<sup>240</sup> and in 1993, when it explicitly addressed the jurisdictional effect of process sent worldwide.<sup>241</sup>

Here, too, attending to the differences between state and federal courts helps us sort through some longstanding puzzles. Setting aside the complex questions of non-delegation, the phrase "practice and procedure"

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<sup>236</sup> See *supra* text accompanying notes 142–45.

<sup>237</sup> See sources cited *supra* note 17.

<sup>238</sup> See Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. § 2072 (2018)).

<sup>239</sup> Fed. R. Civ. P. 4(f) (1938), in 308 U.S. 663, 667 (1939).

<sup>240</sup> Fed. R. Civ. P. 4(f) (1963), in 374 U.S. 875, 876–77 (1963).

<sup>241</sup> Fed. R. Civ. P. 4(k) (1993), in 507 U.S. 1103, 1109 (1993).

doesn't admit of a single clear interpretation. Yet on balance, there's a fair deal of evidence that the Supreme Court got it right when it upheld the 1938 Rules in *Mississippi Publishing Corp. v. Murphree*.<sup>242</sup> In federal court, personal jurisdiction follows directly from a lawful command to appear. So a rule about how, when, and where process may be served will have jurisdictional consequences; but a rule about service is still *regulating* practice and procedure.

If the 1938 Rules were valid, there's strong reason to believe that the 1963 and 1993 Rules were valid too. Read in context, these latter Rules weren't unsuccessful attempts to alter the law of jurisdiction through rules of court, but simple qualifications of when the federal courts were or weren't trying to assert their jurisdiction over certain defendants. Congress's revision of the Rules Enabling Act over time also suggests that any potential problems with the early Rules may since have been cured. So the Federal Rules appear to be valid, and our basic jurisdictional structures sound; it's just that they're slightly broader than anyone knew.

#### A. Worldwide Service Under Current Law

Well into the twentieth century, federal courts continued to recognize the common-law rule limiting their process to their territorial districts.<sup>243</sup> In the previous century, Congress had occasionally enacted statutes authorizing nationwide service of process,<sup>244</sup> but these were rare. Today, however, U.S. law authorizes national or transnational service in a wide variety of cases, both by statute and by rule of court.

A number of these service provisions apply worldwide. Section 12 of the Clayton Antitrust Act, adopted in 1914, authorizes worldwide service of process "wherever [a corporate defendant] may be found."<sup>245</sup> Now that

<sup>242</sup> 326 U.S. 438, 445 (1946).

<sup>243</sup> See, e.g., *Ahrens v. Clark*, 335 U.S. 188, 190 (1948) (describing this "accepted premise"), abrogated on other grounds by *Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484, 499–500 (1973); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 467 (1945) ("Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial."); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district . . . and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district."); *Munter v. Weil Corset Co.*, 261 U.S. 276, 279 (1923) ("The District Court of Connecticut had no power to send its process to New York for service.").

<sup>244</sup> E.g., Act of Mar. 3, 1873, ch. 226, § 4, 17 Stat. 485, 509 (Crédit Mobilier statute).

<sup>245</sup> 15 U.S.C. § 22 (2018) (codifying Act of Oct. 15, 1914, ch. 323, § 12, 38 Stat. 730, 736); see, e.g., *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 293 (3d Cir. 2004).

the general venue statute lets a non-resident be sued in any district,<sup>246</sup> some courts hold that Clayton Act suits can be brought against any foreign corporation, anywhere.<sup>247</sup> Similar language appears in the securities acts, the Investment Company Act, and the False Claims Act, among others.<sup>248</sup> American courts may also exercise a form of worldwide jurisdiction in bankruptcy cases, in serving subpoenas, or in class actions.<sup>249</sup> Even the Commodity Futures Trading Commission has its share of worldwide jurisdiction, serving subpoenas on contactless foreigners “not to be found within the territorial jurisdiction of any court of the United States.”<sup>250</sup>

Other worldwide service provisions are found in Federal Rule of Civil Procedure 4. While Rule 4(k)(1)(A), the standard avenue to federal court, simply tracks state-court jurisdiction, and while Rule 4(k)(1)(B) (known as the “100-mile bulge rule”) addresses necessary or impleaded parties nearby, Rule 4(k)(1)(C) incorporates all the statutory service provisions by reference. And Rule 4(k)(2) goes farther, making service effective for jurisdiction over *any* defendant on a federal claim if no state court would have jurisdiction and if “exercising jurisdiction is consistent with the United States Constitution and laws.”<sup>251</sup> The Federal Rules now provide mechanisms for serving a summons anywhere in the world,<sup>252</sup> and as argued above, the U.S. Constitution and laws generally don’t forbid the exercise of federal personal jurisdiction. So in any case with an otherwise forum-less federal claim—for example, the antiterrorism suits discussed in the Introduction—Rule 4(k)(2) straightforwardly authorizes the assertion of federal jurisdiction. (The drafters clearly imagined that the

<sup>246</sup> 28 U.S.C. § 1391(c)(3) (2018).

<sup>247</sup> See Jordan G. Lee, Note, Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit in Any District?, 56 Fla. L. Rev. 673, 682–84 (2004).

<sup>248</sup> See 15 U.S.C. §§ 77v(a), 78aa(a), 80a-43 (2018); 31 U.S.C. § 3732(a) (2018) (“A summons as required by [Civil Rule 3] shall be issued by the appropriate district court and served at any place within or outside the United States.”).

<sup>249</sup> See 11 U.S.C. § 541(a) (2018) (providing that the bankruptcy estate includes property “wherever located and by whomever held”); 28 U.S.C. § 1783(a) (2018) (empowering U.S. courts to order the appearance of U.S. nationals abroad); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (allowing a court, with “minimal procedural due process protection,” to “exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum”); see also Woolley, *supra* note 17, at 625 & nn.229–30 (discussing examples).

<sup>250</sup> Futures Trading Act of 1986, Pub. L. No. 99-641, § 103(3), 100 Stat. 3556, 3557 (codified as amended at 7 U.S.C. § 9(7) (2018)); cf. *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 110 n.13 (1987) (discussing this provision).

<sup>251</sup> Fed. R. Civ. P. 4(k)(2)(B).

<sup>252</sup> E.g., *id.* 4(f).

Fifth Amendment imposed *some* constraints, but they remained agnostic on what those constraints were;<sup>253</sup> so they can't be accused of smuggling some specific theory of the Amendment into the Rule's general language. If it turns out that there were no constraints, or if the Constitution were amended to remove them, then the rule would be easily satisfied, not undermined.)

Another court whose rules likely permit worldwide service is the Supreme Court itself. Suppose a state has a claim against an entirely contactless foreigner. (Maybe that foreigner now possesses property once stolen from a state office building; maybe one foreigner owed money to another, and the creditor moved here and his claims escheated; etc.) If it wants, the state may sue the foreign citizen in the Supreme Court's original jurisdiction.<sup>254</sup> Once the state moves for leave to file a bill of complaint, initial service under Supreme Court Rules 17.3 and 29 could be made "personally, by mail, or by third-party commercial carrier"—with no limits on *where* that service may occur.<sup>255</sup> The Court has adopted the Rules of Civil Procedure to govern the "form of pleadings and motions," but as to everything else, "those Rules and the Federal Rules of Evidence" are merely "taken as guides."<sup>256</sup> And because the Court uses the same service rules for its initial process as for the subsequent service of briefs and motions, which might often go abroad (say, to a party's counsel of record in the London office, or to a foreigner who files a cert petition *pro se*),<sup>257</sup> it's hard to argue that the Court's initial process can't go abroad too. If the Court's Rules aren't implicitly limited to the United States, then its writ runs all over the world.<sup>258</sup>

<sup>253</sup> See Fed. R. Civ. P. 4 advisory committee's note to 1993 amendment, in 28 U.S.C. app. at 111–12 (2018).

