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## Jurisdiction in the Trump Era

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## JURISDICTION IN THE TRUMP ERA

*Scott Dodson\**

### INTRODUCTION

The election of Donald Trump as President of the United States induced immediate speculation about how his tenure would affect various areas of the law.<sup>1</sup> In civil-procedure circles, the intuition is that his status as a pro-business, antiregulation Republican seems likely to push procedural doctrine generally in pro-defendant directions.<sup>2</sup> That intuition seems sound in the specific procedural subtopic of jurisdictional doctrine relating to forum selection.<sup>3</sup>

Forum matters to litigants, sometimes a great deal.<sup>4</sup> Forum affects the relative cost of litigation by forcing distant parties to spend more on the litigation than they might otherwise. Forum selection can be law selection, in both procedure and substance, because different courts will apply different laws to the dispute. The forum determines the range of judges who may preside over the case and the range of jurors who will resolve factual disputes in a jury trial. For these reasons, forum choice is a litigation advantage.

One can assume that legal actors with strong pro-plaintiff or pro-defendant predispositions will attempt to slant the law of forum selection to give the preferred side of a litigation more forum choice and restrict the forum choice of the other side.<sup>5</sup> With regard to the Trump administration, Trump's pro-

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1. See generally, e.g., Scott Dodson et al., *The 2016 Presidential Election: The Next Four Years and Beyond*, 44 HASTINGS CONST. L.Q. 255 (2017).

2. See Symposium, *Civil Litigation Reform in the Trump Era: Threats & Opportunities*, 87 FORDHAM L. REV. 19 (2018).

3. Elsewhere, I have argued that jurisdiction is definitionally akin to forum selection, but I recognize that current jurisdictional doctrine professes to be both broader and narrower than forum selection. See generally Scott Dodson, *Defending Jurisdiction*, 59 WM. & MARY L. REV. ONLINE 85 (2018); Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017).

4. See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1921 (2009) (“Forum is worth fighting over because outcome often turns on forum . . .”).

5. See, e.g., *infra* text accompanying notes 53–55 (discussing the Class Action Fairness Act of 2005).

business background and rhetoric,<sup>6</sup> plus Republican control of both chambers of Congress, might induce predictions of a dramatic departure from the jurisdictional trends of the Obama administration.

But, curiously, forum doctrines—especially personal jurisdiction and diversity jurisdiction—were already trending in pro-defendant directions during the Obama administration for several years before Donald Trump was even a presidential candidate.<sup>7</sup> The Trump era thus portends a continuation and validation of that trend, rather than a departure from it.

In this Essay, I document recent pre-Trump, pro-defendant trends in personal jurisdiction and diversity jurisdiction, and I detail how those trends impose significant burdens on plaintiffs. I then explain why the remainder of Trump's presidency is likely to entrench those trends through judicial appointments, rulemaker stasis, and congressional efforts. The result is likely to be less an alteration of pre-Trump law than a reinforcement and expansion of it.

## I. PERSONAL JURISDICTION

Personal jurisdiction—the power of a court over a litigant—has balanced plaintiff and defendant interests for decades. Though historically a doctrine steeped in policing interstate relations,<sup>8</sup> the modern incarnation of personal jurisdiction is grounded in the due process rights of litigants.<sup>9</sup> While state interests and territorial borders are still relevant to personal jurisdiction, state geography has become a means of assessing the critical inquiry—fairness to

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6. Sam Schechner, *IBM CEO: Executives Like Trump's Pro-Business Promises*, WALL ST. J. (Jan. 19, 2017, 5:51 AM), <https://www.wsj.com/articles/ibm-ceo-executives-like-trumps-pro-business-promises-1484823068> [<https://perma.cc/E6W5-PWBZ>].

7. See *infra* Parts I.B, II.B. There are some notable exceptions, to be sure. The Consumer Financial Protection Bureau was created during Obama's presidency and, during that time, the agency proposed a rule banning companies from using arbitration clauses to disadvantage certain consumer plaintiffs seeking redress in court; however, in November 2017, President Trump signed a joint congressional resolution nullifying the rule. *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROTECTION BUREAU (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/> [<https://perma.cc/LG6T-9Z6P>].

8. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878) (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”). See generally Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017) (documenting the history of personal jurisdiction and *Pennoyer*).

9. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945) (focusing on whether a nonresident's contacts with the forum state made it “reasonable” for the court to exercise personal jurisdiction in light of the “‘inconveniences’ which would result . . . from a trial away from [the nonresident's] ‘home’”); see also *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).

the defendant—as measured by the defendant’s “minimum contacts” with the forum state.<sup>10</sup>

### A. Personal Jurisdiction Development

From 1945 to 2011, the U.S. Supreme Court developed standards in an attempt to balance the various interests at stake in personal jurisdiction and flesh out its contours. Not all movement was in a pro-plaintiff direction,<sup>11</sup> but at least two trends appeared to be. First, the Court suggested that a state could exercise “general” jurisdiction over a defendant who had “continuous and systematic” contacts with the forum state even if the cause of action was unrelated to those contacts.<sup>12</sup> This standard for general jurisdiction was “taught to generations of first-year law students” and was applied by lower courts for decades.<sup>13</sup> This standard effectively allowed plaintiffs to sue a company in any state in which it did business; for many large corporations, that meant in any state in the Union.<sup>14</sup> Though tempered by venue rules and other forum restrictions,<sup>15</sup> general jurisdiction gave plaintiffs broad choice of forum when suing national corporations.

Second, the Court seemed open to relaxing “specific” jurisdiction’s required nexus between the defendant and the forum by allowing actors other than the defendant to help establish that nexus. For example, in *Asahi Metal Industry Co. v. Superior Court*,<sup>16</sup> the Court agreed that third-party

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10. See *Int’l Shoe*, 326 U.S. at 316–17 (setting out the “minimum contacts” formulation); see also *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781–82 (2017) (repeating that formulation).

11. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114, 116, 121 (1987) (agreeing that “fairness” factors could weigh against the exercise of personal jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–96 (1980) (refusing to allow the unilateral conduct of the plaintiff to establish the required connection between the defendant and the forum state).

12. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416–17 (1984) (reasoning that the defendant’s activities in the forum did not “constitute the kind of continuous and systematic general business contacts the Court found to” support general jurisdiction in prior precedent”); cf. *Int’l Shoe*, 326 U.S. at 318 (acknowledging that personal jurisdiction can attach when “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities”).

13. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 770 (2014) (Sotomayor, J., concurring); see also Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 767 (1988) (“Courts currently measure the sufficiency of unrelated business contacts between the forum state and the defendant with the continuous and systematic test . . .”).

14. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014) (stating as conventional wisdom “that national corporations with substantial operations in all fifty states (such as McDonalds or WalMart) would likely be subject to general personal jurisdiction in all fifty states”); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 614 n.88 (1993) (“General jurisdiction may also exist over out-of-staters if their forum connections are very substantial. For example, most states will have general jurisdiction over McDonalds.”).

15. For a summary of those subconstitutional controls on forum, see William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1242–46 (2018).

16. 480 U.S. 102 (1987).

intermediaries in the stream of commerce could help create the necessary link between the defendant and the state of injury.<sup>17</sup> And in *Calder v. Jones*,<sup>18</sup> the Court held that California could exercise specific jurisdiction over a libelous magazine article's Florida-based author and editor because their Florida conduct had "effects" in California, which was the residence of the plaintiff and the locus of her reputation.<sup>19</sup>

Both *Asahi* and *Calder* expanded the range of states having the potential to exercise specific jurisdiction over a particular defendant. Coupled with the likelihood that interstate businesses would be subject to general jurisdiction in multiple states under the "continuous and systematic" test, plaintiffs appeared to have a relatively wide range of forum choice in many lawsuits.

### B. A Restrictive Turn

Beginning in 2011, the Court's personal jurisdiction opinions dramatically scaled back plaintiffs' forum choices. In a pair of general jurisdiction cases decided in 2011 and 2014, the Court, nearly unanimously, discarded the "continuous and systematic" test and instead confined general jurisdiction to the states in which the defendant is "at home"; paradigmatically, the defendant's domicile (if an individual) or state of incorporation and principal place of business (if a corporation).<sup>20</sup> Importantly, the new "at home" test is a comparative one, which limits the range of general jurisdiction to the one or two states in which the defendant is *most* at home.<sup>21</sup> As a result, for Walmart, only Delaware (its state of incorporation) and Arkansas (where it has its headquarters)—not California (where it does much of its business)—can exercise general jurisdiction.<sup>22</sup> And, for foreign corporations, likely *no* state would be able to exercise general jurisdiction.<sup>23</sup>

As for specific jurisdiction, the Court, in a different pair of decisions decided in 2011 and 2014, tightened the required nexus between the defendant and the forum in ways that reduce the range of plausible litigation forums. In *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>24</sup> Justice Kennedy,

17. *Id.* at 112 (plurality opinion); *id.* at 117 (Brennan, J., concurring).

