

PERSONAL JURISDICTION — GENERAL LAW — FIFTH CIRCUIT HOLDS THAT FIFTH AMENDMENT REQUIRES SAME MINIMUM CONTACTS ANALYSIS AS FOURTEENTH AMENDMENT. — *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 1021 (2023).

“[A] subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts.”<sup>1</sup> So observed Justice Joseph Story, four decades before the Fourteenth Amendment’s ratification. Since then, the Supreme Court has developed a robust but “messy”<sup>2</sup> doctrine limiting state court personal jurisdiction under the auspices of *Fourteenth* Amendment due process.<sup>3</sup> But the Supreme Court has not extended those limits to the personal jurisdiction of the federal courts,<sup>4</sup> which is subject only to the *Fifth* Amendment. Recently, in *Douglass v. Nippon Yusen Kabushiki Kaisha*,<sup>5</sup> the Fifth Circuit held that the Fifth Amendment personal jurisdiction test requires the same “minimum contacts” with the United States that the Fourteenth Amendment requires with a state.<sup>6</sup> In grafting Fourteenth Amendment precedents onto the Fifth Amendment, the court elided the twin Due Process Clauses. This move improperly constitutionalizes the general law, hemming in the sovereign power of the United States to redress wrongs committed against Americans abroad.

On June 17, 2017, two ships collided in Japanese territorial waters.<sup>7</sup> One was the *ACX Crystal*, a 730-foot container ship chartered by Japanese global logistics company Nippon Yusen Kabushiki Kaisha (NYK); the other was the U.S.S. *Fitzgerald*, a U.S. Navy destroyer.<sup>8</sup> The *ACX Crystal*’s bow tore through the *Fitzgerald*’s hull, flooding several compartments on board.<sup>9</sup> Seven American sailors perished.<sup>10</sup> At least forty more suffered injuries.<sup>11</sup> NYK vessels made port calls in the United States about 1500 times annually from 2017 to 2019,<sup>12</sup> and NYK

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<sup>1</sup> *Picquet v. Swan*, 19 F. Cas. 609, 613 (Story, Circuit J., C.C.D. Mass. 1828) (No. 11,134).

<sup>2</sup> Recent Case, *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir.), 136 HARV. L. REV. 990, 990 (2023).

<sup>3</sup> See *Ford Motor Co. v. Mont.* 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) (specific jurisdiction); *Daimler AG v. Bauman*, 571 U.S. 117, 121, 127 (2014) (general jurisdiction).

<sup>4</sup> See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783–84 (2017) (leaving the question open); *accord J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality opinion) (same); *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 113 n.\* (1987) (same).

<sup>5</sup> 46 F.4th 226 (5th Cir. 2022) (en banc).

<sup>6</sup> *Id.* at 235; *accord Lewis v. Mutond*, 62 F.4th 587, 592 (D.C. Cir. 2023) (“[L]ittle jurisdictional daylight exists between the two Amendments.”).

<sup>7</sup> *Douglass*, 46 F.4th at 230.

<sup>8</sup> *Id.* at 229–30, 230 n.6.

<sup>9</sup> *Id.* at 231.

<sup>10</sup> *Id.*

<sup>11</sup> *Douglass v. NYK*, 996 F.3d 289, 291 (5th Cir. 2021) (per curiam).

<sup>12</sup> *Douglass*, 46 F.4th at 230.

generates about \$1.5 billion in annual revenue in North America.<sup>13</sup> NYK is no stranger to U.S. federal courts either: since 1993, NYK has brought nearly eighty actions in federal court<sup>14</sup> and has occasionally defended itself from claims in American courts.<sup>15</sup>

