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## New Limits on General Personal Jurisdiction: Examining the Retroactive Application of *Daimler* in Long-Pending Cases

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# New Limits on General Personal Jurisdiction: Examining the Retroactive Application of *Daimler* in Long-Pending Cases

Brooke A. Weedon\*

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### I. Introduction

“If it’s a new test, why can’t they use it?”<sup>1</sup>

This comment by Judge George B. Daniels of the U.S. District Court for the Southern District of New York fits a wealth of controversy into just a few words.<sup>2</sup> With the Supreme Court’s apparent limiting of general personal jurisdiction in *Daimler AG v. Bauman*<sup>3</sup> in January of 2014, defendants across the country began attempts to have the cases against them dismissed on the grounds that the particular courts could no longer exercise general personal jurisdiction over them.<sup>4</sup> These defendants believe that the *Daimler* interpretation of general personal jurisdiction fundamentally changed the previously controlling *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>5</sup> test, and several judges in federal district courts agree.<sup>6</sup> Spurring the controversy, however, are judges operating under the assumption that *Daimler* did not change the already existing *Goodyear* test and thus, denying dismissals to other defendants in the same situation.<sup>7</sup> Judge Daniels’s position depends on the assumption—one that he

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1. Pete Brush, *Daimler Ruling Comes to Banks’ Aid in Yen-Libor Action*, LAW360 (Sept. 30, 2014, 3:40 PM), <http://www.law360.com/articles/582588> (last visited Sept. 28, 2015) (on file with the Washington and Lee Law Review).

2. *See id.* (noting that the judge lacked sympathy for the plaintiff’s claim that the “defendants had waived jurisdictional defenses regardless of *Daimler* by not asserting them earlier in the more than two-year-old case”).

3. 134 S. Ct. 746 (2014).

4. *See infra* Part IV.A (describing cases in which judges granted such dismissals and others in which judges denied such dismissals).

5. 131 S. Ct. 2846 (2011).

6. *See infra* Part IV.A (describing the cases in which judges granted dismissals based on lack on general personal jurisdiction).

7. *See infra* Part IV.A (explaining that these denials of dismissals occur in cases in which defendants previously waived the personal jurisdiction defense).

thinks is obvious—that *Daimler* did create a new test.<sup>8</sup> The problem, however, is that others persuasively argue that the *Daimler* and *Goodyear* tests are the same.<sup>9</sup> Apart from the issue of whether *Daimler* created a new test, Judge Daniels’s comment also encapsulates the separate issue of whether—even if *Daimler* created a new test—defendants are entitled to relief under the new case, especially if they have already waived the personal jurisdiction defense of Rule 12(b)(2).<sup>10</sup> This Note proceeds by reconciling these two issues in an attempt to propose the correct outcome for litigants regarding the treatment of *Daimler* in long-pending cases.<sup>11</sup>

The Supreme Court’s ruling in *Daimler* was a further development of *Goodyear* and personal jurisdiction law.<sup>12</sup> In delivering the Court’s ruling, Justice Ginsburg declared, “[T]he inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.’”<sup>13</sup> Despite the apparent intention to clarify the existing law on general jurisdiction, the *Daimler* ruling incited disagreement as to the extent the *Goodyear* rule changed as a result of *Daimler* and even as to whether *Daimler* changed the *Goodyear* rule at all.<sup>14</sup> Some argue that *Daimler* created a much

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8. See *infra* Part II.C (explaining the controversy over the relationship between *Goodyear* and *Daimler*).

9. See *infra* Part II.C (noting the argument that *Goodyear* already pronounced the standard repeated in *Daimler*).

10. See FED. R. CIV. P. 12(b)(2) (providing that a party must raise a defense based on lack of personal jurisdiction in the responsive pleading); *infra* Part III (explaining the development of retroactivity law).

11. See *infra* Part IV (proposing that *Daimler* must be applied retroactively even when defendants previously waived the personal jurisdiction defense).

12. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

13. *Id.* at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

14. Compare Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. EN BANC 197, 199 (2014) (“The Court meant what it said in *Goodyear*: general jurisdiction should be limited, except in an exceptional case, to a corporation’s state of incorporation and principal place of business.”), and Case

stricter test for general jurisdiction than was previously in existence, but others counter that the *Daimler* decision simply restated the existing *Goodyear* rule.<sup>15</sup>

The disagreement over *Daimler*'s significance is especially problematic in long-pending cases in which defendants have moved for dismissals on the grounds that personal jurisdiction no longer exists because of the apparently stricter *Daimler* test.<sup>16</sup> To decide whether to grant or deny such motions to dismiss, judges must first determine whether the defendant already waived the personal jurisdiction defense and, if so, whether the waiver will preclude the application of the *Daimler* test.<sup>17</sup> These determinations require the judge to decide whether the new personal jurisdiction test applies retroactively and whether any previous waiver matters in the face of a new constitutional pronouncement.<sup>18</sup> Then, if the judge allows the defendant to use the *Daimler* test and agrees that personal jurisdiction no longer exists under *Daimler*, the judge will often have the option to either dismiss the relevant claims or transfer the claims if there is another jurisdiction where personal jurisdiction does exist under *Daimler*.<sup>19</sup>

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Comment, *Personal Jurisdiction—General Jurisdiction—Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 311 (2014) (arguing that Justice Ginsburg applied the same personal jurisdiction theory in both *Goodyear* and *Daimler*), with Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705, 707–08 (2014) (identifying *Daimler* as part of the recent trend of “declining to allow the extraterritorial reach of American courts over foreign nationals as a matter of subject matter jurisdiction” rather than a clarification of *Goodyear*), and Eric H. Weisblatt & Claire Frezza, *Who to Sue and Where in ANDA Litigation: Personal Jurisdiction Post-Daimler*, 69 FOOD & DRUG L.J. 351, 351–52 (2014) (stressing that *Daimler* provides a “new rule for general jurisdiction” that requires “a stricter analysis of where a defendant company is ‘at home’ sufficient to cause it to be haled into court under general jurisdiction principles”).

15. See sources cited *supra* note 14 (providing examples of scholars’ opposing positions as to whether *Daimler* states a new test or simply restates the *Goodyear* test).

16. See *infra* Part IV (noting in particular that statutes of limitations can prevent plaintiffs from litigating the case again).

17. See *infra* Part IV (explaining that the decision is much less complex in cases in which there was no waiver).

18. See *infra* Part IV (arguing that waiver does not matter in the face of a new constitutional pronouncement).

19. See *infra* Part IV (arguing that judges should choose transfer over

In arguing that *Daimler* created a new test, some defendants have raised new personal jurisdiction defenses and achieved dismissals.<sup>20</sup> Other defendants, however, have raised the same defenses and been denied dismissals.<sup>21</sup> Dismissals resulting from the *Daimler* decision have been granted even when the case has been pending for years and the plaintiff sued under personal jurisdiction that was in accord with case law at the time.<sup>22</sup> One judge even granted a dismissal despite the ability to transfer the case instead.<sup>23</sup>

This Note argues that courts should apply the *Daimler* decision when defendants raise this newly available personal jurisdiction defense.<sup>24</sup> In light of both personal jurisdiction law and retroactivity law, this Note argues that courts should permit defendants to use the new *Daimler* test even when the defendant did not raise a Rule 12(b)(2) defense and thus waived the personal jurisdiction defense.<sup>25</sup> This argument is qualified, however, by the additional argument that courts should refrain from dismissing the case based on a lack of personal jurisdiction under *Daimler* in favor of transferring the case when possible.<sup>26</sup> Choosing transfer over dismissal when possible would mitigate the unfairness to

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dismissal when possible).

20. See, e.g., *Fed. Home Loan Bank of Bos. v. Ally Fin., Inc.*, No. 11-10952-GAO, 2014 WL 4964506, at \*4 (D. Mass. Sept. 30, 2014) (granting defendant's motion to dismiss based on lack of personal jurisdiction in light of the *Daimler* ruling); see also *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134 (2d Cir. 2014) (determining that, in light of *Daimler*, the district court erred in finding that it could exercise general jurisdiction over the appellant bank).

21. See, e.g., *Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, No. CIV-11-1284-D, 2014 WL 4471606, at \*5 (W.D. Okla. Sept 10, 2014) (denying dismissal based on defendant's previous waiver of the personal jurisdiction defense); *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 8 F. Supp. 3d 9, 14 (D.D.C. 2014) (denying dismissal based in part on the argument that *Daimler* did not change the law as it was already stated in *Goodyear*).

22. See, e.g., *Fed. Home Loan Bank*, 2014 WL 4964506, at \*4 (denying transfer request even though the venue plaintiff requested had personal jurisdiction over defendant).

23. See *id.* (describing a situation in which transfer was an option).

24. See *infra* Part IV.A (noting that this should be the result regardless of whether the defendant previously waived the personal jurisdiction defense).

25. See *infra* Part IV.A (explaining that *Daimler* was a new constitutional pronouncement and thus applies retroactively).

26. See *infra* Part IV.B (explaining the unfairness of dismissal in the context of long-pending cases).

plaintiffs of having their claims in long-pending cases barred by statutes of limitations.<sup>27</sup> If the claim is dismissed and the statute of limitations has expired, the plaintiff will not be able to bring the claim again in a jurisdiction where there is personal jurisdiction under *Daimler*.<sup>28</sup>

Part II of this Note examines the development of personal jurisdiction,<sup>29</sup> and Part III discusses the Supreme Court's treatment of retroactivity.<sup>30</sup> Part IV argues that defendants should be allowed to raise the new *Daimler* personal jurisdiction argument even when they failed to raise a Rule 12(b)(2) defense prior to the Supreme Court's decision in *Daimler*.<sup>31</sup> Part IV then examines the consequences of allowing defendants to do this in long-pending cases and concludes by proposing that—out of fairness to plaintiffs—cases should be transferred rather than dismissed when possible.<sup>32</sup>

## II. Development of Personal Jurisdiction Law: Goodyear to Daimler

### A. Pre-Goodyear Personal Jurisdiction

Before 2011, most personal jurisdiction jurisprudence focused on specific jurisdiction, not general jurisdiction.<sup>33</sup> The Court first began to distinguish between what came to be known as specific jurisdiction and general jurisdiction in 1945 with *International*

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27. See *infra* Part IV.B (noting that transfer will not always be possible).

28. See *infra* Part IV.B (emphasizing the unfairness of this outcome if transfer was an option).

29. See *infra* Part II (focusing on the relationship between *Goodyear* and *Daimler*).

30. See *infra* Part III (focusing on the current state of adjudicative retroactivity law).

31. See *infra* Part IV (emphasizing that new constitutional pronouncements always apply retroactively).

32. See *infra* Part IV (noting that this preferable result is not always possible).

33. See Camilla Cohen, Case Comment, *Goodyear Dunlop's Failed Attempt to Refine the Scope of General Personal Jurisdiction*, 65 FLA. L. REV. 1405, 1406 (2013) (emphasizing the limited scope and clarity of general jurisdiction case law before the Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown* in 2011).