18. 465 U.S. 783 (1984).

19. *Id.* at 783–85.

20. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 761 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). The Court reaffirmed these decisions in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

21. *Daimler*, 134 S. Ct. at 762 n.20 ("[T]he general jurisdiction inquiry does not 'focus[s] solely on the magnitude of the defendant's in-state contacts.' General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." (second alteration in original) (citation omitted)).

22. See Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. (forthcoming 2018) (manuscript at 29–30).

23. See Dodge & Dodson, *supra* note 15, at 1220. The Court has left open the possibility that, in an exceptional case, a corporation might be essentially at home in a state that is not its place of incorporation or formal headquarters. See *Daimler*, 134 S. Ct. at 761 & n.19.

24. 564 U.S. 873 (2011).

writing for a plurality of four justices that included the late Justice Antonin Scalia, would have cast personal jurisdiction as a consent-to-sovereign-authority doctrine where consent could be inferred only by a defendant's purposeful, specific, and direct connection with the forum state.<sup>25</sup> Justices Breyer and Alito penned a concurrence that relied simply on precedent and found that more purposeful and direct connection with the forum state was required when the quantity of connections was small.<sup>26</sup> Notably, both the plurality and the concurrence rejected the dissent's vision of specific jurisdiction as grounded primarily in fairness and reasonableness.<sup>27</sup>

In *Walden v. Fiore*,<sup>28</sup> the Court limited the interpretive reach of *Calder* by casting that case as focused on the defendants' contacts with California independent of the plaintiff's status as a California *resident*.<sup>29</sup> *Walden* refocuses the inquiry on whether "the defendant's suit-related conduct . . . create[s] a substantial connection with the forum State."<sup>30</sup> In addition, "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State."<sup>31</sup> *Walden* thus requires a direct link between the defendant's purposeful conduct and the forum state.<sup>32</sup>

### C. Effects

This restrictive turn in personal jurisdiction narrows the range of possible forums open to plaintiffs and increasingly funnels cases into the home states of defendants. The recent general jurisdiction cases do that intentionally, limiting general jurisdiction to the one or two states where the defendant is fairly considered to be "at home."<sup>33</sup> Specific jurisdiction offers opportunities to sue defendants outside their home states if the defendant's conduct caused injury in the forum; however, the recent cases demand a particularly strong and direct nexus between the defendant's conduct and the state of injury to do so. These cases also encourage corporations to use commercial intermediaries to further limit the likely applicability of specific jurisdiction in the state of injury. Consequently, some plaintiffs may choose to avoid a personal jurisdiction fight in the state of injury by electing to file in the defendant's home state.

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25. *Id.* at 880–84 (plurality opinion).

26. *Id.* at 888 (Breyer, J., concurring) ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.").

27. Compare *id.* at 899–906 (Ginsburg, J., dissenting) (relying upon principles of fairness and reasonableness), with *id.* at 890 (Breyer, J., concurring) (expressing concern about the dissent's formulation), and *id.* at 880, 882–83 (plurality opinion) (rejecting "[f]reeform notions of fundamental fairness" and "reasonable foreseeability" in favor of a focus on how "the defendant's actions" manifest an intent to be subject to state power).

28. 134 S. Ct. 1115 (2014).

29. *Id.* at 1123.

30. *Id.* at 1121.

31. *Id.* at 1122.

32. *Id.*

33. See generally, e.g., *id.*

Restricting forum choice in this way promotes two important defendant interests. First, the funneling of cases into the home states of defendants gives them, as a general matter, the home-field advantages of close proximity, local favoritism, and insider knowledge, while out-of-state plaintiffs face the corresponding disadvantages. Few plaintiffs, for example, relish the idea of suing Walmart in Bentonville, Arkansas. Worse, if the defendant is a foreign entity, the plaintiff may be forced to sue abroad, where the relative advantages and disadvantages become significantly more pronounced.<sup>34</sup>

Second, the restriction on forum availability inhibits aggregation in multiparty or multiclient cases. Aggregation is not an unabashed good in all instances, to be sure, but federal procedure generally favors aggregation for fairness and efficiency reasons.<sup>35</sup> Yet, the personal jurisdiction cases discussed above make aggregation significantly more difficult. If a plaintiff wishes to sue two defendants that are not at home in a common state, the plaintiff may be forced to sue the defendants separately.<sup>36</sup> And if multiple plaintiffs wish to sue those two defendants for similar injuries that arose in different states, then not even the state of injury would allow joinder of the claims in a common forum.<sup>37</sup> The resulting disaggregation allows defendants to deploy an “empty chair” defense<sup>38</sup> and force plaintiffs to bear the costs and expense of multiple lawsuits, costs which corporate defendants often bear more easily than plaintiffs.