The injured sailors and personal representatives of the deceased sailors brought tort actions under the Death on the High Seas Act<sup>16</sup> against NYK in the Eastern District of Louisiana.<sup>17</sup> The plaintiffs asserted personal jurisdiction under Rule 4(k)(2),<sup>18</sup> arguing that NYK was amenable to general “national contacts” jurisdiction given its “systematic and continuous contacts with the United States as a whole.”<sup>19</sup> NYK moved to dismiss for lack of personal jurisdiction.<sup>20</sup> Although Rule 4(k)(2) implicates the Fifth Amendment, the district court applied the Fourteenth Amendment’s personal jurisdiction standard and dismissed the suits.<sup>21</sup>

A panel of the Fifth Circuit affirmed.<sup>22</sup> The panel considered itself bound by the circuit’s precedent in *Patterson v. Aker Solutions Inc.*,<sup>23</sup> which applied *Daimler AG v. Bauman*<sup>24</sup> — a Fourteenth Amendment precedent — to resolve a jurisdictional challenge under the Fifth Amendment.<sup>25</sup> The Fifth Circuit then voted to take the case en banc.<sup>26</sup>

Sitting en banc, the Fifth Circuit affirmed.<sup>27</sup> Writing for the majority, Judge Jones<sup>28</sup> held that the “Fifth Amendment due process test for personal jurisdiction mirrors the Fourteenth Amendment test,” requiring “the same ‘minimum contacts’ with the United States as the Fourteenth Amendment requires with a state.”<sup>29</sup> In so holding, the court deferred to its own and sister circuits’ precedents.<sup>30</sup> On the merits, the court noted that the two amendments’ Due Process Clauses “use the

<sup>13</sup> *Id.* at 271 (Elrod, J., dissenting).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 230 (majority opinion).

<sup>16</sup> 46 U.S.C. §§ 30,301–30,308 (“When the death of an individual is caused by wrongful act . . . on the high seas . . . , the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.” *Id.* § 30,302.)

<sup>17</sup> *Douglass v. NYK*, 465 F. Supp. 3d 610, 613 (E.D. La. 2020).

<sup>18</sup> The Rule authorizes jurisdiction for “a claim that arises under federal law” when “the defendant is not subject to jurisdiction in any state’s court[]” and “exercising jurisdiction is consistent with the United States Constitution and laws.” FED. R. CIV. P. 4(k)(2).

<sup>19</sup> *Douglass*, 46 F.4th at 231.

<sup>20</sup> *Id.* The plaintiffs did not make a specific-jurisdiction argument. *Id.* at 242 n.29.

<sup>21</sup> *Id.* at 231.

<sup>22</sup> *Douglass v. NYK*, 996 F.3d 289, 300 (5th Cir. 2021) (per curiam). Judges King, Elrod, and Willett constituted the panel.

<sup>23</sup> 826 F.3d 231 (5th Cir. 2016); see *Douglass*, 996 F.3d at 297–98.

<sup>24</sup> 571 U.S. 117 (2014); see *id.* at 139 (describing the at-home test for general jurisdiction).

<sup>25</sup> See *Douglass*, 996 F.3d at 299 (quoting *Patterson*, 826 F.3d at 234).

<sup>26</sup> *Douglass*, 46 F.4th at 231.

<sup>27</sup> *Id.* at 243.

<sup>28</sup> Judge Jones was joined by Chief Judge Richman and Judges Smith, Stewart, Dennis, Southwick, Costa, Ho, Duncan, Engelhardt, and Wilson. Judge Haynes concurred in the judgment without opinion.

<sup>29</sup> *Douglass*, 46 F.4th at 234–35.