*Shoe Co. v. Washington*.<sup>34</sup> The case involved a suit brought by the state of Washington against a defendant that failed to contribute to the state unemployment compensation fund.<sup>35</sup> The state statutes required the defendant to make annual contributions to the fund based on its employees' services in the state.<sup>36</sup> International Shoe Co. was a Delaware corporation with its principal place of business in Missouri, but had manufacturing and distribution branches in other states, including Washington.<sup>37</sup> International Shoe Co. argued that the presence of its salesmen in Washington was not sufficient for the "presence" requirement of personal jurisdiction and that, consequently, the company was not subject to jurisdiction in Washington.<sup>38</sup>

The Court disagreed with International Shoe Co.'s presence argument and created a new test for general personal jurisdiction—the minimum contacts test—which requires a defendant to have sufficient minimum contacts with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>39</sup> In creating this test, the Court distinguished between specific and general jurisdiction for the first time, holding that International Shoe Co. was subject to specific jurisdiction in Washington because the activities conducted by the employees in Washington gave rise to the suit.<sup>40</sup> The Court distinguished this definition of specific jurisdiction with its characterization of general jurisdiction as follows:

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34. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (distinguishing between specific and general jurisdiction on the basis that where there is not continuous activity in the forum state, suits must be related to the activity, but where there is continuous activity in the forum state, suits can be entirely unrelated to the activity).

35. See *id.* at 311 (noting that the state unemployment compensation fund was "enacted by state statutes").

36. See *id.* at 312 (defining the required contribution as "a specified percentage of the wages payable annually" to the employee).

37. See *id.* at 313 (noting also that the defendant has no office in Washington and "makes no contracts either for sale or purchase of merchandise there").

38. See *id.* at 314–15 (emphasizing that the presence requirement must be satisfied for there to be jurisdiction by the state courts).

39. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

40. See *id.* at 320 ("The obligation which is here sued upon arose out of those very activities.").

While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought 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.<sup>41</sup>

This first articulation of general jurisdiction adopted a new analysis based on “continuous and systematic” activities, but did not define what constitutes sufficiently continuous and systematic contacts with the jurisdiction.<sup>42</sup> In later decisions culminating with *Daimler*, the Court repeatedly attempted to define the bounds of general jurisdiction.<sup>43</sup>

The only two cases analyzing the scope of general personal jurisdiction prior to 2011 were *Perkins v. Benguet Consolidated Mining Co.*<sup>44</sup> in 1952 and *Helicopteros Nacionales de Colombia v. Hall*<sup>45</sup> in 1984.<sup>46</sup> In *Perkins*, the Court held that general jurisdiction was appropriate because there was corporate headquarters-level activity by the defendant in the forum state.<sup>47</sup> The Court explained that it used the *International Shoe* analysis to reach this holding, but did not provide a detailed account of the Court’s reasoning in determining that the facts of the case satisfied the *International Shoe* analysis.<sup>48</sup> *Helicopteros* involved a wrongful

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41. *Id.* at 318 (citations omitted).

42. See James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 979–80 (2012) (indicating that future decisions would necessarily clarify the general jurisdiction analysis).

43. See *infra* Parts II.B–C (focusing on the extent to which *Daimler* built on the *Goodyear* standard for general personal jurisdiction).

44. 342 U.S. 437 (1952).

45. 466 U.S. 408 (1984).

46. See Cohen, *supra* note 33, at 1406 (“Consequently, lower courts were left to develop the contours of general personal jurisdiction, resulting in a hodgepodge of inconsistent holdings that often conflated several important distinctions between specific and general jurisdiction.”).

47. See *Perkins*, 342 U.S. at 445 (“The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.”).

48. See Pielemeier, *supra* note 42, at 977 (noting that the Court offered “little further reasoning beyond quotation of *International Shoe*’s discussion of suits on

death suit brought in Texas courts against the corporate Colombian owner of a helicopter that crashed in Peru, killing four U.S. citizen passengers.<sup>49</sup> The Court held that the defendant's contacts with the forum state of Texas were insufficient to support a conclusion of general jurisdiction because they were not continuous and systematic.<sup>50</sup> In reaching this holding, the Court disagreed with the Texas Supreme Court's assessment that the corporation's Texas purchases and training trips constituted sufficient contacts for general jurisdiction.<sup>51</sup>

It is difficult to reconcile *Helicopteros* and *Perkins* because *Helicopteros* failed to explain why the contacts in *Perkins* were stronger than those in *Helicopteros* in a manner that would provide other courts with any framework for analyzing general jurisdiction under different sets of facts.<sup>52</sup> The apparent new test for whether a defendant has "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*" left much open to interpretation by the lower courts.<sup>53</sup> *Perkins* made clear that "[c]ontacts warranting a conclusion that the forum state was the defendant's principal place of business" justified the exercise of general jurisdiction, and *Helicopteros* explained that "purchases of millions of dollars worth of products and training over a seven-year period in the forum state were not sufficient."<sup>54</sup> The very limited scope of these examples, however, left lower courts without

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causes of action arising from dealings distinct from forum activities, and a lengthy factual description of the defendant's activities in Ohio").

49. See *Helicopteros*, 466 U.S. at 409–10 (noting that the corporation's principal place of business was also in Colombia and that its business was "providing helicopter transportation for oil and construction companies in South America").

50. See *id.* at 416 (examining all of the defendant's contacts with the Texas forum in turn and concluding that they do not "constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*").

51. See *id.* at 417 (declaring that *Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), "makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction").

52. See Cohen, *supra* note 33, at 1411 (explaining that both the *Perkins* and *Helicopteros* opinions simply listed the defendants' contacts with the forum in each case without any meaningful discussion as to why some contacts were considered stronger than others).

53. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984).

54. Pielemeier, *supra* note 42, at 979–80.

direction on how to apply the cases to other situations.<sup>55</sup> This confusion required the Court to provide additional guidance on the general jurisdiction analysis in subsequent decisions.<sup>56</sup>

### *B. General Personal Jurisdiction After Goodyear*

The Court in *Goodyear* established that general jurisdiction could be exerted over a defendant corporation only when the corporation is fairly regarded as “at home” in the forum state.<sup>57</sup> In that case, a bus accident in France killed two minor North Carolina residents, and the estates of the minors brought suit against Goodyear USA and its foreign subsidiaries for producing the defective bus tire.<sup>58</sup> The foreign subsidiaries moved to dismiss for lack of personal jurisdiction and the North Carolina Court of Appeals affirmed the lower court’s denial of the motion.<sup>59</sup> The Supreme Court disagreed with the North Carolina court’s stream-of-commerce analysis on the basis that “ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.”<sup>60</sup> The Court ultimately concluded that general personal jurisdiction, unlike specific personal jurisdiction,

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55. See *id.* at 979 (noting that lower courts have reached a “wide variety of results” using *International Shoe*, *Perkins*, and *Helicopteros* as guidance).

56. See *infra* Parts II.B–C (explaining how *Goodyear* and then *Daimler* provided this necessary guidance).

57. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011) (declaring that petitioners were not at home in North Carolina because “[t]heir attenuated connections to the State . . . fall far short of the ‘continuous and systematic general business contacts’ necessary to entertain a suit against them on claims unrelated to anything that connects them to the State” (quoting *Helicopteros*, 466 U.S. at 416)).

58. See *id.* at 2850 (noting that the named defendants included Goodyear USA and three of its subsidiaries in Turkey, France, and Luxembourg).

59. See *id.* (explaining the determination of the Court of Appeals that the higher threshold for general jurisdiction was crossed “when petitioners placed their tires ‘in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina’” (quoting *Brown v. Meter*, 681 S.E.2d 382, 394 (2009))).

60. *Id.* at 2855.

requires more than continuous activity within a state.<sup>61</sup> The defendant must be at home in the forum.<sup>62</sup>

This rule for general jurisdiction as stated in *Goodyear* did not, however, provide the lower courts with meaningful guidance for deciding future general jurisdiction issues.<sup>63</sup> The opinion makes clear that general jurisdiction can no longer be based solely on regular sales within the forum and that general jurisdiction requires a significantly higher connection to a forum than specific jurisdiction.<sup>64</sup> Yet, the opinion is much less clear on what is required for a defendant to be at home in a forum.<sup>65</sup> The opinion suggests that a corporate defendant will be considered at home only in its state of incorporation and principal place of business, but does not explicitly state such strict limitations for general jurisdiction.<sup>66</sup> This suggestion creates additional problems for plaintiffs wishing to litigate against foreign corporations in the United States. Such restrictions would entirely preclude a plaintiff from bringing suit in any U.S. forum.<sup>67</sup> The Court addressed this unique issue three years after the *Goodyear* decision in *Daimler*.<sup>68</sup>

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61. See *id.* at 2856 (emphasizing that continuous activity of any sort will not necessarily be sufficient for general personal jurisdiction).

62. See *id.* (explaining that the defendant's ties to the forum State must "render them essentially at home" there).

63. See Cohen, *supra* note 33, at 1406–07 ("While the decision may be interpreted as refining the test for asserting general jurisdiction, *Goodyear* could just as easily be narrowly confined to its facts in light of the manner in which the Court framed the issues.").

64. See Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 549 (2012) (arguing that the distinction between general and specific jurisdiction makes "clear that limited sales do not satisfy the 'substantial' activity or 'continuous and systematic' contacts required for general jurisdiction").

65. See Pielemeier, *supra* note 42, at 990 ("[T]he opinion signals that other bases for general jurisdiction will need to entail substantial contacts warranting the conclusion that the defendant is 'at home' in the forum.").

66. See *id.* (explaining that the oral argument transcript shows that several justices suggested general jurisdiction would be limited to the defendant's state of incorporation and principal place of business).

67. See *id.* at 991 (suggesting that a better test for foreign corporate defendants would find "a place where they are 'at home' in the United States").

68. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (holding that California could not exercise general jurisdiction over a German corporation because the corporation was not incorporated in California and did not have its principal place of business in California).

*C. General Personal Jurisdiction After Daimler*

In *Daimler AG v. Bauman*, the Court reversed the U.S. Court of Appeals for the Ninth Circuit's decision that personal jurisdiction existed over the defendant German corporation, Daimler AG.<sup>69</sup> Twenty-two Argentinian residents sued Daimler AG under the Alien Tort Statute<sup>70</sup> and the Torture Victim Protection Act<sup>71</sup> in the U.S. District Court for the Northern District of California.<sup>72</sup> The plaintiffs alleged that a Daimler AG subsidiary, Mercedes-Benz Argentina, collaborated with perpetrators of Argentina's Dirty War to harm and kill employees of the Argentinian subsidiary and those employees' families.<sup>73</sup> These Argentinian victims asserted that the Northern District of California had jurisdiction over Daimler AG because of the California contacts of another Daimler AG subsidiary, Mercedes-Benz USA, LLC (MBUSA).<sup>74</sup> Daimler AG moved to dismiss in the Northern District of California for lack of personal jurisdiction, arguing that the California contacts of the U.S. subsidiary were not a sufficient basis for subjecting the foreign corporation to the court's general jurisdiction.<sup>75</sup> The U.S. subsidiary was incorporated in Delaware, had its principal place of business in New Jersey, had several offices in California, and distributed its vehicles to many

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69. See *id.* at 753 (explaining that the Ninth Circuit based its ruling on the apparent satisfaction of the agency test).

70. See 28 U.S.C. § 1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

71. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2012)) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture shall, in a civil action, be liable for damages to that individual.").

72. See *Daimler*, 134 S. Ct. at 751 (noting that claims were also filed under the laws of California and Argentina for wrongful death and intentional infliction of emotional distress).

73. See *id.* at 751–52 (emphasizing that none of the incidents in the complaint occurred in the United States).

74. See *id.* at 752 (explaining that MBUSA purchases vehicles from Daimler AG in Germany and imports them to the United States for resale).