Some might argue that personal jurisdiction’s recent trend toward restricting plaintiff forum selection is less a pro-defendant effort than an equilibration of historically excessive forum choice, but it is hard to see how that is the case when defendants can consent and extract consent to personal jurisdiction. If, for example, the state of injury is particularly favorable to a defendant for some reason, then the defendant can consent to personal jurisdiction there no matter how attenuated its conduct with the state. Further, if aggregation is to the defense advantage, then defendants can consent to personal jurisdiction in the forum to allow aggregation on their own terms. Finally, business entities with strong bargaining power have nearly unfettered power to select favorable states for litigation—even though those states are otherwise unavailable under personal jurisdiction law—through contractual forum-selection clauses, which the Obama-era Supreme Court unanimously endorsed.<sup>39</sup>

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34. See Dodge & Dodson, *supra* note 15, at 1229 n.156.

35. See Dodson, *supra* note 22, at 7–16. For a recent history of aggregation, see Judith Resnik, “Vital” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1779–80 (2017).

36. See Dodson, *supra* note 22, at 42–43.

37. See *id.* at 43. Things are more complicated for class actions. See *id.* at 37.

38. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 217 (1994) (“[A] defendant will often argue the ‘empty chair’ in the hope of convincing the jury that the [absent defendant] was exclusively responsible for the damage.”).

39. See generally *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568 (2013). For discussions of that power, see generally Scott Dodson, *Atlantic Marine and the Future of Party*

## II. DIVERSITY JURISDICTION

Unlike personal jurisdiction, which determines the geographic range of forum options, diversity jurisdiction divides state and federal courts. Diversity jurisdiction allows federal courts to hear certain cases based on state law if the parties are citizens of different states.<sup>40</sup> Historically, diversity jurisdiction has been justified on the ground that a federal forum is necessary to alleviate the perception of state bias against out-of-state litigants, though other reasons for diversity jurisdiction do exist.<sup>41</sup>

### A. Traditional Scope of Diversity Jurisdiction

The Constitution authorizes diversity jurisdiction over controversies “between Citizens of different States,”<sup>42</sup> which, the Supreme Court has held, requires only “minimal diversity” between at least one plaintiff’s citizenship and at least one defendant’s.<sup>43</sup>

Nevertheless, for much of diversity jurisdiction’s history, Congress and the Supreme Court have restrained its scope. The First Congress partially implemented the constitutional grant by passing a statute granting district courts jurisdiction over suits “between a citizen of the State where the suit is brought, and a citizen of another State.”<sup>44</sup> The 1806 case *Strawbridge v. Curtiss*<sup>45</sup> stands for the proposition that the diversity-jurisdiction statute authorizes diversity jurisdiction in multiparty cases only for cases involving *complete* diversity of citizenship.<sup>46</sup> Congress has imposed an amount-in-controversy requirement on diversity jurisdiction and has raised the limit on that requirement with regularity.<sup>47</sup> Throughout the 1900s, movements among prominent jurists to abolish or restrict diversity jurisdiction proliferated,<sup>48</sup> and some restrictions—such as expanding the citizenship of corporations to include their state of principal place of business and limiting alienage jurisdiction for lawful permanent residents—were codified.<sup>49</sup>

*Preference*, 66 HASTINGS L.J. 675 (2015) and Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014).

40. 28 U.S.C. § 1332 (2012).

41. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 122–36 (2003).

42. U.S. CONST. art. III, § 2.

43. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967).

44. Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73, 78.

45. 7 U.S. (3 Cranch) 267 (1806).

46. For more detail about *Strawbridge*’s complete diversity rule and its subsequent interpretation, see Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323, 1330–31 (2016).

47. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1, 23–24 (1996).

48. Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 98 (“Every administration since President Carter’s, the Judicial Conference, the American Law Institute, state courts, numerous public interest and legal aid organizations, and most legal scholars support the abolition or curtailment of diversity [jurisdiction].”).