<sup>30</sup> See *id.* at 238–39 nn.19–22 (Fifth Circuit cases); *id.* at 239 n.24 (out-of-circuit cases).

same language and serve the same purpose.”<sup>31</sup> The court reasoned that the plaintiffs’ emphasis on the Fourteenth Amendment’s concern with federalism was “myopic” because any federalism concerns about state sovereignty derive from the “individual liberty interest” protected by the Fourteenth Amendment.<sup>32</sup> Regardless, the court noted that federalism is irrelevant because it matters only for specific jurisdiction, not for general “at-home” jurisdiction, which was at issue here.<sup>33</sup> The court also rejected the plaintiffs’ concern that so holding would rob Rule 4(k)(2) of many extraterritorial applications, rendering it a “nullity”: because the Fifth Amendment’s limit on personal jurisdiction is independent of Rule 4(k)(2), interpreting its requirements based on its interaction with the Rule “would let the procedural tail wag the constitutional dog.”<sup>34</sup> Applying the Fourteenth Amendment standard to the facts here, the court held that NYK was not amenable to general jurisdiction.<sup>35</sup> “[S]uch sweeping jurisdiction” could reach NYK only if its U.S. operations rendered it at home here.<sup>36</sup> Although NYK’s contacts with the United States were substantial, they were “a minor portion of its” operations.<sup>37</sup>

Judge Ho concurred.<sup>38</sup> Appealing to the doctrine of incorporation, he noted that “individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the *same scope* as against the Federal Government.”<sup>39</sup> Thus, it would be anomalous to apply different standards of due process to the states and federal government for personal jurisdiction, but the same standards for all other constitutional rights.<sup>40</sup>

Judge Elrod dissented.<sup>41</sup> She argued that because the Fifth Amendment “has its own text, history, and structural implications,” its Due Process Clause “need not parrot what the Supreme Court has said about the Fourteenth’s.”<sup>42</sup> And in the absence of binding Supreme

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<sup>31</sup> *Id.* at 235; *see also id.* at 243 (“[T]o suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.” (quoting *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring))).

<sup>32</sup> *Id.* at 236–37 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982)).

<sup>33</sup> *See id.*

<sup>34</sup> *Id.* at 240. The court was unpersuaded that admiralty’s broad *subject matter* jurisdiction over “all acts and torts done upon the high seas” provides an exception to due process limits on the exercise of *personal* jurisdiction. *Id.* at 241 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1665, at 450 (Boston, Little, Brown & Co. 4th ed. 1873)).

<sup>35</sup> *Id.* at 242.

<sup>36</sup> *Id.* (quoting *Ford Motor Co. v. Mont. 8th Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021)).

<sup>37</sup> *Id.* at 243.

<sup>38</sup> *Id.* (Ho, J., concurring). Judge Ho was joined by Judge Costa.

<sup>39</sup> *Id.* at 245 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2137 (2022)).

<sup>40</sup> *See id.* at 247. The Fourteenth Amendment’s Due Process Clause does not incorporate the Fifth’s: each amendment has its own Due Process Clause. *But cf. id.* (“[W]hy should that matter?”).

<sup>41</sup> *Id.* at 249 (Elrod, J., dissenting). Judge Elrod was joined in full by Judges Graves and Willett and in part by Judges Higginson and Oldham.

<sup>42</sup> *Id.* at 251.

Court precedent, Judge Elrod would have applied the original meaning of the Fifth Amendment.<sup>43</sup> Early cases contemplating the personal jurisdiction of the federal courts glaringly failed to mention any Fifth Amendment bar.<sup>44</sup> Further, the Fourteenth Amendment embodies “principles of interstate federalism” that are “irrelevant” to the Fifth Amendment.<sup>45</sup> And the meaning of “due process of law” might have “undergone linguistic drift” between when the First Congress proposed the Fifth Amendment in 1789 and when “the 39th Congress proposed the Fourteenth Amendment in 1866.”<sup>46</sup> Thus, Judge Elrod would have allowed the plaintiffs’ suit to proceed.<sup>47</sup> To do otherwise would “gut[] Rule 4(k)(2) of virtually all of its intended applications,” decimating Congress’s power to “right the most grievous wrongs committed against Americans abroad.”<sup>48</sup>

