Related Contracts and Personal Jurisdiction

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It used to seem so easy. After Professors Arthur von Mehren and Donald Trautman wrote their celebrated article,¹ we came to accept that there were two kinds of jurisdiction, general and specific. If the defendant entered into the state and committed a tort, this gave rise to specific jurisdiction in that state’s courts. If the defendant merely conducted unrelated business in the forum, jurisdiction was necessarily “general.” In the latter case, jurisdiction was harder to establish because the quantum of unrelated contacts sufficient to establish general jurisdiction was greater than the quantum required for specific jurisdiction. Supreme Court cases seemed to reflect this dichotomy between general and specific jurisdiction fairly nicely.²

It’s not so simple any more. The question whether general or specific jurisdiction is at issue is still of major importance, because it remains true that more substantial contacts must be shown if general jurisdiction is sought.³ What is considerably less clear is whether, in particular cases, the relevant basis for authority is general or specific. Professors von Mehren and Trautman did not address this issue, perhaps because it seemed at the time that the difference was fairly clear and intuitively obvious. Yet, as is typically the case with legal categories, borderline cases find their way into the courts as soon as a dichotomy is established. We find ourselves now with disputes in which it is far from clear whether jurisdiction, if it exists, is general or specific.⁴ Because this characterization determines the quantum of contacts that must be shown, uncertainty on this issue infects the

³ See, e.g., Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 415 n.10 (1984) (requiring “continuous and systematic” contacts because parties conceded that the case did not “arise out of” and was not “related to” forum contacts).

* Nathan Baker Professor of Law, Yale University. The author wishes to thank Professor Mary Twitchell for good humor and scholarly openness that is rarely encountered in such response/rejoinder episodes.
entire jurisdictional analysis. When some contacts exist but are not "continuous and systematic," whether jurisdiction exists at all depends upon whether general or specific jurisdiction analysis is employed.

Enter Professor Mary Twitchell. In her recent article in this Review, she seeks to clarify what ought to count as general jurisdiction, and what ought to count as specific. She also traces the background of the two concepts, explores the literature discussing them, and analyzes their application in recent cases. Although much of what she says is new and useful, I take issue with her on several major points. Speaking generally, I have my doubts about how much help her analysis provides, interesting as it is. In addition, at some of the points where she comes close to making concrete recommendations, I think she departs from both sound intuition and Supreme Court precedent.

The overall problem concerns Professor Twitchell's failure to explain the foundation for the different treatment of general and specific jurisdiction. We need a fairly precise explanation before we can determine the proper disposition of litigation that has some marginal connection to the state. Let me illustrate what I think is a common intuition about the difference between general and specific jurisdiction by using an example. Assume that a defendant who lives in New York travels by car to Massachusetts and there injures a pedestrian. This is an easy case for "specific jurisdiction" in Massachusetts. If the plaintiff tries to sue in Florida, however, this would not be a case of specific jurisdiction: if there were jurisdiction at all, it would be general. Consequently, the plaintiff would have to show a continuous and systematic connection between the defendant and Florida. Again, this seems an easy case to classify.

But what if the plaintiff attempts to sue in Connecticut or Maine on the grounds that the defendant drove through Connecticut on the way to Massachusetts, or was in Massachusetts on the way to Maine? These two cases seem much harder to classify. They do not seem to fit within von Mehren and Trautman's paradigm of specific jurisdiction. On the other hand, there does seem to be some sort of relationship between the dispute and these two states. It is precisely in unravelling the nature of this relationship that Professor Twitchell leaves us without guidance. Yet, obviously, a great deal turns on whether our case is one of general or specific jurisdiction, because especially under her view — a substantially higher quantum of contacts is necessary to satisfy the former test than is necessary to satisfy the latter.7

5 Perkins, 342 U.S. at 438.
7 In the final section of her article, Professor Twitchell suggests that general jurisdiction

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In some respects, it might be argued that Connecticut and Maine are in as strong a position to assert jurisdiction as Massachusetts, where all of us would agree that jurisdiction is proper. The defendant purposefully availed herself of the benefits of Connecticut law by driving through the state just as much as she purposefully availed herself of Massachusetts law. Her insurance will cover a defense in Connecticut or Maine just as surely as it will cover her defense in Massachusetts. Yet whether or not one believes that it would be unconstitutional for Maine or Connecticut to assert adjudicative authority over this dispute, it seems undeniable that their case is a much harder one to make than that of Massachusetts. But why? Our intuition must depend somehow on the different functions that general and specific jurisdiction fulfill, and thus on some foundational distinction. We will return to this problem after investigating the analysis that Professor Twitchell herself proposes.