49. Pub. L. No. 85-554, § 2, 72 Stat. 415, 415 (1958) (codified as amended at 28 U.S.C. § 1332(c) (2012)); see Pub. L. No. 100-702, § 203(a), 102 Stat. 4642, 4646 (1988) (codified



### B. Recent Expansions

In the last two decades, however, the scope of diversity jurisdiction has been more expansion friendly.<sup>50</sup> In 1999 and 2002, Congress codified minimal diversity in the Y2K Act<sup>51</sup> and the Multiparty, Multiforum Trial Jurisdiction Act,<sup>52</sup> respectively. In 2005, Congress more broadly expanded diversity jurisdiction by passing the Class Action Fairness Act,<sup>53</sup> which codifies minimal diversity for most interstate class actions, eliminates barriers to removal of those class actions, and circumscribes the citizenships of unincorporated businesses who are parties to such class actions.<sup>54</sup>

During this time, corporate and defense interest groups ramped up their efforts to lobby for greater access to federal courts through diversity jurisdiction. For example, the National Association of Manufacturers commissioned a study that supported the abrogation of the *Strawbridge* complete-diversity rule and a widespread return to minimal diversity.<sup>55</sup>

Meanwhile, the Supreme Court unanimously decided *Hertz Corp. v. Friend*,<sup>56</sup> which held that a corporation's principal place of business is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities," typically its headquarters.<sup>57</sup> In giving the statute this construction, the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."<sup>58</sup> This simplification gives corporations more power to control their citizenships for diversity jurisdiction purposes because it is far easier to manipulate a central headquarters than diffuse business operations. Indeed, a corporation could fairly easily isolate its citizenship in just one state

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as amended at 28 U.S.C. § 1332(a) (2012)). One notable expansion of diversity jurisdiction during this era was the Federal Interpleader Act, which granted federal jurisdiction based on minimal diversity for the narrow category of interpleader actions. *See generally* Federal Interpleader Act of 1917, 39 Stat. 929 (codified as amended at 28 U.S.C. § 1335 (2012)).

50. One outlier is *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016), which adhered to the diversity-hindering rule that unincorporated associations take the citizenships of their members. *Id.* at 1014.

51. Pub. L. 106-37, § 15, 113 Stat. 185, 201 (1999) (codified at 15 U.S.C. § 6614 (2012)).

52. Pub. L. No. 107-273, § 11020(b)(1)(A), 116 Stat. 1725, 1826 (2002) (codified as amended at 28 U.S.C. § 1369 (2012)).

53. Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12 (2005) (codified as amended at 28 U.S.C. § 1332(d) (2012)).

54. *See* C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 489 (2006).

55. JOANNA SHEPHERD, NAT'L ASS'N OF MFRS, ESTIMATING THE IMPACT OF A MINIMAL DIVERSITY STANDARD ON FEDERAL COURT CASELOADS 4 (2015), <http://www.nam.org/Advocacy/The-Center-for-Legal-Action/Estimating-the-Impact-of-a-Minimal-Diversity-Standard-on-Federal-Court-Caseloads.pdf> [<https://perma.cc/TBM4-GLQC>].

56. 559 U.S. 77 (2010).

57. *Id.* at 80–81.

58. *Id.* at 80; *see also id.* at 94 ("[A]dministrative simplicity is a major virtue in a jurisdictional statute . . . . Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims . . . . Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake . . . . Simple jurisdictional rules also promote greater predictability.").

by establishing its headquarters in its state of incorporation (or, more provocatively, overseas, thereby enabling the invocation of federal alienage jurisdiction for any lawsuit by U.S. citizens).

### C. Effects

The defense community has long favored invoking diversity jurisdiction for strategic advantages. One advantage pertains to the law applied by the federal forum. Before 1938, federal court offered an entirely different substantive law, which largely favored corporate and defense interests.<sup>59</sup> Since 1938, federal court has offered uniform procedures that, in recent years, have evolved to benefit defendants,<sup>60</sup> especially with respect to rules of pleading,<sup>61</sup> class actions,<sup>62</sup> summary judgment,<sup>63</sup> and discovery.<sup>64</sup>

A second advantage is geographical. Unlike state courts, federal courts can transfer a case across state boundaries. For defendants, that opens the possibility of transferring a case in federal court across state lines to more favorable venues, such as a defendant's home state.<sup>65</sup> In 2013, a unanimous Supreme Court made such venue transfer even more favorable to corporate defendants when it afforded forum-selection clauses near-dispositive weight in the decision to transfer a case.<sup>66</sup> Further, transfers based on such forum-selection clauses do not need to specify the applicable law.<sup>67</sup>

For these reasons, expanding opportunities to invoke diversity jurisdiction disproportionately benefits defendants.

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59. See generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 1870–1958* (1992). That regime was (largely) put to rest by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

60. See generally Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

61. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). For criticisms of these cases for their detrimental impact on plaintiffs, see, for example, Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 65–66 (2010).