Judge Higginson also dissented.<sup>49</sup> In his view, “cross-incorporat[ing]” Fourteenth Amendment due process into the Fifth Amendment would be inapt in this situation,<sup>50</sup> given the Supreme Court’s “sovereign state-centered comity approach,” including the presumption against extraterritoriality.<sup>51</sup> Further, Judge Higginson chided the majority for implicitly foreclosing federal courts from hearing a damages suit by the United States for the sunken destroyer.<sup>52</sup>

Judge Oldham dissented as well.<sup>53</sup> He would have applied the original public meaning of the Fifth Amendment because the Supreme Court has not answered whether it “imposes the same restrictions” on the personal jurisdiction of federal courts as the Fourteenth does on that of state courts.<sup>54</sup> That original meaning “did not impose any” such limits, leaving it “to Congress to impose such limits by statute.”<sup>55</sup>

As the dissenters convincingly argued, the *Dougllass* majority misinterpreted the Fifth Amendment’s Due Process Clause.<sup>56</sup> Although the

<sup>43</sup> *Id.* at 254–55.

<sup>44</sup> *See id.* at 258–62 (quoting, *inter alia*, Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1710 (2020)). Instead, those early courts suggested that “general principles of law,” not the Constitution, limited their jurisdiction. *Id.* at 260 (quoting *Picquet v. Swan*, 19 F. Cas. 609, 615 (Story, Circuit J., C.C.D. Mass. 1828) (No. 11,134)).

<sup>45</sup> *Id.* at 263.

<sup>46</sup> *Id.* at 251–52 (quoting Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA. L. REV. 447, 453 (2022)).

<sup>47</sup> *Id.* at 270.

<sup>48</sup> *Id.* at 276, 278. It would also “sink” the court’s ability to hear many admiralty cases. *Id.* at 277.

<sup>49</sup> *Id.* at 282 (Higginson, J., dissenting).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 283 (citing *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090 (2016)).

<sup>52</sup> *Id.* at 282–83, 282 n.2.

<sup>53</sup> *Id.* at 284 (Oldham, J., dissenting).

<sup>54</sup> *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1784 (2017)).

<sup>55</sup> *Id.* (citing, *inter alia*, Sachs, *supra* note 44, at 1717–27).

<sup>56</sup> *Accord* *Lewis v. Mutond*, 62 F.4th 587, 598 (D.C. Cir. 2023) (Rao, J., concurring) (arguing persuasively that “importing Fourteenth Amendment due process limits into the Fifth Amendment” would be a “parachronism”).

Fourteenth Amendment sets metes and bounds around state long-arm statutes,<sup>57</sup> the Fifth Amendment does not cabin the territorial jurisdiction of the federal courts.<sup>58</sup> But the court also overlooked how general law illuminates the twin clauses' distinct relationships with personal jurisdiction: the Fourteenth Amendment brought personal jurisdiction into the rendering court, while the Fifth never did. By treating the clauses identically, the Fifth Circuit improperly constitutionalized a question of general law, curbing the sovereign power of the United States to redress wrongs committed against Americans abroad.

General law refers to the background legal “substratum”<sup>59</sup> beyond the “control of any single jurisdiction.”<sup>60</sup> It reflects the principles and customs of multiple jurisdictions, including U.S. states and foreign countries, across different substantive areas of common law.<sup>61</sup> In the era of *Swift v. Tyson*,<sup>62</sup> state and federal courts “exercised independent judgment” about the general law’s content.<sup>63</sup> Since *Erie Railroad Co. v. Tompkins*,<sup>64</sup> federal courts must defer to state high courts on questions of common law,<sup>65</sup> seemingly bringing the general law into disrepute.<sup>66</sup> But reports of the general law’s death have been greatly exaggerated: it continues to persist throughout federal law,<sup>67</sup> and it governs state border disputes.<sup>68</sup> And general law finishes the incomplete picture in *Douglass*, explaining the different effects of the twin Due Process Clauses on personal jurisdiction and revealing an oversight in the court’s reasoning.