75. See *id.* (explaining that in response to the motion, plaintiffs "submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California").

parts of the United States, including California.<sup>76</sup> The district court determined that the distribution of vehicles to California was insufficient to exert personal jurisdiction over Daimler AG and granted Daimler AG's motion to dismiss, but the Ninth Circuit disagreed and reversed.<sup>77</sup>

In reversing the Ninth Circuit ruling, the Supreme Court addressed “whether a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary.”<sup>78</sup> In the course of establishing that Daimler AG was not at home in the forum state, the Court never expressly addressed the Ninth Circuit’s agency theory that appeared “to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*.”<sup>79</sup> Although the Court probably would have rejected the agency theory, it did not reach the issue because—even assuming that the U.S. subsidiary was at home in California—Daimler AG’s California contacts were nonetheless too slim to render the foreign corporation at home in the state.<sup>80</sup> The Court also addressed the transnational issues that it failed to address comprehensively in *Goodyear*.<sup>81</sup> The Court justified its strict interpretation of *Goodyear* in part because of the risks a more lenient interpretation would have on international comity.<sup>82</sup>

There has been much debate over what exactly the *Daimler* Court accomplished with its ruling.<sup>83</sup> Some scholars argue that the

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76. *See id.* (“MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.”).

77. *See id.* (“[O]ver 10% of all sales of new vehicles in the United States take place in California, and MBUSA’s California sales account for 2.4% of Daimler’s worldwide sales.”).

78. *Id.* at 759.

79. *Id.* at 760.

80. *See id.* at 759 (“*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.”).

81. *See id.* at 762 (noting that the Ninth Circuit “paid little heed to the risks to international comity its expansive view of general jurisdiction posed”).

82. *See id.* at 763 (explaining that other nations have more limited approaches to personal jurisdiction and “that subjecting Daimler AG to general jurisdiction in California would not accord with the ‘fair play and substantial justice’ due process demands”).

83. *See, e.g.,* Childress III, *supra* note 14, at 201–02 (examining what the

*Daimler* decision imposed additional limitations on personal jurisdiction beyond the limitations imposed by *Goodyear*.<sup>84</sup> Other scholars take the position that *Daimler* simply reiterated the already-existing *Goodyear* test.<sup>85</sup> On the one hand, the fact that the Ninth Circuit made its decision before the *Goodyear* ruling—and had it made the decision after *Goodyear*, it likely would have decided differently—supports those advocating for the latter position.<sup>86</sup> In light of the *Goodyear* ruling, the *Daimler* plaintiffs overreach “[i]n asking the court to essentially go back to the drawing board and ignore the specific showings required by general personal jurisdiction.”<sup>87</sup> On the other hand, the fact that *Goodyear* did not specifically address how vicarious jurisdiction fits into the “essentially at home” standard supports those advocating for the former position.<sup>88</sup> This is particularly relevant

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*Daimler* court failed to address and what will be the grounds for future general jurisdiction disagreements); Hoffheimer, *supra* note 64, at 551–52 (arguing that the decision could support both a flexible approach “that approves general jurisdiction in multiple states where a foreign corporation has strong permanent connections” and a restrictive approach “that limits general jurisdiction to the place of incorporation and . . . the principal place of business”).

84. See, e.g., Mullenix, *supra* note 14, at 707–08 (identifying *Daimler* as part of the recent trend of “declining to allow the extraterritorial reach of American courts over foreign nationals as a matter of subject matter jurisdiction” rather than a clarification of *Goodyear*); Weisblatt & Frezza, *supra* note 14, at 351–52 (stressing that *Daimler* provides a “new rule for general jurisdiction” that requires “a stricter analysis of where a defendant company is ‘at home’ sufficient to cause it to be haled into court under general jurisdiction principles”).

85. See, e.g., Childress III, *supra* note 14, at 199 (“The Court meant what it said in *Goodyear*: general jurisdiction should be limited, except in an exceptional case, to a corporation’s state of incorporation and principal place of business.”); Case Comment, *supra* note 14, at 311 (arguing that Justice Ginsburg applied the same personal jurisdiction theory in both *Goodyear* and *Daimler*).

86. See Todd W. Noelle, Supreme Court Commentary, *At Home in the Outer Limits: DaimlerChrysler v. Bauman and the Bounds of General Personal Jurisdiction*, 9 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 17, 40 (2013) (“Unless the Court decides to expand its general jurisdiction jurisprudence far beyond where it currently stands, the Court will almost certainly reverse.”).

87. *Id.* at 41.

88. See Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler v. Bauman*, 34 U. PA. J. INT’L L. 765, 782 (2013) (“[T]he key question remaining is whether there is anything in *Goodyear*’s articulation of the ‘essentially at home standard’ that would preclude the kind of excessive vicarious jurisdiction exercises that courts frequently permit.”). In this context, the term “vicarious jurisdiction” describes “any attempt that is made to impute the contacts of one person or entity to

for foreign corporations such as Daimler AG because “the distinction between domestic and foreign entities indeed may have been precisely what the [*Goodyear*] Court had in mind when it intentionally left the door more ajar than it otherwise needed.”<sup>89</sup> This observation renders plausible the argument that *Daimler* did create a new general personal jurisdiction test—one that is particularly important for foreign defendants—rather than simply restating the already existing *Goodyear* test.<sup>90</sup>

Both of the aforementioned positions demonstrate merit. The confusion as to the relationship between *Goodyear* and *Daimler* has resulted in inconsistent results among lower courts in dealing with defendants’ recent assertions of *Daimler* in long-pending cases.<sup>91</sup> The most logical way to reconcile the two positions—and the recommendation of this Note—is to conclude that *Daimler* is not inconsistent with *Goodyear* because *Daimler* builds off of the earlier *Goodyear* test.<sup>92</sup> In building off of *Goodyear*, however, *Daimler* does provide its own distinct test that offers more specific guidance to lower courts on how to apply the at home standard, especially to foreign corporate defendants.<sup>93</sup> The previous lack of clarification on how to apply the somewhat cryptic *Goodyear* test to these specific types of defendants led many courts and litigants to believe that the test was more lenient than the Court meant it to be when it decided *Goodyear*.<sup>94</sup> *Daimler* necessarily developed a

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another.” *Id.* at 765. The term is most often associated with corporate entities such as Daimler AG, especially “when the plaintiff tries to establish jurisdiction over a nonresident corporate parent by looking to the forum activities of its subsidiaries.” *Id.* at 765–66.

89. *Id.*

90. *See id.* at 783 (arguing that the Ninth Circuit’s *Daimler* ruling “stretches the reasonableness of exercising general jurisdiction vicariously beyond any constitutional limit that Justice Ginsburg’s *Goodyear* opinion can plausibly be read to recognize”).

91. *See infra* Part IV (arguing that these inconsistent results are a consequence of misunderstandings as to the relevant personal jurisdiction and retroactivity law).

92. *See* Stephanie Denker, Comment, *The Future of General Jurisdiction: The Effects of Daimler AG v. Bauman*, 20 FORDHAM J. CORP. & FIN. L. 145, 162 (2014) (arguing that *Daimler* does not overrule *Goodyear*, but rather clarifies it).

93. *See id.* (“The Court’s reliance on *Goodyear*’s ‘at home’ standard and the Court’s application of the paradigm forum states in the *Goodyear* opinion indicates its reluctance to stray from precedent.”).

94. *See* Fed. Home Loan Bank of Bos. v. Ally Fin., Inc., No. 11-10952-GAO,

clearer and more specific test because many courts were applying *Goodyear* incorrectly.<sup>95</sup> Thus, *Daimler* does constitute a new constitutional pronouncement even though it is not inconsistent with *Goodyear*.<sup>96</sup> This Note's subsequent arguments elaborate on the logic of this proposed reconciliation.<sup>97</sup>

### III. Retroactivity and Exceptions to Retroactivity

#### A. Adjudicative Retroactivity Versus Legislative Retroactivity

In any discussion of retroactivity doctrine, the distinction between adjudicative retroactivity and legislative retroactivity is critical.<sup>98</sup> An analysis of adjudicative retroactivity requires recognition of the fact that judicial decisions concern three different types of law: statutes, common law, and the Constitution.<sup>99</sup> Adjudicative retroactivity as to the interpretation of federal statutes has always been considered appropriate because the language of the rules does not change as a result of the judicial decision; the new decision simply declares that previous interpretations of the language were wrong.<sup>100</sup> Adjudicative retroactivity as to the common law is unique because—unlike with statutes—the positive source of the law is the evolution of the judicial decisions themselves.<sup>101</sup>

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2014 WL 4964506, at \*2 (D. Mass. Sept. 30, 2014) (demonstrating a situation in which a judge found personal jurisdiction to exist in its earlier application of *Goodyear*, but not later when the defendant raised *Daimler*).

95. See *id.* (describing how the judge reached different conclusions using the *Goodyear* and *Daimler* versions of the general personal jurisdiction test).

96. See Denker, *supra* note 92, at 162 (emphasizing that the underlying premise is the same in both *Goodyear* and *Daimler*).

97. See *infra* Part IV.A (explaining that *Daimler* must be applied retroactively because it is a development of *Goodyear* and thus, a new constitutional pronouncement).

98. See Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1076 (1999) (differentiating between several sources of law).

99. See *id.* (“The differing positive sources of the law being changed impart a different character to each type of decision.”).

100. See *id.* (“Consequently, retroactivity in statutory interpretation is not very difficult.”).

101. See *id.* (“With no positive source independent of judicial decisions, the law must change as the decisions change. Consequently, it makes sense to

The interpretation of constitutional law is analogous to common law in that the law is the evolution of judicial decisions.<sup>102</sup> While the Constitution itself is a source of positive law separate from the evolution of judicial decisions, “the view that the Constitution means now what it always has, and always will, has serious difficulties.”<sup>103</sup> Much of the historical difficulty associated with retroactivity rules for constitutional interpretation comes from the fact that complex case law guides constitutional interpretation rather than comprehensive statutes or constitutional provisions.<sup>104</sup> Yet, despite the traditional recognition of the unique nature of the retroactivity of constitutional law, the Court has retreated from this view in favor of treating retroactivity the same for both constitutional law and statutory interpretation.<sup>105</sup> Today, the same presumption of retroactivity that has always existed for statutory interpretation now also exists for constitutional interpretation.<sup>106</sup>

Unlike adjudicative retroactivity, legislative retroactivity is generally not appropriate.<sup>107</sup> Despite this general presumption that legislation is not retroactive, the matter is complicated by the distinction between procedural legislative retroactivity and substantive legislative retroactivity.<sup>108</sup> While new legislation that would have a substantive effect on litigants is prospective and does not apply to pending cases, legislation that is considered

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distinguish between old law and new law.”).

102. See *id.* at 1076–77 (describing the Constitution as similar to common law in that the doctrines embodied in the text have evolved over time through judicial decisions).

103. *Id.* at 1076.

104. See Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 106 (2010) (explaining that, as a result of retroactivity rules being completely judge-made, the Supreme Court has drastically changed the rules on multiple occasions in the last fifty years).

105. See *infra* Part III.B (emphasizing that there is a firm rule of retroactivity for adjudication generally).

106. See *infra* Part III.B (explaining why new constitutional pronouncements are always retroactive).

107. See Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1016 (2006) (“In their ideal forms, legislation is prospective and general, while adjudication is retrospective and particular.”).