62. See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). Many supporters of the Class Action Fairness Act (CAFA) were motivated by the seemingly correct belief that federal judges would be more hostile to multistate class actions than their state counterparts. See David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1252 (2007). For early assessments of CAFA, see generally Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1439 (2008).

63. See *Scott v. Harris*, 550 U.S. 372, 380–81 (2007); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–26 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–52 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986).

64. See generally Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

65. 28 U.S.C. § 1404(a) (2012) (allowing venue transfer for the convenience of the parties and witnesses).

66. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 574–75 (2013); see *id.* at 579 (“[A] proper application of § 1404(a) requires that a forum-selection clause be given controlling weight in all but the most exceptional cases.”).

67. *Id.* at 582–83.

## III. THE FUTURE OF JURISDICTION

The president has limited direct influence over federal civil procedure. That is because civil procedure in the federal courts is developed by Congress (infrequently) through statutes, the Supreme Court through the rulemaking process,<sup>68</sup> and the federal courts through the interpretive process. None of these entities reports to the president.

Nevertheless, the president exerts some indirect influence over federal civil procedure. The president certainly influences congressional agendas, and a Congress controlled by the president's political party is more likely to press an agenda that the president supports.<sup>69</sup> In addition, the president appoints federal judges, including justices of the Supreme Court, with the Senate's confirmation.<sup>70</sup> The Chief Justice of the Supreme Court, in turn, appoints members of the Advisory Committee on Civil Rules. This committee is the primary body that considers and drafts amendments to the federal rules, the membership of which is dominated by lower federal judges that the president may have appointed to the bench.<sup>71</sup> So, even without direct, formal influence over federal civil procedure, the president does wield some indirect and structural influences.

In the case of President Trump, several influences are palpable. First, he began his presidency with a Republican-controlled Congress primed to embrace business interests lobbied by pro-defendant groups like the Chamber of Commerce. Second, Trump appointed Neil Gorsuch, thus far a reliable conservative vote, to the Supreme Court, has nominated Brett Kavanaugh, another seemingly reliable conservative vote, to replace Justice Kennedy, and may have the opportunity to appoint others if additional vacancies arise. Third, Trump has already nominated and had twenty-three federal judges confirmed, and he will likely nominate many more.<sup>72</sup>

These indirect influences suggest that the recent defense-centric trends in personal jurisdiction and diversity jurisdiction chronicled above will continue or accelerate in the Trump administration. There is some evidence that that is already occurring.

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68. See 28 U.S.C. § 2072 (2012). For a history of the Rules Enabling Act, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

69. See George C. Edwards III & Andrew Barrett, *Presidential Agenda Setting in Congress*, in POLARIZED POLITICS: CONGRESS AND THE PRESSURES IN A PARTISAN ERA 109, 127 (Jon R. Bond & Richard Fleisher eds., 2000); George C. Edwards III et al., *The Legislative Impact of Divided Government*, 41 AM. J. POL. SCI. 545, 561–62 (1997).

70. U.S. CONST. art. II, § 2, cl. 2.

71. See Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1, 9 (2018); *About the Judicial Conference*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/8LTP-7DDG>] (last visited Aug. 24, 2018).

72. See *How Trump Is Making a Lasting Impact on Nation's Courts*, CBS NEWS (Jan. 24, 2018, 8:22 AM), <https://www.cbsnews.com/news/trump-impact-supreme-court-district-judges-appointments/> [<https://perma.cc/2VDS-FCPJ>]. Nearly one hundred judges have been appointed and await confirmation. See *Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/73AJ-RQAZ>] (last visited Aug. 24, 2018).

*A. Personal Jurisdiction*

The appointment of Neil Gorsuch to the Supreme Court to fill the seat left vacant by longtime conservative Justice Antonin Scalia seems unlikely to change the trajectory of the Court on matters of personal jurisdiction and diversity jurisdiction, as early indications suggest Gorsuch votes much like Scalia did.<sup>73</sup> The better prediction is that the Court will continue or even expand the trends it has already started.