Before the Fourteenth Amendment, defendants challenged personal jurisdiction at the recognition stage — when the plaintiff tried to enforce the judgment in a second forum — rather than when the original

<sup>57</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>58</sup> Sachs, *supra* note 44, at 1704–05.

<sup>59</sup> *United States v. Burr*, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (remarks of Marshall, C.J.).

<sup>60</sup> Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006). Scholarly interest in general law is swelling. See, e.g., Danielle D’Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023); Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010 (2023); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment* (Feb. 13, 2023) (unpublished manuscript) (on file with the Harvard Law School Library). But see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 919–24, 935–36 (2007) (arguing that federal courts can apply general or customary international law only when authorized by another source of positive law).

<sup>61</sup> See Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1263 (2017).

<sup>62</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>63</sup> Nelson, *supra* note 60, at 506.

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

<sup>65</sup> Nelson, *supra* note 60, at 506.

<sup>66</sup> See *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945). Even before *Erie*, general law had legal-realist detractors. It was an “illusion,” *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting), and a “brooding omnipresence in the sky,” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>67</sup> Nelson, *supra* note 60, at 503–04.

<sup>68</sup> Sachs, *supra* note 61, at 1268.

court rendered the judgment.<sup>69</sup> When the recognizing court was federal, it would cast a gimlet eye on a state court's exercise of jurisdiction, recognizing the judgment only if it complied with the federal court's own view of the general law.<sup>70</sup> These "well-established rules of international law"<sup>71</sup> applied to all courts as "rules of decision."<sup>72</sup> States could not abrogate these general-law rules: although under the Rules of Decision Act<sup>73</sup> federal courts must apply state statutes "in cases where they apply,"<sup>74</sup> they did not apply those that exceeded the state's "legislative jurisdiction."<sup>75</sup> Then the Fourteenth Amendment introduced a constitutional defense against exorbitant personal jurisdiction,<sup>76</sup> supplying federal-question teeth to the general law's rules.<sup>77</sup> Defendants could now raise challenges to personal jurisdiction in the rendering court, eliminating the need for skepticism at the recognition stage later.

By contrast, federal court judgments never invited gimlet eyes in federal court, and the Fifth Amendment imposed no independent bar to jurisdiction.<sup>78</sup> Given congressional silence, federal courts would decline jurisdiction contrary to general "principles of public law."<sup>79</sup> Against this backdrop, courts would hesitate to infer "usurpation[s] of foreign sovereignty"<sup>80</sup> unless Congress spoke clearly.<sup>81</sup> But if Congress directed them to "summon[]" a defendant "from the other end of the globe,"<sup>82</sup> federal courts would be bound "to obey and administer"<sup>83</sup> Congress's mandate, even if exercising jurisdiction would offend "the usages and received obligations of the civilized world."<sup>84</sup> (An "act of congress"<sup>85</sup> was probably the *only* authority that allowed federal courts to exceed the background limits of general law, "which federal statutes would always

<sup>69</sup> See *id.* at 1252–53.

<sup>70</sup> Sachs, *supra* note 44, at 1720.

<sup>71</sup> *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1851).

<sup>72</sup> *Ex parte Graham*, 10 F. Cas. 911, 912 (Washington, Circuit J., C.C.E.D. Pa. 1818) (No. 5657).

<sup>73</sup> 28 U.S.C. § 1652.

<sup>74</sup> *Id.*

<sup>75</sup> *D'Arcy*, 52 U.S. (11 How.) at 176.

<sup>76</sup> See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

<sup>77</sup> Sachs, *supra* note 61, at 1318.

<sup>78</sup> See Sachs, *supra* note 44, at 1723, 1726–27.

<sup>79</sup> *Picquet v. Swan*, 19 F. Cas. 609, 614 (Story, Circuit J., C.C.D. Mass. 1828) (No. 11,134).

<sup>80</sup> *Id.* at 611.