108. See Dane Reed Ullian, Note, *Retroactive Application of State Long-Arm Statutes*, 65 FLA. L. REV. 1653, 1662 (2013) (noting that there is an exception to the general prospectivity rule for procedural and remedial laws).

procedural or remedial—not substantive—will generally have a retroactive effect on litigants in pending cases.<sup>109</sup> As will be discussed later in this Note, personal jurisdiction long-arm statutes are generally considered procedural or remedial—not substantive—and, thus, courts apply the statutes retroactively to litigants in cases on direct review.<sup>110</sup>

Because general personal jurisdiction as it was clarified by *Daimler* should, by analogy, also be considered procedural or remedial, it makes some sense for defendants to argue that *Daimler* should be applied retrospectively for this reason.<sup>111</sup> By extension, it would also make sense for plaintiffs to counter with the argument that a previous waiver of the personal jurisdiction defense operates as an indirect restraint on retroactivity.<sup>112</sup> Yet, as will be argued throughout the rest of this Note, the Court's clarification of *Goodyear* through *Daimler* is a matter of constitutional interpretation by the judiciary, not legislation through a statute.<sup>113</sup> Thus, instead of relying on a few exceptions to the presumption of legislative prospectivity, defendants will be able to utilize the much more advantageous firm rule of adjudicative retroactivity.<sup>114</sup> Unlike with the long-arm statutes, plaintiffs will not be able to argue that there is any indirect restraint on retroactivity, as there are no exceptions to adjudicative retroactivity.<sup>115</sup>

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109. *See id.* at 1663 (“Substantive laws either modify or enhance a preexisting right or create a right where one did not exist. Procedural laws, on the other hand, address the means by which one vindicates a preexisting right.”).

110. *See infra* Part III.C (explaining that this conclusion is based on legislative retroactivity law).

111. *See infra* Part III.C (explaining the difference between long-arm statutes and Supreme Court decisions in the retroactivity context).

112. *See infra* Part III.C (attempting to apply retroactivity law in the personal jurisdiction context).

113. *See infra* Part III.B (emphasizing that the law of legislative retroactivity does not apply to long-pending cases deciding whether to allow defendants to use *Daimler*).

114. *See infra* Part III.B (explaining that adjudicative retroactivity is more favorable to defendants because new constitutional pronouncements are always retroactive).

115. *See infra* Part III.C (rejecting the argument that principles of legislative retroactivity apply to the long-pending cases at issue in this Note).

*B. General Rule for Adjudicative Retroactivity*

Before 1971, the law of adjudicative retroactivity was confused and vague.<sup>116</sup> The first attempt to coherently define the law of adjudicative retroactivity came with the Supreme Court's delivery of a three-factor test for deciding whether a judgment applies retroactively in *Chevron Oil Co. v. Huson*.<sup>117</sup> Because the test operates under a presumption of retroactivity, "a litigant seeking prospective-only application must firmly convince a court that each factor (of the three) factors favors such a decision."<sup>118</sup> The Court followed this test until the 1990s when it delivered three decisions, the final and most decisive of which was *Harper v. Virginia Department of Taxation*.<sup>119</sup> *Harper* rejected the *Chevron Oil* test and the notion that the Court could limit the retroactivity of new constitutional decisions.<sup>120</sup>

In considering whether new law should be applied only prospectively, the Supreme Court rejected the argument that prospective application is justified by the potential unfairness of one or more parties' reliance on the previous law.<sup>121</sup> The Court then provided the new general rule for the retroactivity of constitutional issues: when the Supreme Court applies a rule of federal law to a specific case before it, that rule has controlling—and retroactive—effect for all cases open on direct review.<sup>122</sup> Despite the Court's

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116. See Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37, 45 (2014) (describing "an initial period of infrequent and unreflective use of non-retroactivity" by federal courts).

117. See 404 U.S. 97, 106–07 (1971) (defining the three factors as whether the decision establishes a new principle of law, whether retroactive application will further the purpose and effect of the rule, and whether the retroactivity could produce inequitable results).

118. Kay, *supra* note 116, at 42.

119. 509 U.S. 86 (1993).

120. See Kay, *supra* note 116, at 47–48 (noting that those three decisions were *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper*).

121. See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 813 (2003) ("Eventually, the Court reverted to a firm rule of retroactive application in criminal cases on direct review, and now it appears to have done the same in the civil arena.").

122. See *Harper*, 509 U.S. at 97 (explaining that the new interpretation must be given retroactive effect "regardless of whether such events predate or postdate our announcement of the rule").

hesitance to apply decisions retroactively for fear of disrupting justified reliance on previous decisions, the Court articulated the new rule in *Harper* in part because of the significant costs of the case-by-case approach advocated by *Chevron Oil*.<sup>123</sup> Another policy rationale for the *Harper* rule was the role of the judiciary and the separation of powers doctrine.<sup>124</sup> As stated by Justice Scalia in his concurrence, “Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*.”<sup>125</sup> As Justice Scalia previously articulated, prospective decisionmaking would infringe on the legislature’s domain of creating law and go beyond the judiciary’s mandate of interpreting existing law.<sup>126</sup>

Prior to *Harper*—which eliminated prospectivity in the civil arena—the Court had already established a firm rule of retroactivity in the criminal arena with *Griffith v. Kentucky*<sup>127</sup> six years earlier.<sup>128</sup> Although the Court was slower to eliminate prospectivity in civil cases, the rationale for firm retroactivity is the same in both types of cases.<sup>129</sup> As Justice Blackmun articulated in *Griffith* regarding the Court’s mandate to adjudicate specific cases and controversies, “each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that

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123. See Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271, 304 (1998) (“Thus, the Court’s position now seems to be that it will retroactively apply its most recent interpretation of federal law, justified expectations or reliance interests of the parties notwithstanding.”).

124. See Kay, *supra* note 116, at 49 (explaining that the Court’s “deviation from the judicial role” was a central reason for subsequent “decisions retreating from prospective judgments”).

125. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring).

126. See *Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (describing the view “that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be”).

127. 479 U.S. 314 (1987).

128. See *id.* at 322 (“[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violated basic norms of constitutional adjudication.”).

129. See *id.* (describing the “settled principles” of judicial review that apply to both criminal and civil cases as justification for a firm rule of retroactivity).

we apply that rule to all similar cases pending on direct review.”<sup>130</sup> A second problem with prospectivity in both civil and criminal cases is that such a rule would necessarily treat similarly situated litigants differently.<sup>131</sup> In 1993, the Court finally acknowledged that these same principles require retroactivity in the civil arena as well.<sup>132</sup>

An important element of the *Harper* retroactivity definition is that the new Supreme Court ruling applies only to cases “open on direct review.”<sup>133</sup> “[T]he need for finality” justifies limiting retroactive application of new rules to cases on direct review.<sup>134</sup> While already-decided cases are not affected by this retroactivity rule, all pending cases are bound by it, regardless of how long the case has been pending.<sup>135</sup> It does not matter that the litigants and the courts in long-pending cases may have been relying on the previous law for years.<sup>136</sup> For all the costs associated with the earlier *Chevron* case-by-case approach to retroactive application of new federal rules, a significant benefit was the discretion it left to judges to apply the prospectivity doctrine in cases in which the retroactivity doctrine would be particularly inequitable.<sup>137</sup> The

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130. *Id.* at 322–23.

131. *See id.* at 323 (“[T]he problem with not applying new rules to cases pending on direct review is ‘the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary’ of a new rule.”).

132. *See Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 89 (1993) (holding that, in accord with *Griffith*, “this Court’s application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision”).

133. *Id.* at 97.

134. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (“[O]nce suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.”).

135. *See* David Lehn, Note, *Adjudicative Retroactivity as a Preclusion Problem: Dow Chemical Co. v. Stephenson*, 59 N.Y.U. ANN. SURV. AM. L. 563, 572 (2004) (“[I]f the balance favors retroactivity, the new law is retroactive if and only if they are not yet final.”).

136. *See* Robert J. Sweeney, Note, *Harper v. Virginia Department of Taxation: Of Pernicious Abstractions and the Death of Precedent*, 39 N.Y.L. SCH. L. REV. 833, 835 (1994) (“No matter how loudly the facts of a subsequent case might scream out for the equitable application of the non-retrospectivity doctrine, that doctrine may no longer be used if it was not employed in the first case.”).

137. *See id.* at 869 (suggesting that by using *Harper* to overrule *Chevron*, “the Court avoided the hard case where the facts might cry out for the equitable

*Chevron* rule was in large part justified by a policy of fairness to litigants who had relied on existing law.<sup>138</sup>

If *Chevron* was still the retroactivity rule today, it seems likely that applying the new *Daimler* decision to the long-pending cases at issue would be considered so inequitable as to justify the use of the prospectivity doctrine.<sup>139</sup> Such inequity is especially acute in situations where the plaintiffs could have brought the case in a different U.S. court where personal jurisdiction still would have existed under *Daimler*.<sup>140</sup> These plaintiffs might have brought the case elsewhere had they known of the *Daimler* rule at the time, but now are barred from doing so because of the relevant statute of limitations.<sup>141</sup> Statutes of limitations with tolling provisions might aid some plaintiffs, but not all statutes allow tolling and those that do will not benefit all plaintiffs.<sup>142</sup> When tolling is permitted, it operates only from the point a suit is filed until the point the suit is dismissed.<sup>143</sup> If a judge dismisses for lack of personal jurisdiction, the tolling effect of filing the first action will not help in cases filed right before the expiration of the statute of

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application of the prospectivity doctrine”).

138. See Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1560 (1998) (“From the earliest cases at the state and federal level, rules of law were not given retroactive effect in order to protect those who had in good faith and with good reason relied upon and acted in accordance with the prior rule.”).

139. See *id.* (noting that it would be equitable to apply the prospectivity doctrine in cases where, “for example, a deserving litigant who had the misfortune to bring the right lawsuit at the wrong time might be cheated out of the opportunity to obtain a remedy”).

140. See *id.* (“Post-*Griffith* in the criminal area and post-*Harper* in the civil, fairness in the sense of protecting reliance interests has given way to fairness in the sense of equity or equal treatment.”).

141. See *id.* (arguing that *Chevron* had the capacity to avoid such extremely inequitable consequences for plaintiffs).

142. See Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 810–11 (2006) (explaining that the applicable state or federal statute of limitations may or may not have a corresponding tolling provision).

143. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974) (“[T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.”).

limitations.<sup>144</sup> Plaintiffs in these cases will not have time to refile the suit in the appropriate jurisdiction.<sup>145</sup> Thus, *Chevron* could mitigate the unfairness to plaintiffs of dismissals in which any tolling of the statute of limitations is inapplicable or unhelpful.<sup>146</sup>

There is a limited exception to the sometimes ineffective nature of tolling provisions.<sup>147</sup> Some jurisdictions allow a judge to dismiss a case without prejudice subject to reinstatement.<sup>148</sup> If the plaintiff complies with the court-imposed conditions, the plaintiff can refile the case within the time period prescribed by the judge.<sup>149</sup> But like tolling provisions generally, not all jurisdictions allow this exception.<sup>150</sup> More importantly, the exception does not provide a solution to the unfairness of allowing defendants to raise *Daimler* because a judge without jurisdiction over a defendant cannot impose conditions regarding the case.<sup>151</sup>

The new *Harper* rule—unlike the *Chevron* rule that had the potential to mitigate unfairness to plaintiffs—makes clear that there is no room for any equitable exception in the retroactivity doctrine.<sup>152</sup> If the Supreme Court announces a new rule while a

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144. See *Statute of Limitations—Tolling—Dismissal*, 227 F.3d 1009 (7th Cir. 2000), 16 No. 1 FED. LITIGATOR 10, 10 (2001) (“Filing suit stops the running of the statute of limitations—but only contingently.”).

145. See *id.* (describing the frequent inability of tolling provisions to address the unfairness of statutes of limitations in the face of dismissal).

146. See *id.* (emphasizing the general rule that cases dismissed without prejudice end any tolling of the statute of limitations).

147. See Don Zupanec, *Statute of Limitations—Tolling—Dismissal Without Prejudice—Reinstatement*, 20 No. 7 FED. LITIGATOR 5, 5 (2005) (“When a timely complaint is dismissed without prejudice and the dismissal order sets conditions for reinstatement within a specified period of time, the statute of limitations is tolled if the conditions are satisfied by the deadline.”).