Two cases from 2017, both eight-to-one decisions whose majorities included Justice Gorsuch, tend to validate that prediction. In *BNSF Railway Co. v. Tyrrell*,<sup>74</sup> the Supreme Court reaffirmed the *Daimler AG v. Bauman* test for general jurisdiction.<sup>75</sup> And, in *Bristol-Myers Squibb Co. v. Superior Court*,<sup>76</sup> the Court further narrowed specific jurisdiction by demanding a close nexus between the forum and the claim.<sup>77</sup> *Bristol-Myers Squibb* is a particularly important case because it continues *Walden*'s erosion of more relaxed relationships between the forum, the claim, and the defendant<sup>78</sup> and because it seems to validate the *Nicastro* plurality's reinvigoration of state sovereignty.<sup>79</sup> These two cases indicate that the restrictive turn of personal jurisdiction jurisprudence is likely to continue or accelerate in the Trump era.<sup>80</sup>

Two issues do present possible opportunities for countertrends in personal jurisdiction. The first is the possibility that Congress or the Supreme Court will expand, by statute or rule, the scope of personal jurisdiction in federal courts. Congress has, in the past, occasionally provided for nationwide personal jurisdiction in federal courts for certain kinds of claims,<sup>81</sup> and it could expand those opportunities. Similarly, although Rule 4(k) of the Federal Rules of Civil Procedure confines federal courts' personal jurisdiction in most other cases to their states' borders, the Supreme Court could promulgate a rule amendment broadening the scope of Rule 4's

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73. See Lola Fadulu, *Neil Gorsuch's Early Opinions Reveal a Deeply Conservative Supreme Court Justice*, QUARTZ (June 26, 2017), <https://qz.com/1015025/neil-gorsuch-early-opinions-reveal-a-deeply-conservative-supreme-court-justice/> [<https://perma.cc/B2FW-28C8>].

74. 137 S. Ct. 1549 (2017).

75. *Id.* at 1554, 1558–59. Justice Sotomayor dissented on the same grounds she dissented in *Daimler*. See *id.* at 1560 (Sotomayor, J., concurring in part and dissenting in part).

76. 137 S. Ct. 1773 (2017).

77. *Id.* at 1786. For more discussion on this point, see Dodson, *supra* note 22, at 5–6.

78. *Bristol-Myers Squibb*, 137 S. Ct. at 1781–82 (relying on *Walden* and distinguishing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)).

79. *Id.* at 1780–81 (stating that personal jurisdiction “encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question”).

80. Of course, if President Trump successfully appoints additional justices to the Supreme Court, he could have a profound impact on the ideological balance of the Court. That certainly may occur and influence different areas of the law, but with the Court already trending, near unanimously, along the President's ideological lines in the areas of personal jurisdiction and diversity jurisdiction, it is hard to see any appointment changing the Court's trend in this area. See *supra* Parts I.B., II.B.

81. Dodson & Dodge, *supra* note 15, at 1236 & n.198.

authorization.<sup>82</sup> The likelihood of either happening in the Trump administration, however, is low. Congress appears to have no appetite for such expansion.<sup>83</sup> The rulemakers have recently indicated a willingness to consider the expansion of Rule 4(k),<sup>84</sup> but the likelihood of any formal amendment proposal is uncertain.<sup>85</sup> And as more lower federal judges appointed by President Trump become candidates for membership on the rules committees, the possibility of personal jurisdiction reform diminishes further.<sup>86</sup>

The second issue is the doctrine of implied consent to personal jurisdiction that some states attempt to extract through registration statutes.<sup>87</sup> Whether a registration statute can confer personal jurisdiction despite the lack of otherwise minimum contacts is a question that is likely to ultimately be answered by the Supreme Court. Since *Daimler AG v. Bauman*, many state courts and lower federal courts have held that such statutes do not confer personal jurisdiction.<sup>88</sup> Given its current composition, the Supreme Court would likely agree.<sup>89</sup>

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82. Commentators have been urging expansion of Rule 4(k) for decades. *See, e.g.*, Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1130–33 (1989).

83. *See* Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 418–19 (2017) (explaining why expanding personal jurisdiction by statute is politically invariable). Notably, this reluctance was seen in the Obama era as well, when repeated attempts to pass the Foreign Manufacturers Legal Accountability Act failed. *See id.* at 446 n.235.

84. *See* Advisory Comm. on Civil Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. CTS. at 335–44 (Apr. 10, 2018), <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/3YX4-9MEU>].

85. *See* Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917, 933–36 (2017) (observing that rulemakers increasingly prefer to make modest changes to civil rules).

86. One potentially more promising area is the expansion of personal jurisdiction over foreign corporations. President Trump has voiced support for measures that improve American business advantages over foreign businesses and that allow U.S. federal courts to more easily assert jurisdiction over foreign defendants (especially if U.S. businesses are the plaintiffs), which means such changes might be palatable. For one approach to that expansion, see generally Dodge & Dodson, *supra* note 15 (arguing for nationwide personal jurisdiction over alien defendants).

87. *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1346 (2015) (doubting that such statutes could extract consent to general jurisdiction). *But see* *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (approving a broad theory of implied consent for specific jurisdiction).