<sup>254</sup> See U.S. Const. art. III, § 2, cl. 1–2 (permitting jurisdiction over a controversy "between a State . . . and foreign . . . Citizens," and extending original jurisdiction to the "Cases before mentioned" "in which a State shall be Party"); accord 28 U.S.C. § 1251(b)(3) (2018).

<sup>255</sup> See Sup. Ct. R. 17.3, 29.3.

<sup>256</sup> *Id.* 17.2.

<sup>257</sup> Cf. *id.* 29.3 ("When a party is not represented by counsel, service shall be made on the party, personally, by mail, or by commercial carrier.")

<sup>258</sup> The Court's territorial jurisdiction has attracted little scholarly attention; one long-ago student note merely points out that Rule 17.3's predecessor "contain[ed] no territorial limitations on service of process." Note, *The Original Jurisdiction of the United States Supreme Court*, 11 *Stan. L. Rev.* 665, 685 n.135 (1959). The issue has also received little attention from the Court itself, which reserved the issue in *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496 n.2 (1971) (declining to answer "whether that foreign corporation has 'contacts' of the proper sort sufficient to bring it personally before us, and whether service of process can lawfully be made upon Dow Canada").

*B. Inter-District Service Under the 1938 Rules*

Whatever power the Supreme Court has over its own process, its power to regulate the process of the district courts is governed by statute. The 1934 Enabling Act authorized new rules of “practice and procedure,” which must neither “abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>259</sup> This power, some critics argue, didn’t go far enough to authorize changes to territorial service or personal jurisdiction.<sup>260</sup> The initial version of Rule 4—promulgated in 1937, and taking effect in 1938—not only specified various methods of service (hand delivery, service to a dwelling, and so on),<sup>261</sup> but also specified its geographic range. For the first time, a district court’s process could routinely be sent outside the district, so long as it stayed within state lines:

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.<sup>262</sup>

This rule was controversial from the start, and it isn’t hard to see why.<sup>263</sup> If Congress divides a state into two districts, assigning separate judges to each, it undoes that legislative choice to let District A’s judges hear cases reserved for District B. The Court can’t use procedural rulemaking to abolish venue, or to eliminate original federal-question

<sup>259</sup> Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. § 2072 (2018)).

<sup>260</sup> See Kelleher, *supra* note 7, at 1224; Spencer, *supra* note 17, at 711–13; Woolley, *supra* note 17, at 604; see also Ralph U. Whitten, Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4, 40 Me. L. Rev. 41, 87–88 (1988) (sharing some of these criticisms).

<sup>261</sup> Fed. R. Civ. P. 4(d)(1) (1938), in 308 U.S. 663, 665 (1939).

<sup>262</sup> Fed. R. Civ. P. 4(f) (1938), in 308 U.S. at 667.

<sup>263</sup> Compare *Totus v. United States*, 39 F. Supp. 7, 10 (E.D. Wash. 1941) (endorsing Rule 4(f)), *Williams v. James*, 34 F. Supp. 61, 68 (W.D. La. 1940) (treating “Rule 4(f) as being altogether procedural and not being substantive at all”), *Devier v. George Cole Motor Co.*, 27 F. Supp. 978, 978 (W.D. Va. 1939) (applying Rule 4(f) over objection), and *Keller v. Am. Sales Book Co.*, 16 F. Supp. 189, 193 (W.D.N.Y. 1936) (suggesting that the draft rule would expand service of process), with *Carby v. Greco*, 31 F. Supp. 251, 254 (W.D. Ky. 1940) (holding Rule 4(f) invalid), and *Melekov v. Collins*, 30 F. Supp. 159, 160 (S.D. Cal. 1939) (same). See also, e.g., *Schwarz v. Artcraft Silk Hosiery Mills*, 110 F.2d 465, 467 (2d Cir. 1940) (relying on *Devier*); *Richard v. Franklin Cnty. Distilling Co.*, 38 F. Supp. 513, 515 (W.D. Ky. 1941) (relying on *Carby*). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1172 n.673 (1982) (describing the controversy).

jurisdiction, or to merge the District of Delaware with that of New Jersey. So why should it get to alter personal jurisdiction, or to have cases destined for one forum heard in another? Assuming that *any* judicial rulemaking is lawful—as an exercise of judicial power, a delegation of legislative power, or something else<sup>264</sup>—a “general grant of rulemaking authority” arguably shouldn’t be read to “extend[] to matters of personal jurisdiction.”<sup>265</sup>

American courts have sometimes denied their ability to override jurisdictional or service limits through mere internal rules.<sup>266</sup> To some scholars, a rule of practice or procedure must “concern[] the method a court uses to adjudicate matters presented to it,” not “whether a court may adjudicate a matter at all,” or whether it may “exercise authority over particular persons or property.”<sup>267</sup> And Rule 82 specifically disclaims any intention to “extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.”<sup>268</sup>

Yet regulations of procedure can have jurisdictional *consequences* without themselves enlarging a court’s jurisdiction. Rule 54 of Civil Procedure lets district judges direct the entry of a final judgment on one claim while another is still pending.<sup>269</sup> In other words, the rule lets a court

<sup>264</sup> See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 440–43 (2008). Compare, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. (forthcoming 2021) (manuscript at 24), <http://ssrn.com/id=3512154> [<https://perma.cc/WM6X-NQ5D>] (taking a skeptical view of the nondelegation doctrine), Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1740–41 (2002) (same), and Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. Chi. L. Rev. 1331, 1340 (2003) (same), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1326–27 (2003) (disagreeing), Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 263–64 (2005) (same), and Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. (forthcoming) (manuscript at 30–33), <http://ssrn.com/id=3559867> [<https://perma.cc/VSR9-9953>] (same).

<sup>265</sup> Whitten, *supra* note 260, at 60.

<sup>266</sup> E.g., *Wash.-S. Nav. Co. v. Balt. & Phila. Steamboat Co.*, 263 U.S. 629, 635 (1924) (“[N]o rule of court can enlarge or restrict jurisdiction.”); *Sewchulis v. Lehigh Valley Coal Co.*, 233 F. 422, 424 (2d Cir. 1916) (describing service outside district lines as “not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law”); cf. *Dearing v. Bank of Charleston*, 5 Ga. 497, 506 (1848) (arguing that a court, through mere “rules of practice,” should never attempt “to make a citizen of a foreign State subject to their jurisdiction; a power which able men have denied to Legislatures”).

<sup>267</sup> Spencer, *supra* note 17, at 672.

<sup>268</sup> Fed. R. Civ. P. 82 (1938), in 308 U.S. 663, 765 (1939).

<sup>269</sup> Fed. R. Civ. P. 54(b).

of appeals take jurisdiction of an appeal on the separate claim, now the subject of a “final decision[.]” under 28 U.S.C. § 1291.<sup>270</sup> But Rule 54 didn’t unlawfully expand the subject-matter jurisdiction of the courts of appeals.<sup>271</sup> Instead, by regulating the entry of judgment in district courts, Rule 54 provides the occasion for the *exercise* of jurisdiction in appellate courts; it alters factual conditions on the ground, of which the appellate courts’ preexisting legal authority takes account. Rule 54 has predictable and intentional effects on appellate jurisdiction, but it’s a rule of district-court procedure all the same.