148. See *id.* (describing a case in which the U.S. Court of Appeals for the Third Circuit held that this limited exception allows the statute of limitations to be tolled if the plaintiff satisfies the conditions of reinstatement (citing *Brennan v. Kulick*, 407 F.3d 603 (3rd Cir. 2005))).

149. See *id.* (“Because only a limited amount of time is available for satisfying the conditions, a plaintiff must act promptly or see the dismissal become a dismissal with prejudice and preclude refiling.”).

150. See *id.* (suggesting that even fewer jurisdictions recognize this exception than those that recognize tolling).

151. See *id.* (emphasizing that the noted exception has extremely limited application).

152. See Teresa A. Dondlinger, Note, *Retroactivity and the Remains of Chevron Oil After Harper v. Virginia Department of Taxation*, 47 TAX LAW. 455, 463 (1994) (“The result [of *Harper*] is that the issue of retroactivity will be

case is pending, the judge presiding over the pending case must allow litigants to utilize the new rule.<sup>153</sup> Whereas the *Chevron* rule focused on policies of fairness and reliance, the new *Harper* rule focuses on a policy of equal treatment.<sup>154</sup>

It appears that, in deciding the current retroactivity rule, the Court foresaw the potential for unfairness to plaintiffs in cases such as those at issue in this Note, but decided to place greater value on equality at the expense of fairness.<sup>155</sup> The value placed on equality prevents the Court's decisions from applying only to a single case when many others confronting the same issue are open on direct review.<sup>156</sup> The argument is that fairness and reliance—while not unimportant—cannot coexist with equality, which the Court has prioritized.<sup>157</sup> In making this value judgment, it is likely that the Court also considered separation of powers issues.<sup>158</sup> The making of prospective decisions is reserved to the legislature, and allowing courts to act prospectively in any degree would defy constitutional limits on the judiciary.<sup>159</sup>

The rule that new judicial decisions affecting constitutional issues are retroactive, as stated in *Harper*, has been affirmed in

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determined without regard ‘to the particular equities of individual parties’ claims.’” (quoting *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993))).

153. *See id.* at 466 (emphasizing that the *Harper* decision “virtually guaranteed that all new rules of law will be applied retroactively”).

154. *See* Stephens, *supra* note 138, at 1560–61 (“[S]upporters of the new retroactivity doctrines have argued that it is unfair to award one party the benefit of a new constitutional rule, while denying it to all others similarly situated who were not lucky enough to reach the Supreme Court first.”).

155. *See id.* at 1561 (describing this blanket value judgment as more difficult to justify in the civil context than in the criminal context).

156. *See* Meir Katz, Note, *Plainly Not “Error”: Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979, 1992 (2004) (“Retroactivity focuses directly and exclusively upon law current at the time of decision and orders its application to all parallel and similar cases. Equality ensures law’s integrity and consistency.”).

157. *See id.* at 1993–94 (“Actual reliance, which is a major cause of retroactivity’s adverse effects, comes about by the failure to object to settled law—that is by passivity and silence. Such reliance invokes sympathy, and it might be compelling if equality was not the foremost protected value.”).

158. *See* Stephens, *supra* note 138, at 1568 (noting that *Harper* is consistent with constitutional limits on judicial power).

159. *See id.* at 1565 (describing Justice Scalia’s view that “[a]llowing judges to render prospective rules of law encourages them to disregard established law”).

subsequent Supreme Court cases.<sup>160</sup> In *Reynoldsville Casket Co. v. Hyde*,<sup>161</sup> the Court dealt with the ramifications of its earlier decision holding unconstitutional an Ohio statute that applied different statutes of limitations to in-state and out-of-state defendants.<sup>162</sup> Hyde conceded that the new decision rendering the aforementioned statute unconstitutional applied retroactively to her case because of *Harper*.<sup>163</sup> While that could have been the end of the case, Hyde instead argued that the decision invalidating the Ohio statute should be examined through a lens of remedy rather than one of retroactivity.<sup>164</sup> The Court rejected this proposed exception to the *Harper* rule and held that the *Harper* retroactivity rule applied to the case.<sup>165</sup> As noted by the Court, recognizing a remedy exception to the retroactivity rule would leave *Harper* with nothing more than symbolic significance.<sup>166</sup> In the most recent of the subsequent cases, *Danforth v. Minnesota*,<sup>167</sup> the Court justified the *Harper* rule on the grounds that the judiciary does not create new law; rather, the source of the newly articulated rule is the Constitution itself.<sup>168</sup> Although none of these cases accounts for the

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160. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 n.32 (1994) (“While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity.”).

161. 514 U.S. 749 (1995).

162. See *id.* at 750–51 (“In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), this Court held unconstitutional (as impermissibly burdening interstate commerce) an Ohio ‘tolling’ provision that, in effect, gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants.”).

163. See *id.* at 752 (“Although one might think that is the end of the matter, Hyde ingeniously argues that it is not.”).

164. See *id.* (“States, she says, have a degree of legal leeway in fashioning remedies for constitutional ills.”).

165. See *id.* (reversing the Supreme Court of Ohio’s holding “that, despite *Bendix*, Ohio’s tolling law continues to apply to tort claims that accrued before that decision”).

166. See *id.* at 754 (“If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on ‘remedy’ rather than ‘non-retroactivity?’”).

167. 552 U.S. 264 (2008).

168. See *Allen*, *supra* note 104, at 108 (explaining that retroactivity is required because the Court is simply articulating the existing law of the Constitution).

possibility of waiver in the context of personal jurisdiction defenses, the refusal of the Court to recognize exceptions in other contexts indicates that the firm rule of retroactivity should apply in all types of cases.<sup>169</sup>

### *C. Retroactivity in the Personal Jurisdiction Context*

Scholars have dealt with retroactivity in the personal jurisdiction context, but the scholarship deals primarily with the permissibility of expanding long-arm statutes, not cutting back jurisdiction as a constitutional matter.<sup>170</sup> The justification for the retroactivity of expanding long-arm statutes is firmly rooted in the notion that such laws do not affect substantive rights.<sup>171</sup> In *McGee v. International Life Insurance Co.*,<sup>172</sup> the characterization of expanding long-arm statutes as procedural, and thus not affecting substantive rights, was based on the fact that the petitioner's ability to litigate was not impaired or enlarged by the statute.<sup>173</sup>

In this way, cutting back jurisdiction as a constitutional matter is fundamentally different than expanding long-arm statutes. Whereas expanding long-arm statutes does not—as noted by the Court in *McGee*—impair the ability of a plaintiff to litigate against a defendant, cutting back jurisdiction as a constitutional matter does just that.<sup>174</sup> In pending cases where the statute of limitations has often passed, the retroactive application of a more restrictive jurisdictional rule often will completely preclude the plaintiff from enforcing substantive rights against the defendant if

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169. See, e.g., *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 89 (1993) (failing to note any exceptions to the firm rule of adjudicative retroactivity).

170. See Ullian, *supra* note 108, at 1663 (explaining that expanded long-arm statutes can be applied retroactively because the laws are procedural).

171. See *id.* at 1665 (describing personal jurisdiction laws as generally procedural because they do not affect substantive rights).

172. 355 U.S. 220 (1957).

173. See *id.* at 224 (“The statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent’s substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent.”).

174. See *id.* (explaining that the remedial statute “did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent”).

the case is dismissed.<sup>175</sup> In limited circumstances, however, it is not unprecedented in the civil context to have an indirect restraint on the general rule that all judicial decisions apply retroactively.<sup>176</sup>

Perhaps most relevant to the issue of personal jurisdiction is the indirect restraint of statutes of limitation, as illustrated by the following example:

[I]f a court had previously held that there was no cause of action for a putative tort, but has now reversed itself to provide for liability (a decision which would necessarily have retroactive effect), the generally applicable civil tort statute of limitations would limit the retroactive application of the decision to alleged violations that occurred within the statutory limitations period.<sup>177</sup>

Res judicata and collateral estoppel are two other judicially recognized indirect restraints on the general principle that judicial decisions apply retroactively in civil cases.<sup>178</sup>

The courts have not considered the possibility that the waiver of personal jurisdiction defenses might be another procedural rule serving as an indirect restraint on retroactivity.<sup>179</sup> Yet, waiver as an indirect restraint on the retroactive application of new judicial decisions could support an argument that *Daimler* cannot always be raised as a defense in long-pending cases.<sup>180</sup> As discussed in the next Part, consent-based jurisdiction through waiver might render any lack of general personal jurisdiction irrelevant.<sup>181</sup> This argument might be especially persuasive in light of the courts'

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175. See *infra* Part IV.B (explaining why this is a particularly problematic consequence of dismissing long-pending cases).

176. See Allen, *supra* note 104, at 109 (defining indirect restraints as “those in which other procedural rules serve as some external limitation on the retroactive application of new decisions”).

177. *Id.* at 110.

178. See *id.* (explaining several examples of indirect restraints on the retroactive effect of judicial decision in both civil and criminal cases).

179. See *id.* (omitting the waiver of the personal jurisdiction defense from the list of indirect restraint examples).

180. See *id.* (explaining that “[i]n the civil context, there are several indirect restraints on the application of the principle that all decisions have retrospective effect”).

181. See *infra* Part IV.A (explaining the concept of submission to the court as a primary basis for jurisdiction).

tendencies to disfavor retroactive laws unless the law is procedural or remedial.<sup>182</sup>

Despite the attractiveness of this waiver argument to plaintiffs who do not want their cases dismissed as a result of *Daimler*, it is highly unlikely that any court would accept it as valid.<sup>183</sup> The abovementioned procedural-versus-substantive law distinction is critical in determining the retroactivity of laws enacted by legislatures, but is meaningless when it comes to new constitutional interpretations announced by the judiciary.<sup>184</sup> Because the new *Daimler* decision is an instance of constitutional interpretation by the judiciary, the firm rule of retroactivity associated with all types of judicial decisions means that courts must allow defendants to utilize *Daimler*.<sup>185</sup> Even if a court recognizes waiver as consent-based jurisdiction rendering general personal jurisdiction irrelevant, there are limits to consent-based jurisdiction that must apply in these long-pending cases.<sup>186</sup> It does not matter whether there has been a previous waiver of the personal jurisdiction defense or how long the case has been pending.<sup>187</sup> The firm rule of adjudicative retroactivity requires the application of new constitutional pronouncements in all circumstances without exception.<sup>188</sup>

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182. See Ullian, *supra* note 108, at 1662 (“For procedural or remedial laws, a court reverses the [presumption that laws are prospective] and applies the law retroactively unless the legislature clearly intended for the law to apply prospectively only.”).

183. See *supra* Part III.B (explaining that the *Daimler* decision is an example of constitutional interpretation by the judiciary and that such interpretations always operate retroactively).

184. See *supra* Part III.B (emphasizing that today there is a firm rule of retroactivity for all judicial decisions).

185. See *supra* Part III.B (explaining that the current retroactivity doctrine for civil cases does not provide for any exceptions).

186. See *infra* Part IV (describing the relevant due process limits on consent-based jurisdiction).

187. See *infra* Part IV (emphasizing that the firm rule of adjudicative retroactivity requires retroactive application of *Daimler*).

188. See *supra* Part III.B (explaining that the Supreme Court has never provided any exceptions to adjudicative retroactivity).