88. *See* 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.2 n.25 (4th ed. 2017) (collecting cases).

89. I note the potential irony that the Supreme Court has strongly upheld forum consent when plaintiffs enter into a valid contract of adhesion specifying or limiting the propriety of a particular forum for a dispute. *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991). In addition, the Trump administration recently abrogated a rule proposed by the Consumer Financial Protection Bureau that would have invalidated certain arbitration agreements. *See* Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, HILL (Nov. 1, 2017), <http://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking> [<https://perma.cc/CH3K-2YWU>].

*B. Diversity Jurisdiction*

For diversity jurisdiction, the primary movement in the Trump era has been congressional. Although Trump's presidency is still in its early stages, a number of bills have been introduced in Congress that would expand diversity jurisdiction to promote the litigation advantages of corporations over consumers and plaintiffs. For example, the Innocent Party Protection Act, which the House passed on March 9, 2017, by a 224-194 margin,<sup>90</sup> would make it easier for defendants to remove cases to federal court based on diversity jurisdiction when the plaintiff joins a party that destroys complete diversity.<sup>91</sup> And Representative Steve King (R-IA) introduced a bill on July 27, 2017, that would define statutory diversity jurisdiction as minimal diversity for all cases.<sup>92</sup>

It is worth pointing out that the advantages of federal court for corporations and defendants have not abated. The Supreme Court shows little sign of retreating from its pro-business procedural rulings.<sup>93</sup> Meanwhile, Congress has become increasingly active by moving a number of bills forward that give defendants more procedural advantages in federal civil litigation. For example, the Fairness in Class Action Litigation Act and Furthering Asbestos Claims Transparency Act, which passed the House on March 9, 2017, by a 220-201 vote,<sup>94</sup> mandates increased reporting of payments to plaintiffs by trusts that pay out asbestos-exposure claims against bankrupt companies.<sup>95</sup> The Lawsuit Abuse Reduction Act, which passed the House on March 10, 2017, by a 230-188 vote,<sup>96</sup> requires the imposition of sanctions on plaintiffs and their attorneys for filing meritless lawsuits.<sup>97</sup> The Senate Judiciary Committee held a hearing on a similar bill on November 8, 2017.<sup>98</sup> Other bills affecting civil procedure in federal court that have passed the House include a medical-malpractice overhaul<sup>99</sup> and a bill to reform the citizen-suit process.<sup>100</sup> All this is to say that diversity jurisdiction trends are likely to continue to advantage defendants in the coming years.

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90. 163 CONG. REC. H2003-04 (daily ed. Mar. 9, 2017).

91. H.R. 725, 115th Cong. (2017).

92. H.R. 3487, 115th Cong. (2017). In September 2017, the bill was referred by the House Judiciary Committee to the Subcommittee on the Constitution and Civil Justice. 163 CONG. REC. H6516 (daily ed. July 27, 2017).

93. *See, e.g.*, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017) (restricting patent plaintiffs' venue options). Class actions may present a more mixed future, though that may be because the Court has already taken class actions to the brink of extinction. *See* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 972 (2017) (opining that the decline of class actions is unlikely to reverse course but shows signs of stabilizing).

94. 163 CONG. REC. H1999-H2000 (daily ed. Mar. 9, 2017).

95. H.R. 985, 115th Cong. (2017).

96. 163 CONG. REC. H2039-41 (daily ed. Mar. 10, 2017).

97. H.R. 720, 115th Cong. (2017).

98. S. 237, 115th Cong. (2017).

99. H.R. 1215, 115th Cong. (2017). This bill passed the House 218 to 210 in June 2017. 163 CONG. REC. H5286-87 (daily ed. June 28, 2017).

100. H.R. 469, 115th Cong. (2017). This bill passed the House 234 to 187 in October 2017. *See* 163 CONG. REC. H8208-09 (daily ed. Oct. 25, 2017).

## CONCLUSION

In some ways, the pro-defendant developments in personal jurisdiction and diversity jurisdiction since the election of Donald Trump are not surprising. What is perhaps more surprising is that they do not mark a dramatic break from the Obama years. The courts, Congress, and rulemakers had already begun a pro-defendant trend before Trump became president. Trump era developments, then, are better seen as continuations or expansions of those trends.

A final point is worth noting: the Trump era's impact will likely persist after Trump leaves office. Legislation, once passed, is difficult to undo. Court decisions like *Tyrrell* add to the density of precedent. And President Trump's federal judicial appointees serve under life tenure. Trump's influence will be felt well after the end of his presidency.