I. Dispute-Blind and Dispute-Specific Jurisdiction

Much of Professor Twitchell’s analysis concerns her proposal for a new terminology. Rather than using the terms “general” and “specific,” which she thinks mislead courts and scholars, she would have us use the terms “dispute-blind” and “dispute-specific.” Dispute-blind jurisdiction exists when a court would have adjudicative jurisdiction over any cause of action whatsoever against this defendant, or at least, as she sometimes qualifies this, over “most” disputes. A finding of dispute-specific jurisdiction, in contrast, does not compel the conclusion that jurisdiction would exist in most or all other cases; instead, as Professor Twitchell sometimes states, it takes the “nature” of the dispute into account.

Although I have no problem with this particular terminology, I fail to see why it is any clearer than “general” and “specific.” If Professor Twitchell is correct that courts have not always applied the general and specific terminology correctly, this does not necessarily mean that they will do any better with alternative terms. In addition, it is not clear why she prefers either of these pairs of terms to jurisdiction over “related” or “unrelated” causes of action. The Supreme Court has a much longer history of phrasing things in terms of relat-

8 The purposeful availment standard has been applied in numerous Supreme Court cases. See, e.g., World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

9 See Twitchell, supra note 6, at 613.

10 See id. at 637.

11 See id. at 613.
edness or connectedness than in terms of general and specific jurisdiction.\textsuperscript{12}

More important, though, is the fact that phrasing things in terms of \textit{either} the general/specific or the dispute-blind/dispute-specific terminology is not very helpful in analyzing particular cases. Let's assume that there is a defendant that has some connection with the forum, but not a continuous and systematic one. Whether jurisdiction exists thus depends upon whether there is an adequate nexus between the forum and the controversy such that "dispute-specific" jurisdiction is appropriate. Using Professor Twitchell's own terminology, how is one to make that determination?

At the outset one might note two different possible interpretations of her terms. The first is relatively clear: jurisdiction is dispute-blind if there would be jurisdiction over all or most cases brought against this defendant; if one can imagine cases against this defendant where jurisdiction would not exist, then jurisdiction is dispute-specific.\textsuperscript{13} Professor Twitchell's argument that jurisdiction was dispute-specific in the \textit{Helicopteros} case, for example, proceeds by showing that one can imagine another case against that particular defendant in which the forum court would not have asserted jurisdiction.\textsuperscript{14} The second interpretation is broader: jurisdiction is dispute-specific if it is "based in any way on the nature of the \textit{controversy}."\textsuperscript{15}

The first interpretation makes the definition of Professor Twitchell's terms relatively precise, but presents three closely related problems. First, the court must express an opinion on many jurisdictional questions that are not actually before it. Would there be jurisdiction over the defendant if he or she were involved in a contract case in another state? In an automobile accident entirely across the country?

\textsuperscript{12} International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945), for instance, spoke in terms of claims "arising out of" or "connected with" the state. The "general/specific" phraseology seems not to have been employed until Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn.8 & 9 (1984).

\textsuperscript{13} Professor Twitchell's discussion suggests this sort of definition when she says that "the crucial" question as to whether dispute-blind jurisdiction exists is whether jurisdiction would be "fair for \textit{most} causes of action," or would exist over "any claim." Twitchell, \textit{supra} note 6, at 637 (emphasis in original). One might infer from this that jurisdiction is "dispute-specific" when it would not also exist over all other, or most other, claims.

\textsuperscript{14} In Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984), Texas was asked to assert jurisdiction over a Colombian corporation (Helicol) that had done business in Texas for several years. The basis of the cause of action was a helicopter crash in Peru that killed four American passengers. The helicopter had been purchased by Helicol from a Texas firm and was being used under contract to transport the American employees of a Texas-based consortium. The Texas Supreme Court asserted general jurisdiction over Helicol because of its "numerous and substantial" contacts with the forum. \textit{See} Hall v. Helicopteros Nacionales de Colombia, 638 S.W.2d 870, 874 (Tex. 1982). The U.S. Supreme Court reversed. \textit{See} Helicopteros, 466 U.S. at 419.