When it comes to service of process, this sort of procedural change may be all the federal courts need for the exercise of personal jurisdiction too. As the Court put it in *Murphree*, service of process “is the procedure by which a court having venue and jurisdiction of the subject matter of the suit *asserts* jurisdiction over the person of the party served.”<sup>272</sup> Rules for serving process merely “implement the jurisdiction over the subject matter which Congress has conferred”; they “provid[e] a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained.”<sup>273</sup> Such rules may, as some scholars have argued, interfere with defendants’ ability “to order their day-to-day behavior outside the courtroom,” so as “to avoid making themselves amenable to the jurisdiction” of a particular forum.<sup>274</sup> Yet people also change their day-to-day behavior to avoid creating a discoverable paper trail, and that doesn’t make discovery rules into anything other than rules of procedure.

The historical evidence of the meaning of “practice and procedure” is mixed; the phrase could be used in different ways, with narrower or broader scope, and contemporaries of the Rules Enabling Act made arguments of both kinds. Yet while the question is far from certain, the view that prevailed at the time (and, as we will see, the one Congress has adopted ever since) is that “practice and procedure” was broad enough to do the job. A rule about how, when, and where the court will serve its process likely qualifies as a rule of practice and procedure within the

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<sup>270</sup> 28 U.S.C. § 1291 (2018).

<sup>271</sup> Cf. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c) (2018)) (only subsequently authorizing the Court to define, by rulemaking, “when a ruling of a district court is final for the purposes of appeal under section 1291 of this title”).

<sup>272</sup> 326 U.S. 438, 444–45 (1946) (emphasis added).

<sup>273</sup> *Id.* at 445.

<sup>274</sup> Woolley, *supra* note 17, at 603.

meaning of the Act, rather than a usurpation of jurisdiction or an abridgment of the defendant's substantive rights. From very early on, judicial rules of procedure were thought capable of authorizing service of process in new circumstances, otherwise forbidden at common law. The models for the Rules Enabling Act, both English and American, permitted rulemaking about the territorial reach of service. And after the Act's passage, both the drafters of the Civil Rules and subsequent courts and Congresses saw inter-district service as within the Court's rulemaking power. As federal courts only need valid service to make their jurisdiction effective, these rules were enough to support their exercise of personal jurisdiction.

*1. What Kind of Law Is This?*

Much of the disagreement over Rule 4(f) turns on what exactly the original Rule 4 sought to regulate. The most straightforward way to read it is as a rule about service of process: it regulates how, where, and when a federal court's process may be validly served. That formulation invokes three different kinds of law, however, and much of the scholarly confusion over Rule 4(f) results from conflating them.

The first kind of law is the "how," the form and mode of service: whether the summons must be hand-delivered or may be left at a dwelling, whether it must be printed on blue paper or pink, and so on. These questions were traditionally thought to be matters of practice and procedure, generally left under the Process Acts and Conformity Act to the vagaries of state law;<sup>275</sup> there's no problem fitting them into the Rules Enabling Act.

A second category is the "where," the territorial scope of service: whether the court may direct its process outside of a district or a state. For a long time, these scope-of-service questions were governed by federal statutes, and by common-law inferences that courts drew therefrom. In cases like *Picquet* and *Toland*, the specific controlled the general: the legislative creation of separate districts was taken to override broad statutes adopting state "forms and modes of proceeding."<sup>276</sup> This

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<sup>275</sup> See, e.g., Rev. Stat. § 914 (1872); Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276; Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94; *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

<sup>276</sup> Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276; see *Picquet v. Swan*, 19 F. Cas. 609, 611, 614 (C.C.D. Mass. 1828) (No. 11,134) (comparing the "course of legislation, during a period of almost forty years," to the "general phraseology of these process acts"); accord



approach persisted into the early twentieth century. In 1916, the Second Circuit held in *Sewchulis v. Lehigh Valley Coal Co.* that the Conformity Act didn't oblige federal courts to follow state laws authorizing service throughout a state.<sup>277</sup> Federal statutes defined the district courts as “wholly separate tribunals, whose territorial jurisdiction does not extend beyond the district boundaries”;<sup>278</sup> indeed, U.S. marshals typically weren't allowed to serve process outside their districts.<sup>279</sup> To hear the Second Circuit tell it, the Conformity Act could only address the method of service; the validity of process when served across district lines was “not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law.”<sup>280</sup> In 1922, the Third Circuit agreed, based on the limitations on the marshal's power: a district court's jurisdiction “over parties to an action is controlled . . . by the validity of service of process upon them,” and that in turn “depends upon the authority of the officer making it.”<sup>281</sup>

By the time of the Federal Rules, this legal picture had changed in two crucial respects. First, in 1935, as the Rules were still being drafted, Congress lifted the disability on U.S. marshals, empowering them to serve process in districts other than their own.<sup>282</sup> This eliminated the main barrier to effective service—the only question left being when a court could instruct its marshal to do so, a topic more traditionally subject to procedural control.<sup>283</sup> Second, the Rules Enabling Act included a supersession clause. While Congress had previously made many declarations of judicial rulemaking authority (more authority, indeed,

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*Toland*, 37 U.S. at 328 (“Although the process acts of 1789 and 1792 have adopted the forms of writs and modes of process in the several states, they can have no effect where they contravene the legislation of congress.”).

<sup>277</sup> 233 F. 422, 423 (2d Cir. 1916) (considering Rev. Stat. § 914).

<sup>278</sup> *Id.* at 423.

<sup>279</sup> *Id.* at 424.

<sup>280</sup> *Id.* at 423–24.

<sup>281</sup> *J.E. Petty & Co. v. Dock Contractor Co.*, 283 F. 341, 344 (3d Cir. 1922).

<sup>282</sup> Act of June 15, 1935, ch. 259, § 1, 49 Stat. 377, 377; see H.R. Rep. No. 74-283, at 1 (1935) (noting “uncertainty” as to which marshal could serve process directed from one district to another, and explaining that the bill “will clear up that uncertainty by providing that either marshal may execute the process”); *Totus v. United States*, 39 F. Supp. 7, 10 (E.D. Wash. 1941); *Williams v. James*, 34 F. Supp. 61, 67 (W.D. La. 1940).

<sup>283</sup> Cf. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 45 (1825) (suggesting that “[a] general superintendence” over “the regulation of the conduct of the officer of the Court in giving effect to its judgments” was “properly within the judicial province, and has been always so considered”).

than the courts had ever chosen to use),<sup>284</sup> these had been limited by existing statutes and their common-law implications. No court could have redrawn district lines by a mere rule of practice; by inference, no court on its own could have overridden any limits on service of process that those district lines implied. But unlike previous statutes, the Rules Enabling Act had a supersession clause, which authorized the Court's new procedural rules to override preexisting law.<sup>285</sup> This had the effect of softening the legal restrictions, giving them something like the status of the Federal Rules of Evidence: enacted by Congress, but intended to be abrogable via rulemaking.<sup>286</sup> With the supersession clause in hand, the Court could use rules of practice and procedure to displace, not only procedural statutes, but common-law implications for procedure as well.

The Court's rules still had to fit within the category of "practice and procedure": they couldn't redraw the District of New Jersey, or require new judges to be above the age of forty-five, or alter "the substantive rights of any litigant."<sup>287</sup> But if a case were in a proper court, an instruction to that court's officer to serve process in another district likely fell within the Act's terms. By specifying the proper venues, Congress

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<sup>284</sup> See Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (providing "[t]hat the Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States . . . and generally the forms and modes of proceeding to obtain relief . . . and generally to regulate the whole practice of the said courts"); Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335 (authorizing "the several courts of the United States . . . to make rules and orders for their respective courts directing the returning of writs and processes . . . and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings"); Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276 (making "forms of writs, executions and other process . . . and the forms and modes of proceeding" subject "to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same"); Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (codified as amended at 28 U.S.C. § 2071(a) (2018)) (providing "[t]hat all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States").