*IV. Permitting Defendants to Raise the Daimler Test in  
Long-Pending Cases*

*A. Two Categories of Cases Affected by the Daimler Decision*

There are two categories of cases affected by the *Daimler* decision: those in which the defendant raised a Rule 12(b)(2) defense before the *Daimler* decision<sup>189</sup> and those in which the defendant did not.<sup>190</sup>

*1. First Category: When the Defendant Raised a Rule 12(b)(2)  
Defense Before Daimler*

The determinative factor in the first category is that the objection to personal jurisdiction can be renewed at any stage of the court proceedings.<sup>191</sup> Furthermore, participating in litigation before pursuing a dismissal for lack of personal jurisdiction is acceptable if the defendant raised the defense in an answer.<sup>192</sup> In renewing the previously asserted objection to personal jurisdiction, the defendant will be able to benefit from any new standards and rules regarding the constitutionality of personal jurisdiction.<sup>193</sup> Thus, the new *Daimler* precedent applies through direct review in this first category of cases.<sup>194</sup> The U.S. District Court for the

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189. See, e.g., Fed. Home Loan Bank of Bos. v. Ally Fin., Inc., No. 11-10952-GAO, 2014 WL 4964506, at \*2 (D. Mass. Sept. 30, 2014) (describing a case in which the defendant did raise a Rule 12(b)(2) defense prior to *Daimler*).

190. See, e.g., Am. Fid. Assur. Co. v. Bank of N.Y. Mellon, No. CIV-11-1284-D, 2014 WL 4471606, at \*2 (W.D. Okla. Sept 10, 2014) (describing a situation in which the defendant failed to raise a Rule 12(b)(2) defense prior to *Daimler*).

191. See Don Zupanec, *Jurisdictional Defense—Waiver—Request for Affirmative Relief*, 24 NO. 2 FED. LITIGATOR 10, 10 (2009) (explaining that raising the defense for lack of personal jurisdiction by motion under Rule 12(b) or in the answer “will preserve the defense”).

192. See Don Zupanec, *Personal Jurisdiction Defense—Waiver*, 21 NO. 9 FED. LITIGATOR 2, 2 (2006) (emphasizing that “a personal jurisdiction defense is not necessarily forfeited by a plaintiff’s failure to move promptly to dismiss on jurisdictional grounds after raising the defense in a responsive pleading”).

193. See Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 97 (1993) (emphasizing that adjudicative retroactivity is a strict rule without any exceptions when it comes to pending cases).

194. See *id.* (providing the rule that full retroactive effect of all new judicial decisions must be given in all cases still open on direct review).

Southern District of Florida provides an example of the straightforward application of this rule with *Aronson v. Celebrity Cruises, Inc.*<sup>195</sup> In that case—presumably because the law is so settled—the court did not even provide an analysis of why it was appropriate to apply the new *Daimler* decision.<sup>196</sup> The court simply accepted that an earlier motion to dismiss for lack of personal jurisdiction could be renewed.<sup>197</sup> It then dismissed the claim based on its application of *Daimler*.<sup>198</sup>

*2. Second Category: When the Defendant Did Not Raise a Rule 12(b)(2) Defense Before Daimler*

The fact that the waiver doctrine of the personal jurisdiction defense is often inconsistently applied makes determining whether to apply *Daimler* in the second category of cases more complicated.<sup>199</sup> For example, there is a history of basing jurisdiction on submission to the court—what Rule 12 calls waiver—and, generally, if there is one basis for jurisdiction, an additional basis is not required.<sup>200</sup> Thus, if the basis for jurisdiction is consent through waiver, then there is an argument that general personal jurisdiction is not required at all.<sup>201</sup> This would mean that

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195. See 30 F. Supp. 3d 1379, 1391 (S.D. Fla. 2014) (granting defendant's renewed motion to dismiss for lack of personal jurisdiction based on the new *Daimler* decision).

196. See *id.* (dismissing the claims pursuant to Rule 12(b)(2)).

197. See *id.* (omitting any discussion of the validity of the renewed motion to dismiss).

198. See *id.* ("Given the extent of the California contacts deemed insufficient to establish general jurisdiction in *Daimler*, it is difficult to see how this Court could exercise general jurisdiction over Wrave based on its more attenuated contacts with Florida.").

199. See Christina M. Manfredi, Comment, *Waiving Goodbye to Personal Jurisdiction Defenses: Why United States Courts Should Maintain a Rebuttable Presumption of Preclusion and Waiver Within the Context of International Litigation*, 58 CATH. U. L. REV. 233, 236–37 (2008) (explaining that the inconsistent application of the waiver doctrine is especially prevalent with international defendants).

200. See Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 894 (1989) ("Jurisdiction based on waiver, implied consent, or express contract is defensible as species of a knowing and intended submission to the jurisdiction of the state.").

201. See Carol Andrews, *Another Look at General Personal Jurisdiction*, 47

there is nothing unlawful about a judge not applying the new *Daimler* precedent because jurisdiction is based on consent rather than general personal jurisdiction.<sup>202</sup> But as the controversy at issue in this Note demonstrates, courts have recognized that it is important to establish limits to consent-based jurisdiction.<sup>203</sup> Such limits are especially important when the defendant did not have the opportunity to establish other grounds for lack of jurisdiction because of the case law that existed at the time of consent.<sup>204</sup>

There should be relief from consent-based jurisdiction when the consenting defendant did not have notice of an available jurisdictional defense.<sup>205</sup> While courts will generally deem the expressly consenting parties of a forum selection clause as knowingly waiving all jurisdictional defenses, there is no such notice when parties impliedly consent to jurisdiction.<sup>206</sup> When consent is implicit and the jurisdictional defense comes from a change in personal jurisdiction law, the question is whether the law changed enough to conclude that the defendant did not have notice of that defense prior to the pronouncement of the new law.<sup>207</sup>

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WAKE FOREST L. REV. 999, 1073 (2012) (explaining that, independent of a general personal jurisdiction analysis, “consent is a proper basis for jurisdiction”).

202. See Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 139 (1992) (“The personal jurisdiction defense is a liberty interest under the Fourteenth Amendment that can be knowingly and voluntarily waived.”).

203. See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1344 (2005) (explaining that, historically, consent to jurisdiction has been “limited to particular claims”).

204. See *id.* at 1364 (“State-extracted waiver or consent to jurisdiction is subject to a due process inquiry, although the test is difficult to identify.”).

205. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982) (suggesting that express or implied consent is valid when parties have notice of the waived jurisdictional defenses).

206. See, e.g., *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (providing that express consent to jurisdiction in a particular state is valid because the contract provided both parties with notice of the waiver of other jurisdictional defenses); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (providing that forum selection clauses are valid unless the clause is fundamentally unfair).

207. See Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1658 (2001) (explaining that due process limitations are more of a concern with implied consent than with express consent).

If the change was such that the case law existing at the time of consent did not put the defendant on notice of the personal jurisdiction defense, then the change entitles the defendant to relief from consent-based jurisdiction.<sup>208</sup> But if the previous case law did provide the defendant with notice of the newly pronounced personal jurisdiction defense, then there is no such relief.<sup>209</sup> Because *Daimler* provided its own distinct test on how to apply the at home standard, the case law existing at the time of defendants' consent in long-pending cases did not provide adequate notice of the personal jurisdiction defense pronounced in *Daimler*.<sup>210</sup>

Furthermore, strict adherence to consent-based jurisdiction would render the new *Daimler* precedent irrelevant in long-pending cases.<sup>211</sup> In practice, the fact that several judges presiding over these long-pending cases have accepted that defendants can assert general personal jurisdiction as an additional basis for jurisdiction provides evidence of the rejection of such strict adherence.<sup>212</sup> The practical rejection of consent as the sole basis for jurisdiction in these long-pending cases is likely a recognition of the unfairness of this limitation to defendants.<sup>213</sup> The injustice is obvious in cases in which the case law existing at the time of consent was not sufficient grounds for establishing a lack of general personal jurisdiction.<sup>214</sup> In light of this practical rejection

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208. See *id.* at 1659 (“[T]he Due Process Clause of the Fourteenth Amendment does not delineate the scope of implied consent according to the legal theory pursued. . . . Rather, the scope of the plaintiff’s implied consent is defined in terms of what would be necessary for a fair resolution of the litigation between the parties.”).

209. See *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 704 (emphasizing that an effective waiver of a personal jurisdiction defense must be intentional).

210. See *supra* notes 92–96 and accompanying text (describing this Note’s recommendation on how to reconcile *Daimler* and *Goodyear*).

211. See *infra* Part IV.B (explaining that there have been real consequences in long-pending cases because of *Daimler*).

212. See, e.g., *Fed. Home Loan Bank of Bos. v. Ally Fin., Inc.*, No. 11-10952-GAO, 2014 WL 4964506, at \*4 (D. Mass. Sept. 30, 2014) (permitting dismissal based on lack of general personal jurisdiction); *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134 (2d Cir. 2014) (determining that, in light of *Daimler*, the district court erred in finding that it could exercise general jurisdiction over the appellant bank).

213. See *infra* Part IV.B (describing the harsh consequences of dismissal for lack of jurisdiction in long-pending cases).

214. See *supra* Part II.C (emphasizing that *Daimler* did change the existing personal jurisdiction law).

and the clear relevance of *Daimler* in the long-pending cases at issue, it seems that new cases developing the law of general personal jurisdiction do operate as a limit on consent as the sole basis for jurisdiction.<sup>215</sup> Thus, this Note similarly rejects the validity of the notion that consent can serve as the sole basis for jurisdiction in these long-pending cases.<sup>216</sup>

In accepting that general personal jurisdiction remains important regardless of consent-based jurisdiction in such cases, the timing of the assertion of a Rule 12 defense based on new case law is critical.<sup>217</sup> Waiting too long to assert a Rule 12 defense after the *Daimler* decision could suggest that the defendant consents to jurisdiction even in the face of existing developments in general personal jurisdiction case law.<sup>218</sup> *Holzager v. Valley Hospital*<sup>219</sup> explains that “a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made, especially when it does raise the objections as soon as their cognizability is made apparent.”<sup>220</sup> The U.S. Court of Appeals for the Second Circuit addressed whether the court below erred in declining to apply retroactively an intervening Supreme Court decision about personal jurisdiction.<sup>221</sup> In reversing the lower court’s decision, the Second Circuit rejected the appellee’s argument that the appellant could constructively waive a personal jurisdiction defense that did not exist at the time waiver would occur.<sup>222</sup> Thus, personal jurisdiction is not waived

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215. See *infra* Part IV.B (describing the practical relevance of *Daimler* in long-pending cases).

216. See *infra* Part IV.B (describing how general personal jurisdiction has resulted in real dismissals even when there is an argument for consent-based jurisdiction).

217. See FED. R. CIV. P. 12 (determining when a defense based on lack of personal jurisdiction is deemed waived).

218. See Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 23 (1991) (emphasizing that consent is “one of the primary bases” for jurisdiction and that consent is the equivalent of failure to state an objection).

219. 646 F.2d 792 (2d Cir. 1981).

220. *Id.* at 796.

221. See *id.* at 793 (explaining that the defendant wanted to utilize the Court’s decision in *Rush v. Savchuk*, 444 U.S. 320 (1980), which held that “a plaintiff cannot obtain personal jurisdiction over a non-resident defendant through quasi-in-rem attachment of an insurance policy issued to the defendant by the defendant’s resident insurer”).