\textsuperscript{15} \textit{See} Twitchell, \textit{supra} note 6, at 613.
Only after the court resolves such questions can it know whether its jurisdiction is dispute-blind or dispute-specific. Professor Twitchell's Helicopteros discussion illustrates this point, because she must examine various other hypothetical cases before deciding whether jurisdiction is dispute-blind. This complicates the jurisdictional investigation by requiring some sort of global analysis of all potential jurisdictional issues against the same individual.

Second, and more important, in order to characterize the issue as dispute-blind or dispute-specific, the court must already know whether jurisdiction exists in those other cases. The problem is not just that in considering all hypothetical possibilities the court will be distracted from the problem actually before it. The larger difficulty is that when the court becomes thus engaged, it must have some prior notion about whether jurisdiction exists on such facts. A characterization of jurisdiction as dispute-blind or dispute-specific can be made only after one identifies which causes of action might be brought against the defendant in the forum. The characterization, in other words, depends upon knowing whether due process allows jurisdiction over such other cases. Not only does this require that one have the answer to that question already, but it also risks circularity. To know whether due process would be violated by asserting jurisdiction over the case at hand, one must know whether it would be violated by asserting jurisdiction over hypothetical cases. But to know whether jurisdiction would be permissible over hypothetical cases, one must know whether it was permissible in the case at hand.

Third, this definition would treat as dispute-specific any assertion of jurisdiction that differentiated between actions brought against the defendant, allowing jurisdiction in some cases but not others. The criterion for differentiation could be completely arbitrary, such as whether the plaintiff had attended high school in the forum or whether the dispute was filed on a Monday. A jurisdictional test that required the plaintiff to have attended high school in the forum would not allow jurisdiction in all or most cases brought against a particular defendant. Would jurisdiction over such cases be, for that reason, dispute-specific? Professor Twitchell certainly would not want to say so, even though she suggests at one point (somewhat puzzlingly) that the Constitution does not require any particular degree of claim-relatedness for assertions of jurisdiction.16

For these reasons, the second interpretation of Professor Twitchell's "dispute-blind"/"dispute-specific" terminology is probably more faithful to her meaning. The problem with this interpretation, however, is its imprecision. Asking whether jurisdiction is "based in any way on the nature of the controversy" is considerably more vague

16 See id. at 656.
than asking merely whether the state would treat some cases differently from others. If a state has a different long-arm statute for torts cases than it has for contracts cases, is the decision based on "the nature of the controversy"? Is the place where the plaintiff went to high school part of the "nature of the dispute"? What, for that matter, is "the nature of the dispute"? Professor Twitchell seems to be asking for some meaningful connection between the forum and the dispute without telling us what makes a connection meaningful.

Moreover, her "nature of the dispute" criterion is just as unhelpful as a test of whether the forum would treat different causes of action differently. An assertion of jurisdiction is said to be dispute-specific if it was influenced by the nature of the decision, but this does not help a judge who is trying to figure out which way to decide. The characterization depends on an ex post evaluation of whether the nature of the dispute actually influenced the jurisdictional determination.17 What due process asks ex ante, however, is whether it should.

For Professor Twitchell, this may not be much of a problem. Perhaps she expects us to have well-developed intuitions about when jurisdiction is appropriate and when it is not.18 By consulting such intuitions, we can ask whether the forum would have jurisdiction over all other cases involving the same defendant or whether the nature of the case influences our beliefs about whether jurisdiction is appropriate. If there is jurisdiction over all cases, the forum's jurisdiction in this case is dispute-blind; if the nature of the case influences the jurisdictional determination, its jurisdiction is dispute-specific. Notice, however, that the "dispute-blind" or "dispute-specific" characterization depends on an ex post evaluation of whether the nature of the case influences the jurisdictional determination, its jurisdiction is dispute-specific. Notice, however, that the "dispute-blind" or "dispute-specific" characterization occurs only after such jurisdictional evaluation occurs. It does not help a court decide whether jurisdiction actually exists on a particular set of facts.