<sup>81</sup> *Cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

<sup>82</sup> *Picquet*, 19 F. Cas. at 613; *accord Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

<sup>83</sup> *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826).

<sup>84</sup> *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812). Compare *Burnham v. Superior Ct.*, 495 U.S. 604, 619 (1990) (plurality opinion) (upholding tag jurisdiction), with Pamela K. Bookman, *Toward the Fifth Restatement of U.S. Foreign Relations Law*, in *THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW* 335, 337 (Paul B. Stephan & Sarah A. Cleveland eds., 2020) [hereinafter *RESTATEMENT & BEYOND*] (suggesting tag jurisdiction is considered exorbitant internationally).

<sup>85</sup> *Ex parte Graham*, 10 F. Cas. 911, 913 (Washington, Circuit J., C.C.E.D. Pa. 1818) (No. 5657).

outrank.”<sup>86</sup>) Although such judgments would be valid and enforceable in the United States, they would be subject to collateral attack at the recognition stage in foreign courts if plaintiffs tried to execute the judgment by attaching defendants’ foreign property.<sup>87</sup>

These differences make sense given the constitutional concerns animating the twin clauses. Yes, both clauses ensure procedural fairness to defendants, the hallmarks of which are notice and an opportunity to be heard.<sup>88</sup> But in the personal jurisdiction context, the Fourteenth Amendment is also an “instrument of interstate federalism,”<sup>89</sup> delimiting each state’s territorial sovereignty vis-à-vis other states.<sup>90</sup> Thus, jurisdiction is primarily about “authority rather than fairness.”<sup>91</sup> In the Fifth Amendment context, though, federalism is irrelevant<sup>92</sup> because the sovereign authority of the United States is at issue.<sup>93</sup> And federal courts must listen to Congress when it abrogates general law, even though they may be skeptical of states’ legislative jurisdiction to do the same. Ordering the United States’s international relations with other sovereigns is a congressional and presidential prerogative;<sup>94</sup> thus, federalism concerns should not stop Congress from holding foreign tortfeasors liable for wrongs committed against Americans abroad.<sup>95</sup>

Here, Congress has authorized jurisdiction over NYK via Rule 4(k)(2)<sup>96</sup> and the Death on the High Seas Act,<sup>97</sup> abrogating general law. Accordingly, NYK’s jurisdictional defense should have been raised as a collateral attack at the recognition stage in Japan, not as a due process

<sup>86</sup> Sachs, *supra* note 61, at 1286.

<sup>87</sup> See Sachs, *supra* note 44, at 1711; see also Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145, 173 (1973) (discussing Italian court’s refusal to enforce exorbitant French judgment). International judgment recognition can sometimes be a diplomatic question, best handled by the political branches. Sachs, *supra* note 44, at 1734. But see Bookman, *supra* note 84, at 338–39 (describing diplomatic protest over personal jurisdiction as “unheard of,” *id.* at 339).

<sup>88</sup> See, e.g., 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1074 (4th ed. 2022).

<sup>89</sup> World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

<sup>90</sup> See Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017).

<sup>91</sup> J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011) (plurality opinion).

<sup>92</sup> Cf. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1643 n.358 (2002) (discussing effect of ratification context on constitutional meaning).

<sup>93</sup> See Wendy Perdue, *Aliens, The Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004).

<sup>94</sup> See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”).

<sup>95</sup> The United States has expressed this view in recent litigation. See, e.g., Brief for Intervenor-Appellant at 19, *Fuld v. United States*, No. 22-76(L) (2d Cir. June 21, 2022).

<sup>96</sup> See *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 231 (D.C. Cir. 2022) (“[Rule 4(k)(2)] is essentially a federal long-arm statute.”); Sachs, *supra* note 44, at 1710 (arguing that the Rules Enabling Act “encompasses the power” to decide when “service of process . . . assert[s] the court’s jurisdiction”); *id.* at 1745 (“Rule 4(k)(2) straightforwardly authorizes the assertion of federal jurisdiction.”).