<sup>285</sup> Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. § 2072(b) (2018)) ("[A]ll laws in conflict therewith shall be of no further force or effect."). Compare *id.*, with 28 U.S.C. § 2071 (2018) (recognizing a more limited authority for courts to adopt local rules "for the conduct of their business," and requiring that such local rules "be consistent with Acts of Congress").

<sup>286</sup> See Whitten, *supra* note 260, at 61 & n.83.

<sup>287</sup> Rules Enabling Act § 1, 48 Stat. at 1064.

had already indicated the district courts in which a case could or couldn't be heard, even if the defendant were standing on the courthouse steps and waiting to be served. And by specifying the subject-matter jurisdiction of those courts, Congress had already empowered them to adjudicate the cause. All that was left, per *Murphree*, was for the court to have some legal basis on which to *assert* the jurisdiction it possessed.<sup>288</sup> That's why Charles Clark, explaining "why we consider it procedural" in 1938, distinguished the reach of a court's service from "the venue, which is the place where certain kinds of action shall be tried," as well as from "the jurisdiction of the court, what matters the court shall hear and decide."<sup>289</sup> When the case is in a place that Congress had chosen for trial, and when the court had been given power by Congress to hear it, Rule 4(f) could properly address how far "its process may reach."<sup>290</sup> Or, as Judge George Donworth put it, the district court "always had jurisdiction, but until this rule became effective, you could not serve the summons in another district in this state."<sup>291</sup> If an authorized rule of practice and procedure had the *consequence* of upsetting a common-law inference from a separate statute, that was no longer a barrier to validity in a post-supersession world.

(That still leaves the objection that sending process across district lines might affect "the substantive rights of any litigant," which a rule may neither "abridge, enlarge, nor modify."<sup>292</sup> Assuming, though, that this language was more than boilerplate, made redundant by the more significant restriction to "practice and procedure,"<sup>293</sup> the argument is hard to win. In a state-law diversity case, in which Congress might lack any

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<sup>288</sup> *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 440–41 (1946).

<sup>289</sup> Rules of Civil Procedure for the District Courts of the United States, with Notes as Prepared Under the Direction of the Advisory Committee and Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21, 22, 23, 1938, at 206 (William W. Dawson ed., 1938).

<sup>290</sup> *Id.*

<sup>291</sup> Federal Rules of Civil Procedure, Proceedings of the Institute at Washington, D.C., October 6, 7, 8, 1938, and of the Symposium at New York City, October 17, 18, 19, 1938, at 292 (Edward H. Hammond ed., 1938).

<sup>292</sup> Rules Enabling Act § 1, 48 Stat. at 1064. See generally Kelleher, *supra* note 7 (arguing that Rule 4(k) invalidly purports to govern amenability to jurisdiction, thereby affecting litigants' substantive rights).

<sup>293</sup> See Letter from Sen. Albert B. Cummins to Chief Justice William H. Taft (Dec. 17, 1923) (describing the language, which Cummins had drafted, as restating "the obvious principle that Congress could not if it wanted to, confer upon the Supreme Court, legislative power"), *in* Burbank, *supra* note 263, at 1073 & n.260; see also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (describing the important question as whether a rule "really regulates procedure").

power to set the underlying rule of decision, it might still provide for nationwide service<sup>294</sup>—suggesting that the territorial scope of service isn't so substantive after all.)

The third category is the “when,” the validity of service: whether the defendant on whom process is served is actually obliged to appear. This category is sometimes referred to as “amenability”: whether a defendant is *amenable* to the court's jurisdiction, or subject to the court's command.<sup>295</sup> That doesn't sound like a procedural question. And if amenability were governed by the Fifth and Fourteenth Amendments,<sup>296</sup> or by state laws under the Rules of Decision Act or the *Erie* doctrine,<sup>297</sup> then no rule of court could affect it.

The problem for this argument is that, in the mine run of federal cases, *there are no separate questions of amenability*. So long as service is properly made, a defendant is required to show up in federal court, unless some other rule of law intervenes to excuse him (say, a limitation internal to the service rule, or a doctrine of sovereign immunity).<sup>298</sup> That may be why the Supreme Court has discussed “amenability” in federal court as a question of “authorization for service of summons on the defendant.”<sup>299</sup> A state court's process enjoys no such invincibility: no matter what state law claims to authorize, the general law of jurisdiction may get in the way. But if federal law really authorizes service on a particular defendant, whether by statute or by rule of court, then both state and federal courts have to listen.

Treating a defendant's “amenability” in federal court as depending on what a state court might do ignores the actual sources of jurisdictional law. As discussed above, the Fifth and Fourteenth Amendments have nothing to say about who must respond to a federal summons.<sup>300</sup> Nor, in the early Republic, did state law control the validity of federal service, despite the Process Acts' incorporation-by-reference.<sup>301</sup> If a matter

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<sup>294</sup> See, e.g., 28 U.S.C. § 2361 (2018) (interpleader).

<sup>295</sup> See, e.g., Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 *Notre Dame L. Rev.* 733, 744 (1988); Kelleher, *supra* note 7, at 1203; Woolley, *supra* note 17, at 575.

<sup>296</sup> Kelleher, *supra* note 7, at 1226.

<sup>297</sup> Woolley, *supra* note 17, at 568, 612.

<sup>298</sup> See Nelson, *supra* note 87, at 1654 (sovereign immunity); see also *infra* text accompanying notes 368–72 (limits in service rules).

<sup>299</sup> *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

<sup>300</sup> See *supra* Part I.

<sup>301</sup> See, e.g., *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

involved “the practice of the Federal Courts, and the conduct of their officers,” the states couldn’t regulate it if they wanted to.<sup>302</sup> Even *Erie*, whatever weight one gives it,<sup>303</sup> doesn’t impose the state courts’ jurisdictional limits on federal courts. If, as *Erie* opines, the general law was always a “fallacy,” then there *are* no external limits on state courts, for the Fourteenth Amendment imposed no new restrictions of its own.<sup>304</sup> Or, if these limits are reimagined as rules of “federal common law” instead,<sup>305</sup> then they can be abrogated under the Rules Enabling Act. To exercise personal jurisdiction, a federal court needs no further authorization than lawful service of process, which is precisely what Rule 4(f) sought to provide.

## 2. *Historical Power over Service*

“Procedure,” like “[j]urisdiction,” may be a word of too many meanings,<sup>306</sup> but a fair few of them traditionally included the reach of service of process. Even from its very early days, the Supreme Court was willing to regulate service rules as a matter of internal practice. Soon after its creation, the Court concluded that it would follow standard law and equity practice when sitting in law or equity—“consider[ing] the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court.”<sup>307</sup> That traditional practice presumably included any traditional limits on service. But the Court also thought it had authority, “from time to time, [to] make such alterations therein, as circumstances may render necessary,”<sup>308</sup> and this included a power to alter service rules.

In *Grayson v. Virginia*, the Court had to decide how to issue mesne process against a state.<sup>309</sup> (The case was heard in 1796—after the Eleventh Amendment was ratified, but before the news made it back to the seat of

<sup>302</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 49–50 (1825); accord *Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 54 (1825); cf. *United States v. Wonson*, 28 F. Cas. 745, 749 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit Justice) (similar).