222. See *id.* at 795 (describing additional arguments put forth by appellee and

where intervening Supreme Court decisions declare current personal jurisdictional law unconstitutional.<sup>223</sup> But if there is too much of a delay between the newly available objection and when the party raises the objection, the party risks waiving the defense.<sup>224</sup>

The U.S. Court of Appeals for the First Circuit expanded on the appropriate application of the *Holzsgager* rule in *Bennett v. City of Holyoke*.<sup>225</sup> This court explicitly limited the waiver exception to circumstances in which the authoritative case at the time of the waiver precluded the defense or a supervening authority made the defense available only after the waiver.<sup>226</sup> In sum, an earlier waiver is excused “only when the defense, if timely asserted, would have been futile under binding precedent.”<sup>227</sup> The Supreme Court also addressed this waiver issue in a context other than personal jurisdiction.<sup>228</sup> The Court explained that for a waiver to be effective, it must “be one of a ‘known right or privilege.’”<sup>229</sup> There is no waiver of a defense when the decision that would support that defense does not exist yet.<sup>230</sup>

Applying this *Holzsgager* rule to long-pending cases potentially affected by *Daimler*, one of the crucial questions is whether *Daimler* announced a new constitutional rule or overruled *Goodyear*.<sup>231</sup> The issue is further complicated because there is a legitimate argument that *Daimler* simply clarified the personal jurisdiction law that already existed after *Goodyear*.<sup>232</sup>

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rejected by the Second Circuit).

223. *See id.* at 796 (explaining that a right cannot be waived if the right is not known at the time waiver would occur).

224. *See id.* (noting that failure to raise an immediate defense based on the newly available authority will be considered waiver).

225. *See Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004) (providing the two situations in which the *Holzsgager* exception applies).

226. *See id.* (noting that these two circumstances require application of the “equitable exception”).

227. *Id.*

228. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 142 (1967) (addressing waiver in the context of a party failing to assert certain arguments before trial).

229. *Id.* at 143 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

230. *See id.* (describing the common sense notion that a party cannot waive a defense that does not exist).

231. *See supra* Part II.C (examining both sides of this *Daimler* debate).

232. *See supra* Part II.C (proposing that this argument is flawed).

In *Gilmore v. Palestinian Interim Self-Government Authority*,<sup>233</sup> the U.S. District Court for the District of Columbia referenced *Holzager* in its analysis of whether the defendants waived the personal jurisdiction defense.<sup>234</sup> The court correctly described the *Holzager* rule as providing an exception to waiver of a defense when the legal basis for the defense did not exist yet, except when the defendant does not raise the defense based on the newly available authority in a timely manner.<sup>235</sup> Where the court was incorrect, however, was in its determination that *Goodyear* provided the same legal basis for the defense as *Daimler* and, thus, the waiver exception did not apply.<sup>236</sup> Thus, the court denied the waiver exception to defendants based on its conclusion that *Daimler* did not announce a new constitutional rule.<sup>237</sup>

The U.S. District Court for the Western District of Oklahoma reached the same conclusion based on the *Holzager* rule in *American Fidelity Assurance Co. v. Bank of New York Mellon*.<sup>238</sup> This court also accurately articulated the *Holzager* waiver exception and similarly rejected the defendant's contention that *Daimler* provided a legal basis for the general personal jurisdiction defense distinct from *Goodyear*.<sup>239</sup> Like the *Gilmore* court, this court ignored the fact that while *Daimler* did preserve the underlying premise of *Goodyear*, the clearer and much more specific *Daimler* rule does constitute a new constitutional pronouncement.<sup>240</sup>

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233. 8 F. Supp. 3d 9 (D.D.C. 2014).

234. See *id.* at 13 (emphasizing that the *Holzager* rule requires parties to immediately raise a newly available defense).

235. See *id.* (explaining that “an unavailable defense is not, under Rule 12(h), waived by omission from an earlier Rule 12 motion”).

236. See *id.* at 15 (arguing that *Goodyear* and *Daimler* pronounced the same at home standard).

237. See *id.* (explaining correctly that the *Holzager* waiver exception applies only to previously unavailable defenses).

238. See *Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, No. CIV-11-1284-D, 2014 WL 4471606, at \*3 (W.D. Okla. Sept. 10, 2014) (concluding that *Daimler* did not change the *Goodyear* rule).

239. See *id.* at \*2 (reaching the incorrect conclusion that “*Daimler* did not create a basis for challenging personal jurisdiction not previously available to Defendant”).

240. See *id.* at \*3 (focusing too narrowly on the underlying at home standard maintained by both *Goodyear* and *Daimler*).

If, as this Note argues, the *Gilmore* and *American Fidelity* conclusions were incorrect, then there is also the question of whether waiver matters at all in light of the retroactivity of new constitutional pronouncements. The U.S. District Court for the Southern District of New York found that it did not matter in *Laydon v. Mizuho Bank, Ltd.*<sup>241</sup> But even though the court agreed with the defendants that their failure to raise the personal jurisdiction defense before *Daimler* did not constitute waiver, the seven-month delay between the *Daimler* decision and the defendants' assertion of the defense did result in its waiver.<sup>242</sup>

The U.S. District Court for the Southern District of New York has adhered to the view that if there is a new test for determining the constitutionality of personal jurisdiction, the defendants have the right to use it.<sup>243</sup> This district has decided to apply the new *Daimler* test even when the defendants ignored possible personal jurisdiction defenses up until the release of the *Daimler* decision.<sup>244</sup> This seems to be the correct decision based on the conclusion that *Daimler* did expand upon the *Goodyear* at home standard and thus, should be considered a new constitutional decision.<sup>245</sup> Because new constitutional decisions must be given retroactive effect, this court correctly allowed the defendants to use *Daimler* even in the face of their previous failure to raise any personal jurisdiction defenses.<sup>246</sup>

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241. See *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419(GBD), 2015 WL 1499185, at \*6 (S.D.N.Y. Mar. 31, 2015) (“This Court agrees with the Non-Stipulating Defendants that their Rule 12(b)(2) jurisdictional defense was not available before *Daimler*.”).

242. See *id.* at \*7 (“Defendants waived their personal jurisdiction defenses by failing to promptly assert them after *Daimler* was decided.”).

243. See *Brush*, *supra* note 1 (explaining that a bank defendant was allowed to use *Daimler* in September and have a long-pending case dismissed); see also *Laydon*, 2015 WL 1499185, at \*6 (refusing to rule that the defendants waived their personal jurisdiction defense by failing to raise it prior to the *Daimler* decision).

244. See *Brush*, *supra* note 1 (describing the banking defendants as having “sat on their hands’ with regard to jurisdictional defenses prior to this August” by not pursuing any personal jurisdiction defense until the *Daimler* decision); see also *Laydon*, 2015 WL 1499185, at \*6 (“[T]his Court does not rule that the Non-Stipulating Defendants waived their personal jurisdiction defenses because they failed to raise them in their June 2013 motions to dismiss.”).

245. See *supra* Part II.C (arguing that *Daimler* changed the *Goodyear* rule even though the two decisions are not inconsistent).

246. See *supra* Part III.B (stating the conclusiveness of the Supreme Court’s

Not all courts, however, have adhered to this reconciliation of the Supreme Court's personal jurisdiction and retroactivity decisions. In *American Fidelity*, the U.S. District Court for the Western District of Oklahoma found that waiver of the personal jurisdiction defense did preclude the defendant from asserting the new *Daimler* test and denied the defendant's motion to dismiss for lack of personal jurisdiction.<sup>247</sup> Both this interpretation of waiver and the court's interpretation of the *Daimler* holding are of real importance to this Note's argument.<sup>248</sup> Because this court views *Daimler* as simply clarifying *Goodyear* rather than articulating a new test altogether, the court finds that the same defense was available to the defendant even before the *Daimler* decision.<sup>249</sup> Yet, the defendant still chose to waive the personal jurisdiction defense.<sup>250</sup>

The U.S. District Court for the District of Columbia in *Gilmore* also held that the waiver of the personal jurisdiction defense precludes the defendant from asserting the new *Daimler* test.<sup>251</sup> That court also based its decision on the assertion that *Goodyear* already stated the rule, which *Daimler* simply clarified.<sup>252</sup> Based on the earlier discussion of *Daimler* in relation to *Goodyear*, it

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position that new constitutional decisions must be given full retroactive effect).

247. See *Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, No. CIV-11-1284-D, 2014 WL 4471606, at \*5 (W.D. Okla. Sept. 10, 2014) ("Granting such relief would be inconsistent with the Court's finding that Defendant has waived the lack of personal jurisdiction defense.").

248. See *id.* at \*3 ("Indeed, multiple statements by the Court in *Daimler* demonstrate that the standard Defendant relies upon was clearly first expressed in *Goodyear*.").

249. See *id.* at \*5 ("*Goodyear* announced the 'at home' standard relied upon by Defendant. Because that standard was available more than two years ago, Defendant has not demonstrated the defense of lack of general personal jurisdiction was 'unavailable' until January 2014 when *Daimler* was decided.").

250. See *id.* (explaining that the same, or at least a very similar, personal jurisdiction defense was always available to the defendant).

251. See *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 8 F. Supp. 3d 9, 17 (D.D.C. 2014) ("Defendants forfeited their jurisdictional defense both by omitting it from their 2002 Motion to Dismiss and by failing to promptly assert it after *Goodyear* was decided. Consequently the Court shall exercise jurisdiction over them.").

252. See *id.* at 15 ("Even if Defendants were correct that a legal basis to challenge the Court's jurisdiction did not exist until the announcement of the 'at home' rule . . . they are flat-out wrong that *Daimler* was the genesis of that rule.").

seems that these two courts ruled incorrectly.<sup>253</sup> Because these courts anchored their reasoning on the assumption that *Daimler* did not change *Goodyear*, the argument that *Daimler* provides new guidance on how to apply *Goodyear* disrupts the soundness of the two courts' conclusions.<sup>254</sup> Furthermore, the Supreme Court has established that new constitutional decisions are retroactive, so the two courts' waiver arguments depend upon the position that *Daimler* did not change *Goodyear*.<sup>255</sup> Because such a position is not in accord with *Daimler*, the waiver argument cannot stand and the defendants in these two cases—like those in all long-pending cases—should have been allowed to raise *Daimler*.<sup>256</sup>

### *B. Consequences of Applying the Daimler Decision in Long-Pending Cases*

The most problematic consequence of courts applying the new *Daimler* decision in long-pending cases is the possibility of the case being dismissed outright.<sup>257</sup> As discussed in the previous subpart, statutes of limitations make dismissal especially unfair to plaintiffs.<sup>258</sup> Even if the statute of limitations had not expired and the plaintiff could bring the case again in a different jurisdiction, the case would have to start over from the beginning.<sup>259</sup> Transferring the case instead would allow the plaintiff to pick the

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253. See *supra* Part II.C (arguing that although *Daimler* is consistent with *Goodyear*, the new decision did offer additional guidance and clarification not present in *Goodyear*).

254. See *supra* Part II.C (noting that *Daimler* did expand upon *Goodyear*'s at home standard).

255. See *supra* Part III.B (explaining the significance of *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993)).

256. See *supra* Part III.B (stating the rule that full retroactive effect must be given to all new constitutional decisions for cases on direct review).