<sup>97</sup> The presumption against extraterritorial application likely tempers the risk of exorbitant jurisdiction. See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

challenge in the Eastern District of Louisiana.<sup>98</sup> Then, whether *Douglass* could enforce a federal judgment against NYK's property in Japanese courts would be a question answerable by Japanese law (which may refer to general law or treaties),<sup>99</sup> not by the Fifth Amendment.<sup>100</sup> Japanese courts may look upon such a judgment with a gimlet eye.<sup>101</sup> But that possibility should not stop U.S. courts from applying U.S. law, rendering and executing U.S. judgments, or attaching U.S. property — and neither should the Fifth Amendment. The Death on the High Seas Act and Rule 4(k)(2) supply the only relevant personal jurisdiction limit here: because Congress has directed federal courts to “summon” foreign maritime tortfeasors “from the other end of the globe,”<sup>102</sup> the district court must “proceed upon the law”<sup>103</sup> and hale NYK into court.

General law imposes a ceiling on personal jurisdiction that Congress may abrogate by statute or treaty. *Douglass* both lowers and constitutionalizes that ceiling in the Fifth Amendment. The consequence is a profound dilution of the United States's sovereign power to provide extraterritorial causes of action to its citizens. After *Douglass*, U.S. Navy sailors killed on the high seas by foreign tortfeasors, in violation of a federal statute, will be unable to vindicate their rights in federal courts. Beyond neutering Rule 4(k)(2) and the Death on the High Seas Act, the *Douglass* court's holding also cramps the reach of antitorture and anti-terrorism statutes,<sup>104</sup> consigning American victims injured abroad to fend for themselves in foreign courts.<sup>105</sup> Neither Supreme Court precedent nor the Fifth Amendment requires that result.

<sup>98</sup> In some situations, defendants like NYK can invoke the *forum non conveniens* doctrine. *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). And if a defendant has little U.S. property, it may be sensible “to stay home, default, and fight recognition later on.” Sachs, *supra* note 44, at 1742.

<sup>99</sup> *See* Sachs, *supra* note 44, at 1730 (noting that treaties can expand jurisdiction in quirky ways).

<sup>100</sup> *Compare* Livnat v. Palestinian Auth., 851 F.3d 45, 55 (D.C. Cir. 2017) (reasoning that “risks to international comity” weigh in favor of finding a Fifth Amendment limit on personal jurisdiction (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014))), *with* *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018) (emphasizing that “foreign affairs” involves “delicate judgments . . . that it is the prerogative of the political branches to make”).

<sup>101</sup> It may be relevant that Japan has not signed on to a proposed treaty that would require enforcement of foreign judgments. 41: *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HAGUE CONF. ON PRIV. INT'L L. (Aug. 28, 2022), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> [<https://perma.cc/QW45-7HHR>]. On the other hand, “modern customary international law generally does not impose limits on jurisdiction to adjudicate.” RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. 219 (AM. L. INST. 2018). *But see* Austen Parrish, *Adjudicatory Jurisdiction and Public International Law*, in RESTATEMENT & BEYOND, *supra* note 84, at 303, 303–04 (arguing that the Fourth Restatement improperly breaks with longstanding practice and scholarly consensus).

<sup>102</sup> *Picquet v. Swan*, 19 F. Cas. 609, 613 (Story, Circuit J., C.C.D. Mass. 1828) (No. 11,134).

<sup>103</sup> *Id.* at 615.

<sup>104</sup> *See, e.g.,* Lewis v. Mutond, 62 F.4th 587, 590–91 (D.C. Cir. 2023) (no personal jurisdiction over foreign nationals for alleged violation of the Torture Victim Protection Act); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016) (same for Anti-Terrorism Act).

<sup>105</sup> *See* Aaron Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 370 (2018) (arguing that jurisdictional “stinginess,” *id.* at 379, defeats much extraterritorial law).