<sup>303</sup> See Stephen E. Sachs, *Finding Law*, 107 Calif. L. Rev. 527, 529–30 (2019) (not much).

<sup>304</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938); see *supra* Section I.C.

<sup>305</sup> See Weinstein, *supra* note 21, at 211–12.

<sup>306</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

<sup>307</sup> *Rule*, 2 U.S. (2 Dall.) 411, 413–14 (1792) (emphasis omitted).

<sup>308</sup> *Id.* at 414.

<sup>309</sup> 3 U.S. (3 Dall.) 320, 320 (1796).

government.<sup>310</sup>) At common law, a sovereign couldn't be served with process,<sup>311</sup> and no statute addressed the question. But the Court had already concluded that it had jurisdiction in such cases,<sup>312</sup> so process had to be served *somehow*. The Court concluded that, when sitting “in causes of Equity, as well as in causes of Admiralty and Maritime jurisdiction,” it could “collect a general rule for the government of our proceedings” from the “custom and usage of Courts of Admiralty and Equity”<sup>313</sup>—but that it was also “authorised to make such deviations as are necessary to adapt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration, and controul, of the Legislature.”<sup>314</sup> So it provided, by rulemaking, for a type of service of process that wouldn't have been allowed at common law.<sup>315</sup>

The Court further articulated this authority in *Kentucky v. Dennison*, when it noted that “in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction.”<sup>316</sup> If it had to issue process anyway, without waiting for authorization from Congress, the Court could also “regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice”—including process against state officials, process which the traditional rules of sovereign immunity might have disallowed.<sup>317</sup>

Later discussions of service rules lumped them in under the heading of “procedure.” In *Union Pacific*, for example, the parties agreed that any change in their “substantial rights” under the *Crédit Mobilier* statute would arguably have violated the Fifth Amendment.<sup>318</sup> The statute had enormous consequences for the district court's territorial jurisdiction: “the court wherein [the suit] is brought is vested with powers and aided by modes of procedure which it can apply to no other,” and parties were “subjected to a jurisdiction by process to which the same court cannot

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<sup>310</sup> See Baude & Sachs, *supra* note 180 (manuscript at 18).

<sup>311</sup> See, e.g., *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n., 78–79 n. (Pa. C.P. 1781).

<sup>312</sup> See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 426–27 (1793).

<sup>313</sup> *Grayson*, 3 U.S. at 320.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 320–21.

<sup>316</sup> 65 U.S. (24 How.) 66, 98 (1861), overruled on other grounds by *Puerto Rico v. Branstad*, 483 U.S. 219, 227, 230 (1987).

<sup>317</sup> *Id.*

<sup>318</sup> *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 581, 607–08 (1879).

subject them in any other suit.”<sup>319</sup> But the Court still denied that any “new power [had been] conferred on the court beyond those which we have regarded as affecting the mode of procedure.”<sup>320</sup> When statutes provided for particular procedures in particular actions, they didn’t “infringe the substantial rights of property or of contract of the parties affected,” but merely “suppl[ied] defects of power in the courts, or [gave] them improved methods of procedure in dealing with existing rights.”<sup>321</sup> The statute’s expanded service rules gave no one a right of recovery not possessed before; they merely sought “to provide a specific method of procedure, which, by removing restrictions on the jurisdiction, process, and pleading in ordinary cases, would give a larger scope for the action of the court, and a more economical and efficient remedy than before existed.”<sup>322</sup> Indeed, the reporter’s syllabus in *Union Pacific* straightforwardly described the provisions “authorizing process to be served without the limits of the district” as “regulations of practice and procedure.”<sup>323</sup> These procedural changes plainly had jurisdictional consequences: they allowed the Circuit Court for the District of Connecticut to hear matters that it couldn’t have heard otherwise, thereby “removing restrictions on the jurisdiction.”<sup>324</sup> But their content addressed practice and procedure: they “provide[d] a specific method of procedure,”<sup>325</sup> namely a means of serving process.

While hardly a slam dunk, the pre-1934 history lends support to the view that rules on valid service were within the Court’s power, granted many decades later in the Rules Enabling Act, to “prescribe . . . the practice and procedure” in district courts.<sup>326</sup> Similar evidence can be drawn from the Act’s more immediate inspirations. As a matter of English practice, the Supreme Court of Judicature Act 1875 authorized rulemaking on “any matters relating to the practice and procedure of the said Courts.”<sup>327</sup> By 1883, this included Order XI, which straightforwardly

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<sup>319</sup> Id. at 608.

<sup>320</sup> Id. at 605.

<sup>321</sup> Id. at 606.

<sup>322</sup> Id. at 608 (emphasis added).

<sup>323</sup> Id. at 569 (syllabus).

<sup>324</sup> Id. at 608 (opinion of the Court).

<sup>325</sup> Id.

<sup>326</sup> Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. § 2072(a) (2018)).

<sup>327</sup> 38 & 39 Vict. c. 77, § 17(3), in Frederic Philip Tomlinson, *The Judicature Acts and Rules of the Supreme Court 1883*, at 69–70 (R.T. Reid ed., London, William Clowes & Sons 1883).

authorized “[s]ervice out of the jurisdiction of a writ of summons.”<sup>328</sup> The English rules also inspired similar proposed rules in New York; with an eye to a “power . . . to make rules of court governing the civil practice,” the 1915 proposal would have allowed for service “by publication within or without the state,” as well as “personal service . . . out of the state,” citing Order XI as an exemplar.<sup>329</sup> Though the New York proposal was rejected at home, it later became highly influential in the drafting of the Federal Rules.<sup>330</sup> And a 1926 Senate Report on a predecessor to the Rules Enabling Act, when describing matters outside the scope of the rulemaking power—such as “limitations of actions, attachment or arrest, juries or jurors or evidence”—stated confidently that “[n]either in England nor in any State of the United States where the courts are vested with the rule-making power, has it been assumed that the delegation of that power to them authorizes them to deal with such substantial rights and remedies as those just referred to.”<sup>331</sup> The fact that the English rules *did* authorize service out of the jurisdiction, and that those rules were invoked as a model anyway, makes it less likely that the Federal Rules overstepped their bounds.

### 3. *Post-Enactment Evidence*

The committee drafting Rule 4(f) probably didn’t have this history in view. In fact, it seems to have changed the federal courts’ jurisdictional landscape in a fit of absence of mind. The committee apparently believed that its proposed expansion of service would have no consequences for “the jurisdiction of the district courts”;<sup>332</sup> its members thought they could change the service rules without affecting the forum. But while they may have been confused on this point, they—and many others—concluded that expanding the reach of judicial process was within the scope of the Rules Enabling Act.

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<sup>328</sup> Rules of the Supreme Court, Order XI (1883) (Eng. & Wales), in Tomlinson, *supra* note 327, at 144.

<sup>329</sup> See 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice in the Courts of New York 10, 92, 94 (1915); see also *id.* at 323 (citing to “English practice, Order 11”).

<sup>330</sup> Compare Burbank, *supra* note 263, at 1173 n.673, 1185 n.733, with *id.* at 1056–62, 1087, 1106–07, 1119–20.

<sup>331</sup> S. Rep. No. 69-1174, at 9–10 (1926); see Woolley, *supra* note 17, at 599.

<sup>332</sup> Fed. R. Civ. P. 4(f) advisory committee’s note (1937), in 28 U.S.C. app. at 101 (2018) (“This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.”).