257. See *supra* note 20 and accompanying text (listing recent cases in which judges granted dismissals).

258. See Allen, *supra* note 104, at 109 (describing statutes of limitations as an indirect restraint on retroactivity).

259. See Jeremy Jay Butler, Note, *Venue Transfer When a Court Lacks Personal Jurisdiction: Where Are Courts Going with 28 U.S.C. § 1631?*, 40 VAL. U. L. REV. 789, 789 (2006) (noting that transfer avoids the unnecessary step of refileing a claim in a different court).

case up where it left off in the first jurisdiction.<sup>260</sup> Furthermore, federal law instructs district courts to transfer rather than dismiss when possible and “in the interest of justice.”<sup>261</sup> Yet, judges are afforded discretion in deciding what is in the interest of justice and many are using that discretion to choose dismissal over transfer.<sup>262</sup>

In *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*,<sup>263</sup> the judge presiding over the case rejected the plaintiff’s motion to sever and transfer the claims affected by the new personal jurisdiction argument.<sup>264</sup> Even though there would have been personal jurisdiction in the Southern District of New York, to which the defendant requested the case be transferred, the judge decided instead to dismiss all claims lacking personal jurisdiction in Massachusetts, where the claims had been brought.<sup>265</sup> In light of the previous discussion, the judge was correct in allowing the defendant to utilize the new *Daimler* decision.<sup>266</sup> Had there not been any other federal court with personal jurisdiction over the defendants, the judge also would have been correct in denying the plaintiff’s motion to transfer.<sup>267</sup> But that was not the situation in this case.<sup>268</sup> Out of consideration of relevant statutes of limitations

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260. See *id.* at 789 (“Venue transfer is one aspect of venue that Congress created to improve the efficient change of courtrooms when either the public or the defendant demands a more convenient forum.”).

261. 28 U.S.C. § 1406 (2012).

262. See *supra* note 20 and accompanying text (explaining that dismissals are being granted even when transfer is an option).

263. No. 11-10952-GAO, 2014 WL 4964506 (D. Mass. Mar. 9, 2012).

264. See David McAfee, *Daimler Frees Moody’s, S&P From Bank’s \$5.9B MBS Suit*, LAW360 (Oct. 1, 2014, 9:04 PM), <http://www.law360.com/articles/583381/daimler-frees-moody-s-s-p-from-bank-s-5-9b-mbs-suit> (last visited Sept. 28, 2015) (granting defendant’s motion to dismiss based on lack of personal jurisdiction in light of the *Daimler* ruling) (on file with the Washington and Lee Law Review).

265. See *id.* (“Judge O’Toole rejected the Bank of Boston’s bid to sever the rating agency claims and transfer them to the Southern District of New York, where personal jurisdiction over them exists, instead deciding to dismiss them in their entirety.”).

266. See *supra* Part IV.A (arguing that personal jurisdiction and retroactivity law requires judges to allow defendants to use the new *Daimler* decision even when personal jurisdiction defenses have already been waived).

267. See 28 U.S.C. § 1404(a) (2012) (providing that cases can be transferred only to another district where the case “might have been brought” or to which “all parties have consented”).

268. See McAfee, *supra* note 264 (noting that there was another federal court

in long-pending cases, the judge should not have dismissed the case when transfer was a lawful alternative.<sup>269</sup>

Another possible consequence of courts applying the *Daimler* decision in long-pending cases is the special treatment of foreign defendants at the expense of domestic plaintiffs. One of the main differences between the Court's opinions in *Daimler* and *Goodyear* is that *Daimler* provides a lengthy discussion on the risk that expansive personal jurisdiction poses to international comity whereas *Goodyear* only refers to the issue in one footnote.<sup>270</sup> The concern stems from consideration of the fact that outside of the United States, most nations have a much more restrictive idea of when defendants should be subject to personal jurisdiction in any given forum.<sup>271</sup>

Looking at *Daimler* generally, the decision makes litigation against foreign corporations much more difficult.<sup>272</sup> It is possible that some courts might be looking for reasons to allow foreign defendants to use the new *Daimler* test, even when personal jurisdiction defenses have been waived, to “accord with the fair play and substantial justice due process demands.”<sup>273</sup> Additionally, courts might be choosing to dismiss cases that could easily be

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with personal jurisdiction over the defendants).

269. See 28 U.S.C. § 1404(a) (providing that judges can transfer cases when transfer is “in the interest of justice”).

270. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (“Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 n.5 (2011) (describing the French law that permits jurisdiction based on the plaintiff's relationship with the forum).

271. See *Daimler*, 134 S. Ct. at 763 (“In the European Union, for example, a corporation may generally be sued in the nation in which it is ‘domiciled,’ a term defined to refer only to the location of the corporation’s ‘statutory seat,’ ‘central administration,’ or ‘principal place of business.’”).

272. See *Denker*, *supra* note 92, at 164 (“Since *Daimler* provides a clear, narrow rule that denotes where a Non-U.S. corporation is subject to liability, plaintiffs will have a harder time justifying a lawsuit against a Non-U.S. corporation.”); see also Pertlette Michèle Jura et al., *Disparate Treatment of the Corporate Citizen: Stark Differences Across Borders in Transnational Lawsuits*, 15 No. 2 BUS. L. INT'L 85, 92 (2014) (indicating that *Daimler* is part of the Court's attempt “to make clear that already overburdened US courts are not required to entertain multinational suits having little or nothing to do with the US—and in some cases (perhaps many)—they do not have the jurisdictional power to do so”).

273. *Daimler*, 134 S. Ct. at 763.

transferred.<sup>274</sup> Expansive jurisdiction tests create an international comity problem because they allow “any forum in the United States to resolve any dispute arising anywhere in the world.”<sup>275</sup> The *Daimler* ruling prompts judges to decline to exercise jurisdiction over many foreign corporate defendants, thus mitigating the problem.<sup>276</sup> Instead, the courts simply accept the judgments of foreign jurisdictions.<sup>277</sup>

A related motivation for allowing defendants in long-pending cases to utilize *Daimler* is that the decision provides an incentive for foreign companies to invest and conduct business in the United States and consequently has the potential to stimulate the U.S. economy.<sup>278</sup> The stricter guidance for the at home standard provided by *Daimler* gives foreign companies more certainty about “the jurisdictional consequences of their actions” in the United States, which in turn minimizes the risk of doing business in and with the United States.<sup>279</sup>

As mentioned above, this special treatment of foreign defendants in the interest of international comity comes at a cost for U.S. plaintiffs.<sup>280</sup> With *Daimler*, “[g]eneral jurisdiction, the sole

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274. See Denker, *supra* note 92, at 170 (explaining that courts want to avoid raising “tensions between the United States and other nations”).

275. *Id.*

276. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (explaining the view of the Solicitor General that “foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments”).

277. See *id.* (noting that lenient bases for the exercise of general personal jurisdiction over a foreign defendant often lead to international friction).

278. See Denker, *supra* note 92, at 166–67 (“Because the type of ‘litigation environment critically influences a foreign company’s decision to invest in the United States,’ it is clear that lower anticipated costs will lead to more capital investment.”).

279. See *id.* at 166 (“[W]hen a corporation can predict which forums have the capability of holding it liable, it has the ability to buy insurance, the opportunity to incorporate the costs of potential litigation into its products’ prices, and the chance to decide whether to operate in a state whose costs outweigh its benefits.”).

280. See Kate Bonacorsi, Note, *Not at Home with “At-Home” Jurisdiction*, 37 *FORDHAM INT’L L.J.* 1821, 1853 (2014) (“[G]eneral jurisdiction occasionally served as a jurisdictional basis of last resort. When US plaintiffs could not make showings sufficient for specific jurisdiction, especially in cases against non-US corporations, courts allowed plaintiffs to make a showing of the defendant’s ‘continuous and systematic’ business activities in the forum state.”).

door to relief for U.S. plaintiffs when the minimum contacts approach was otherwise too narrow, is now officially closed.”<sup>281</sup> In a concurring opinion, Justice Sotomayor addressed this injustice to individuals harmed by the actions of the multinational corporations benefitting from the *Daimler* decision.<sup>282</sup> In many instances, *Daimler* may result in foreign corporate defendants never being held accountable for their actions against U.S. plaintiffs.<sup>283</sup> This cost is especially severe for the plaintiffs in the long-pending cases that are being dismissed as a result of courts allowing foreign defendants to utilize the new *Daimler* decision even when those defendants previously waived the personal jurisdiction defense.<sup>284</sup>

Judges should act in accordance with both personal jurisdiction and retroactivity law by allowing these foreign defendants to utilize the new *Daimler* decision.<sup>285</sup> Moreover, judges should mitigate the cost to plaintiffs of using *Daimler* in long-pending cases by transferring the case when possible.<sup>286</sup> In the case of foreign defendants, however, there often will be no venue in the United States with personal jurisdiction over the defendant when the *Daimler* rule is applied.<sup>287</sup> Thus, judges will overwhelmingly

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281. *Id.*

282. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 (2014) (“[F]or example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States.”).

283. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 222 (2014) (“If plaintiffs are injured outside their home state, they must sue in the defendant’s home state or in the location where they suffered the injury, even if the defendant has substantial operations in the plaintiff’s home state.”).

284. See Bonacorsi, *supra* note 280, at 1857 (emphasizing the unfairness to plaintiffs resulting from *Daimler* and that “the Court once again favored defendants to the detriment of US plaintiffs”).

285. See *supra* Part IV.A (arguing that new constitutional decisions should be given full retroactive effect even in the face of waiver of the personal jurisdiction defense).

286. See *supra* Part IV.B (arguing that judges should exercise their discretion to transfer “in the interest of justice” to plaintiffs in long-pending cases with expired statutes of limitations).

287. See Denker, *supra* note 92, at 164 (stating the severely limiting effect of the *Daimler* decision on personal jurisdiction in the United States over foreign defendants).

dismiss these cases, leaving no alternative remedy for plaintiffs to pursue within the United States. While this result is certainly unfair to many plaintiffs, and in part a consequence of international comity concerns, it is the correct result in light of personal jurisdiction and retroactivity law.<sup>288</sup> Still, judges should continue to exercise their discretion to transfer cases rather than dismiss where another venue in the United States has personal jurisdiction over the defendant, whether that defendant is domestic or foreign.

### V. Conclusion

In the interests of fairness and predictability, the controversy encapsulated by Judge Daniels's comment requires a consistent solution to be applied across federal courts.<sup>289</sup> For the solution to be lawful, it must account for both personal jurisdiction law and retroactivity law. An analysis of the development of personal jurisdiction law indicates that *Daimler* did more than restate the *Goodyear* test. Rather, *Daimler* narrowed the scope of general personal jurisdiction beyond what any defendant could have reasonably believed was required by *Goodyear*. Next, an analysis of the current state of retroactivity law in the civil context reveals a strict rule of adjudicative retroactivity. There is no permissible exception to this rule for new constitutional pronouncements in the personal jurisdiction context, not even in the face of waiver. Thus—because *Daimler* was a new constitutional pronouncement of personal jurisdiction law—defendants should be allowed to utilize *Daimler* regardless of whether they previously raised a Rule 12(b)(2) defense.

While this reconciliation of the law clearly demands that *Daimler* apply in long-pending cases, this solution poses problems of its own. In many cases, the application of *Daimler* results in a determination that the court can no longer exercise jurisdiction over the defendant. If the court consequently dismisses the case, a

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288. See *supra* Parts II–III (explaining why personal jurisdiction law and retroactivity law, respectively, require this result).

289. See *supra* note 1 and accompanying text (describing the view that *Daimler* is a new constitutional test that defendants in long-pending cases are entitled to utilize).

plaintiff whose cause of action now has an expired statute of limitations will be left without a judicial remedy. Thus, when transfer is possible in cases that would otherwise be dismissed because of lack of personal jurisdiction under *Daimler*, judges should make every effort to allow transfer. A dismissal would be especially unfair in cases where the defendant waived the personal jurisdiction defense, and the plaintiff continued with litigation in reliance on such waiver. Because of the special impact of *Daimler* on foreign defendants, however, it will sometimes be the case that no court in the United States will be able to exercise jurisdiction under *Daimler*. Courts should limit the harsh consequences of dismissal in long-pending cases to these cases in which there is no other alternative.