When the Civil Rules were first being drafted, venue in a non-diversity case typically had to be laid where the defendant was an inhabitant.<sup>333</sup> Suppose a defendant lived in Brooklyn and worked in a Manhattan office building: the suit would have to be brought in the Eastern District of New York. Under the draft Rule 4(f), though, a plaintiff could serve process more conveniently—say, at the defendant’s office, a place within that state. The opportunities for service would expand, but the forum would stay the same.<sup>334</sup>

One committee member noticed that, in a diversity case, the statute gave the plaintiff a choice of venues (the defendant’s residence or his own).<sup>335</sup> What would happen if a plaintiff laid venue in his own district and served process in the defendant’s district? That inquiry was rebuffed, for if the two parties resided in the same state, they’d be non-diverse, and the case kicked out of federal court.<sup>336</sup> What the committee didn’t anticipate, at least at the time, was what would happen in *Murphree*—that a plaintiff might sue an out-of-state corporation, laying venue in his own district of residence (the Northern District of Mississippi), serving process on the defendant’s agent in a different district (the Southern District of Mississippi), and preserving diversity in light of the defendant’s distant state of incorporation.<sup>337</sup> The result, impossible under preexisting law, was that a defendant could be sued in a district in which it neither resided nor had any agent capable of being served with process.

This mistake explains some of the strange and contradictory signals in the drafters’ statements and in Rule 82, signals other scholars have already noted with confusion.<sup>338</sup> Rule 4(f)’s expansion of service really did expand the available fora. True, this effect was likely unimagined by its drafters; but unexpected loopholes are a common feature of new laws,

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<sup>333</sup> See 28 U.S.C. § 112 (1934).

<sup>334</sup> Proceedings of Conference of Advisory Committee Designated by the United States Supreme Court to Draft Uniform Rules of Civil Procedure 288–89 (Nov. 14, 1935), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV11-1935-min-Vol1.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV11-1935-min-Vol1.pdf) [<https://perma.cc/2LMQ-P429>] (pages 1–289), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV11-1935-min-Vol2.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV11-1935-min-Vol2.pdf) [<https://perma.cc/7GJP-R6FA>] (pages 290–536).

<sup>335</sup> See 28 U.S.C. § 112 (1934).

<sup>336</sup> Proceedings of Conference of Advisory Committee, *supra* note 334, at 284–85.

<sup>337</sup> Compare *id.* at 291–92 (discussing a corporate suit, but only as to whether the rule would expand “doing business” jurisdiction), with *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 439–40 (1946) (describing the facts). Cf. 28 U.S.C. § 1332(c)(1) (2018) (now including “principal place of business” in the definition of corporate citizenship, which severely limited such cases).

<sup>338</sup> E.g., Whitten, *supra* note 260, at 76 (“What on earth is going on here?”).

even when understood as the drafters understood them. What matters is what Rule 4(f) legally *did*—which was to expand the range of the district courts’ process.

In fact, the drafters seem to have believed quite firmly that sending process beyond district lines was a power permitted by the Rules Enabling Act. The new Rule 45, on service of subpoenas, provided for service “without the district,” so long as it was within 100 miles of the hearing or trial.<sup>339</sup> Similarly, Rule 25 provided that motions for substitution after a party’s death could be served on the new party “in any judicial district.”<sup>340</sup> Both of these rules tracked existing statutes,<sup>341</sup> so in that sense they left current law unchanged. But to be lawful, they still had to be rules of “practice and procedure”: a Rule of Criminal Procedure defining the offense of arson is invalid even if it parrots the text of 18 U.S.C. § 81. The fact that these *other* rules, which unambiguously authorized judicial process across district lines, don’t seem to have raised many eyebrows suggests that they were consistent with prevailing understandings of “practice and procedure.”

Some drafters, it’s true, later expressed great skepticism of Rule 4(f).<sup>342</sup> But the majority view seems to have been that the Rule was lawful. Not only did the Court adopt it as part of the Rules, but most lower courts endorsed its validity,<sup>343</sup> on theories consistent with the Court’s broader understanding of the Rules Enabling Act. Five years before *Murphree*, the Court stated in *Sibbach v. Wilson & Co.* that a rule is of “practice and procedure” if it “really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”<sup>344</sup> As Justice Scalia later put it, the question for a Federal Rule is “what the Rule itself *regulates*: If it governs only the manner and the means by which the litigants’ rights are enforced, it is valid . . . .”<sup>345</sup> That

<sup>339</sup> Fed R. Civ. P. 45(e)(1) (1938), in 308 U.S. 663, 722 (1939).

<sup>340</sup> Fed R. Civ. P. 25(a)(1) (1938), in 308 U.S. at 691–92.

<sup>341</sup> See *infra* text accompanying notes 350–56356.

<sup>342</sup> See 1 Proceedings [of the] Advisory Committee on Rules for Civil Procedure 37 (May 17, 1943), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-may-1943-vol-i> [<https://perma.cc/643W-WF2J>] (statement of Chairman William D. Mitchell) (expressing the “gravest doubt of its validity”).

<sup>343</sup> See sources cited *supra* note 263.

<sup>344</sup> 312 U.S. 1, 14 (1941).

<sup>345</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (Scalia, J.) (citation and internal quotation marks omitted).

formulation comfortably encompasses questions of how, where, and when the court will command defendants to appear.

Congress appears to have shared that view as well. During the 1948 recodification of Title 28, Congress in three instances appeared to treat the Court's power to make rules of "practice and procedure" as including the power to send process across district lines. The first instance concerned venue in multidistrict states. As Congress had provided in 1858, and as it had preserved up through the Judicial Code of 1911, a plaintiff suing defendants from multiple districts within a state could lay venue in any one of those districts, and process from a court in one district would travel into the others.<sup>346</sup> This section was repealed in 1948,<sup>347</sup> with the venue provisions moved elsewhere.<sup>348</sup> But the provision for issuing process into other districts *wasn't* provided for elsewhere.<sup>349</sup> Either Congress actually intended in such cases to deny personal jurisdiction while expanding venue, irrationally taking with one hand what it gave with the other; or it just made a mistake; or it assumed that courts could already send process across district lines under Rule 4(f), such that the venue rule was the only one that needed preserving in statutory form. This last explanation seems far more plausible than the others, especially given that *Murphree* had already endorsed the lawfulness of inter-district service.

The other instances concerned subpoenas and motions to substitute after a party's death. As noted above, the initial Rule 25 provided that a motion could be "served in any judicial district."<sup>350</sup> At the time, a statute extended "the jurisdiction of all courts of the United States" in these circumstances "to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States," and it permitted the relevant writ to "be served in any judicial district by the marshal thereof."<sup>351</sup> But in

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<sup>346</sup> Judicial Code of 1911, ch. 231, § 52, 36 Stat. 1087, 1101 (codified as 28 U.S.C. § 113 (1940)); accord Act of May 4, 1858, ch. 27, § 1, 11 Stat. 272, 272; see also Woolley, *supra* note 17, at 574 & n.27 (describing the state of the law over time).

<sup>347</sup> See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 992, 996.

<sup>348</sup> See 28 U.S.C. § 1392(a) (1948) ("Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.").

<sup>349</sup> See *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 109 n.10 (1987).

<sup>350</sup> Fed. R. Civ. P. 25(a)(1) (1938), in 308 U.S. 663, 692 (1939); cf. *Iovino v. Waterson*, 274 F. 2d 41, 45-48 (2d Cir. 1959) (Friendly, J.) (upholding this nationwide service provision against due process and Rules Enabling Act challenges).

<sup>351</sup> See 28 U.S.C. § 778 (1934).

1948, the codifiers repealed this statute too.<sup>352</sup> The same treatment was meted out to a 1793 statute allowing for service of subpoenas nationwide; though still in place by the time of the Federal Rules,<sup>353</sup> once its substance was preserved in Rule 45,<sup>354</sup> it too was repealed in the 1948 recodification.<sup>355</sup> Again, either Congress made a mistake, or it wished to create a legal lacuna, or it thought that these Rules provisions were valid (to the point of rendering the statutes unnecessary).

So the evidence seems quite strong that the 1948 Congress saw these Rules as within the category of “practice and procedure.”<sup>356</sup> To be sure, the repeals alone couldn’t *make* the Rules valid, if they hadn’t been so before. But the repeals do offer evidence of how those in Congress understood the terms “practice and procedure.” And given the vagueness of those terms, they should make us more hesitant to conclude that Congress was wrong.

### *C. Broader Service Under the Federal Rules*

If the 1938 Rules were valid, that still leaves challenges to the 1963 and 1993 revisions. These Rules not only expanded service further, but spoke in explicitly jurisdictional terms. Even so, these Rules are still best understood as regulating service of process—and are consistent with Congress’s own expressed understanding of its statutes.

#### *1. The Change in Phrasing*

The 1963 and 1993 revisions to the Rules vastly expanded the range of federal process. The 1963 revision, which introduced the “100-mile bulge” rule for nearby parties, also expanded the reach of service “beyond the territorial limits of [the] state” where the court sat, “when authorized by a statute of the United States or by these rules.”<sup>357</sup> The “by these rules” language turned out to be crucial. Some states already allowed service outside their borders, and other portions of the revised Rule 4 endorsed out-of-state service under state laws or rules of court. (Even international

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<sup>352</sup> See Act of June 25, 1948, § 39, 62 Stat. at 992–93, 998.

<sup>353</sup> See 28 U.S.C. § 654 (1934).

<sup>354</sup> See Fed. R. Civ. P. 45(e)(1) (1938), in 308 U.S. 663, 722 (1939).

<sup>355</sup> See Act of June 25, 1948, § 39, 62 Stat. at 992–93, 998; see also Woolley, *supra* note 17, at 628–29 (noting the repeal).

<sup>356</sup> Cf. Fed. R. Civ. P. 45(a)(2), (b)(2) (authorizing nationwide service of a subpoena from any district).

<sup>357</sup> Fed. R. Civ. P. 4(f) (1963), in 374 U.S. 875, 876 (1963).

service methods were now possible, when authorized by “federal or state law.”<sup>358</sup>) The result was to make the territorial reach of service potentially worldwide.

The 1993 revisions were more dramatic still. Rather than identifying a geographic area where service would be effective,<sup>359</sup> they provided—under certain conditions—that *any* service permitted by Rule 4, anywhere in the world, “is effective to establish jurisdiction over the person of a defendant.”<sup>360</sup> (This language has since been restyled to “establishes personal jurisdiction over a defendant,” without obvious change in meaning.<sup>361</sup>) These conditions largely “retain[ed] the substance of the former rule,” with respect to defendants reachable “under state long-arm law.”<sup>362</sup> But they also adopted the first version of Rule 4(k)(2), permitting jurisdiction on federal claims against unreachable defendants whenever “consistent with the Constitution and laws of the United States.”<sup>363</sup> And they altered the *in rem* provisions of Rule 4, describing when a court “may assert jurisdiction” over property,<sup>364</sup> as opposed to when service on property may be made.<sup>365</sup> As a result, some critics argue, these provisions really regulated jurisdiction, and not even the somewhat-procedure-ish topic of service of process.<sup>366</sup>

<sup>358</sup> Fed. R. Civ. P. 4(e), (i) (1963), in 374 U.S. at 876, 877. The 1963 revision also enabled plaintiffs to initiate federal actions by seizing property under state law. See Fed. R. Civ. P. 4(e)(2) (1963), in 374 U.S. at 876; Fed. R. Civ. P. 4(e) advisory committee’s note to 1963 amendment, in 28 U.S.C. app. at 102 (2018).

<sup>359</sup> See Spencer, *supra* note 17, at 712.

<sup>360</sup> Fed. R. Civ. P. 4(k) (1993), in 507 U.S. 1103, 1109 (1993).

<sup>361</sup> Fed. R. Civ. P. 4(k); see Fed. R. Civ. P. 4 advisory committee’s note to 2007 amendment, in 28 U.S.C. app. at 114 (2018) (“These changes are intended to be stylistic only.”).

<sup>362</sup> Fed. R. Civ. P. 4(k) advisory committee’s note to 1993 amendment, in 28 U.S.C. app. at 112 (2018).

<sup>363</sup> Fed. R. Civ. P. 4(k) (1993), in 507 U.S. at 1109.

<sup>364</sup> Fed. R. Civ. P. 4(n) (1993), in 507 U.S. at 1110.

<sup>365</sup> Fed. R. Civ. P. 4(e)(2) (1963), in 374 U.S. 875, 876 (1963) (providing “for service” through state-law “attachment or garnishment or similar seizure”).

<sup>366</sup> See Carrington, *supra* note 295, at 744 (questioning whether “a rule amendment would be held valid to alter the mode of service of the summons and complaint, but not effective to alter the principles governing the amenability of a defendant to the territorial jurisdiction of the federal court”); Kelleher, *supra* note 7, at 1226 (“Such a rule does not set out merely the ‘manner’ or ‘means’ of asserting personal jurisdiction—that is what the service provisions do. Rather, it sets out a test by which amenability to jurisdiction is adjudged, a matter already governed by the substantive law of the Constitution.”); Spencer, *supra* note 17, at 712 (arguing that Rule 4(k) no longer “create[s] a geographical region within which service of process will be effective,” as “Rule 45 does with respect to third-party subpoenas,” but rather “outlines the conditions under which ‘personal jurisdiction’ is ‘establishe[d]’”); Woolley, *supra* note 17, at 568 (arguing that “rules governing amenability cannot properly be characterized as rules of

The critics' reading is a straightforward one, but it may reflect an artifact of the styling, rather than any actual change in what the Federal Rules regulate. To begin with, the 1963 Rules aren't substantially different on this score from the 1938 provisions. Prior to 1938, the main federal restriction on service of process was the common-law implication, drawn in *Toland* and its predecessors, that courts established for a particular district could only serve process within that district. If the 1938 Rules could validly send process across district lines—and if, as Chief Justice Marshall had insisted, state law doesn't apply to federal process of its own force<sup>367</sup>—then there's no reason why sending process over *state* lines required any new statutory authorization. Either rules determining the “how-when-and-where” of lawful service are rules of procedure, or they aren't; the 1938 and 1963 Rules stand or fall together.

What the 1993 reorganization did was to define the “how-and-where” of service separately from the “when”: it put the former provisions in Rule 4(e) through 4(j) and the latter in 4(k), demanding that plaintiffs satisfy one requirement from the former category and one from the latter.<sup>368</sup> But reorganizing the requirements into two categories, and requiring plaintiffs to choose one option from Column A and one from Column B, doesn't render Column B unlawful. Stating, as the 1993 Rules did, that service by certain methods won't “[be] effective to establish jurisdiction”<sup>369</sup> unless other conditions are met is just to say that Rule 4(e) through 4(j) don't exhaust the rules governing service of process: there are further criteria to be met before a federal district court issues a legally binding command to appear. That an objection based on the “how” conditions is brought under Rule 12(b)(5) (for “insufficient service of process”), while one based on the “when” conditions is brought under Rule 12(b)(2) (for “lack of personal jurisdiction”), is a distinction that makes no difference to the Rules' validity.

Again, the critics' mistake arises partly out of conflating approaches to state and federal personal jurisdiction. At the state level, it's plausible (though, as explained above, partly mistaken) to view the “test by which amenability to jurisdiction is adjudged” as “a matter already governed by the substantive law of the Constitution,” and therefore as an external

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“practice and procedure,” which must address “the process by which claims and defenses are asserted and adjudicated within a lawsuit”).

<sup>367</sup> See sources cited *supra* note 302.

<sup>368</sup> See Fed. R. Civ. P. 4(e)–(k) (1993), in 507 U.S. 1103, 1106–09 (1993).

<sup>369</sup> See Fed. R. Civ. P. 4(k)(1) (1993), in 507 U.S. at 1109.

constraint inappropriate for judicial rulemaking.<sup>370</sup> But federal courts face no such constraints. The “jurisdictional ‘state of nature’ *external* to [their] rules”<sup>371</sup> is that a defendant must appear whenever process is validly served. (Were Rule 4 to be repealed in full, the result wouldn’t be unlimited personal jurisdiction, but a return to the *Toland*-era rule requiring personal service within the district, which nothing would be around to displace.) Other provisions of Rule 4 authorize out-of-district service of a summons; Rule 4(k) places further conditions, *internal* to the rules, on the validity of that summons when issued. If the default rule is that lawful service of a summons, wherever it takes place, automatically establishes personal jurisdiction, then a rule that “serving a summons . . . establishes personal jurisdiction over a defendant *if . . .*”<sup>372</sup> is an internal limit on that service, not a vain attempt to alter an external limit on jurisdiction. As *Murphree* reminds us, service of process is the means by which the court asserts its jurisdiction over the person of the defendant.<sup>373</sup> Rule 4(k) simply tells us when a district court *isn’t* asserting its jurisdiction—when the summons and complaint don’t actually reflect a binding command to appear.

## 2. *The Change in Statute*

There’s one further wrinkle to Rule 4(k)’s validity: we’ve been reading the wrong statute. The current version of Rule 4(k), amended in 1993 and 2007,<sup>374</sup> wasn’t adopted under the Rules Enabling Act of 1934. Rather, it was adopted under the Judicial Improvements and Access to Justice Act of 1988, which deleted and rewrote the relevant provisions, and which authorized the Court “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts.”<sup>375</sup> The new language may or may not be broader than the previous power “to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts” in civil actions.<sup>376</sup> More importantly, though, this statute was adopted after the

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<sup>370</sup> Kelleher, *supra* note 7, at 1226.

<sup>371</sup> Spencer, *supra* note 17, at 670–71.

<sup>372</sup> Fed. R. Civ. P. 4(k)(2) (emphasis added).

<sup>373</sup> 326 U.S. 438, 444–45 (1946).

<sup>374</sup> See 28 U.S.C. app. at 112–14.

<sup>375</sup> Pub. L. No. 100-702, tit. IV, § 401, 102 Stat. 4642, 4648 (1988) (amending 28 U.S.C. § 2072 (1982)).

<sup>376</sup> 28 U.S.C. § 2072 (1982).

canonical interpretations of “practice and procedure” in *Sibbach* and *Murphree*, and after Congress had repeatedly acted on the understanding that the Rule’s territorial expansion of service was lawful. Early versions of the bill even proposed removing the supersession clause, because the 1948 recodification had repealed the necessary provisions—reinforcing the legislative assumption that Rules 4, 25, and 45 were valid.<sup>377</sup>

In fact, the 1988 Congress went even further down the road of assuming Rule 4’s validity. The same statute that revised the Rules Enabling Act also introduced the modern approach to corporate venue residence. It provided that a corporate defendant resides, for venue purposes, “in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced,” or (if there are multiple such districts within a state) “in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State.”<sup>378</sup> That approach would have made no sense unless a district court’s personal jurisdiction sometimes depended on a defendant’s contacts with a state. If, under existing law, Rule 4(k) were invalid, then a court’s process couldn’t be sent beyond its own district, and contacts with that district would have had nothing to do with personal jurisdiction. A defendant might have plenty of contacts in a district (purposefully shipping defective products there, etc.) but still have no agent there to be served. These contacts would be ignored under a narrow reading of the 1934 Act, but they’d play their ordinary role under the then-extant language of Rule 4(e) and (f), which as of 1988 were read to incorporate a state’s long-arm statutes and extraterritorial means of service.<sup>379</sup> So Congress appears to have assumed, precisely as it was rewriting the Rules Enabling Act, that *Murphree* was correctly decided, and that “process and procedure” were broad enough to include the service of process across district lines. If so, then there’s little reason for us to make a contrary assumption today.

<sup>377</sup> H.R. Rep. No. 100-889, pt. 1, at 28 (1988); see *supra* text accompanying notes 346–56.

<sup>378</sup> Judicial Improvements and Access to Justice Act, tit. X, § 1013, 102 Stat. at 4669 (amending 28 U.S.C. § 1391).

<sup>379</sup> See 28 U.S.C. app. at 557 (1988); Letter from John R. Bolton, Asst. Att’y Gen., to Robert W. Kastenmeier, Chairman, H. Subcomm. on Courts, Civil Liberties, and the Admin. of Just. (Jan. 11, 1988), app. 2, at 15, *in* Court Reform and Access to Justice Act, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Just. on H.R. 3152, 100th Cong., pt. 1, at 831, 854 (1988).



## CONCLUSION

Personal jurisdiction rarely makes headlines or causes waves on the floor of Congress. Yet in the last few years, Congress has tried mightily to extend federal jurisdiction over antiterrorism suits by Americans injured abroad. While the cases were pending, it *twice* amended a jurisdictional statute to broaden its reach—once even to mention the defendants by name.<sup>380</sup> If Congress wants federal claims to be heard in federal courts so badly, we should be pretty confident before letting the courts get in the way.

Unfortunately, the courts *have* gotten in the way, and without adequate reason. The current doctrine on federal personal jurisdiction—that it requires contacts with the nation as a whole, resembling those required for jurisdiction in a particular state—isn't based on the content of the Fifth Amendment when it was adopted, nor even on that of the Fourteenth. Instead, it's based on a misunderstanding of the sources of our jurisdictional law, and on an imagined and inappropriate analogy between state and federal proceedings.

This process is unfortunately familiar. As Justice Holmes described it:

The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.<sup>381</sup>

That path may be appropriate, or perhaps inevitable, for a tradition of customary law. But it's neither inevitable nor appropriate for our written Constitution. Whatever rules the Fourteenth Amendment enforces on state courts—whether of traditional general law, contemporary international law, or something entirely different—the rules adopted for federal courts were different still. This isn't to say that Congress has plenary power over personal jurisdiction. But any limits it faces stem from limits on its enumerated powers, not from constitutional constraints

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<sup>380</sup> See Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, sec. 903, § 2334(e)(5)(A)–(B), 133 Stat. 3082, 3084–85 (referring specifically to the Palestinian Authority and Palestinian Liberation Organization); Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183.

<sup>381</sup> O.W. Holmes, Jr., *The Common Law* 5 (London, MacMillan & Co. 1882).

hidden within the phrase “due process of law.” This confusion ought to be corrected—and soon, before it deprives deserving plaintiffs of a forum, and before it undermines the perceived validity of the Federal Rules.

Federal and state courts are not the same when it comes to personal jurisdiction. We should stop treating them that way.