In all fairness, Professor Twitchell may be making a somewhat different point. First, it is possible that she is less concerned with recommending particular results in particular cases than with insisting that the court be clear about what it is actually doing. For instance, she criticizes some courts for characterizing as "general" assertions of jurisdiction that she thinks are "specific."19 She admits that she might

17 See id. at 644.
18 Professor Twitchell suggests, for instance, what she thinks the Texas court in Helicopteros would have done in other cases involving the same defendant. See id. at 642. Of course, there is an obvious problem here: the mere fact that the Texas court would have denied jurisdiction over other cases involving the same defendant does not mean that they would have been right to do so. Nor does it necessarily mean (even if they were right) that dispute-specific jurisdiction would be appropriate in the litigation that actually arose, for it is entirely possible that Texas had no jurisdiction over any case involving that defendant. See supra note 14 and accompanying text.
19 Professor Twitchell refers to such characterizations as "conditional general jurisdiction"
approve the identical result if characterized differently, and concedes that what is at stake may merely be labelling. Analytical honesty and intellectual clarity may make it worth devising new terminology, even if it only re-categorizes cases that have already been decided.

Second, the dispute-blind characterization arguably helps to resolve cases even if judges do not have well-developed and accurate prior intuitions about whether jurisdiction exists. While a judge might not be able to determine exactly whether jurisdiction exists in all cases, he or she might nonetheless have intuitions about whether some cases for jurisdiction are stronger than others and about whether the nature of the case influences the result. Even if a judge cannot explain the standard for jurisdiction, he or she can nevertheless determine that specific (and not general) jurisdiction is at stake if intuition suggests that the case at hand displays a stronger basis for jurisdiction than would other cases brought against the same defendant.

This is no excuse, however, for our failure as scholars to address these questions. The role of the scholar ought to be to bring such intuitions out into the open and to evaluate them critically. Even if judges use unexplained intuitions to determine whether general or specific jurisdiction is at stake, scholars should probe deeper. For the scholar, it is not enough merely to say, in the Helicopteros case, for example, that jurisdiction is specific because the judge would not have asserted jurisdiction over different cases brought against the same defendant. There would not be much point in writing about these things if, in the final analysis, we were to take at face value all of the judge’s intuitions.

What really matters, of course, is precisely one’s concept of what makes a case a stronger candidate for forum jurisdiction. What are the appropriate criteria for ranking various assertions of jurisdiction over the same defendant? Which of the disputes in which the defendant might become embroiled are sufficiently connected to the forum that jurisdiction is appropriate, even though the defendant is not subject to the state’s authority in all of his or her other activities? The virtue of the Supreme Court’s phrasing of the analysis — that the dispute must arise out of forum activities, or be related or connected to the forum — is that it focuses attention upon the necessary nexus between the forum and the dispute. The general/specific jurisdiction dichotomy is useful primarily after this test for jurisdiction has been applied.

and argues that they are better conceived of as dispute-specific. See Twitchell, supra note 6, at 612.

20 See id. at 642–43.

II. THE REQUISITE CONNECTION

Professor Twitchell is fairly quiet about what she thinks the requisite connection between forum and dispute ought to be. At one point she suggests that "[i]f the claim has some connection with the defendant's forum contacts, the court must consider the nature of the claim in deciding the jurisdiction question. . . . If the court's decision to exercise jurisdiction is colored by the nature of the claim, its decision is one of specific jurisdiction."22 Under this formulation, the clearly crucial question is whether there is an adequate constitutional nexus between the forum and the litigation such that dispute-specific analysis is appropriate.

What kind of nexus counts as "some connection" for Professor Twitchell's purposes? This is, of course, precisely the problem that was raised at the outset by our hypothetical about the automobile accident in Massachusetts. Our intuition that Massachusetts has a very strong claim to assert jurisdiction, that Florida has no claim (unless there are substantial enough contacts for general jurisdiction), and that the claims of Connecticut and Maine fall somewhere in between is an intuition about the proper sort of nexus upon which specific jurisdiction must be predicated. In an earlier article, I suggested that the reason that Massachusetts has such a strong claim is that events relevant to the substance of the dispute occurred there.23 In contrast, nothing of substantive relevance occurred in Florida, Maine, or Connecticut; if jurisdiction exists in those states, it must be general jurisdiction based upon continuous and systematic contacts.

Professor Twitchell's rejection of my analysis depends in part upon some misconceptions about what the requirement of substantive relevance entails. First, she seems to assume that I am requiring that the cause of action "directly arise" out of occurrences in the forum.24 In fact, I never used the phrase "directly arise" although I did speak of cases "arising" out of the forum activities or forum property. This seemingly minor addition of the word "directly" is actually significant. First, it allows her to claim that my test is not based upon Supreme Court precedent.25 Although she concedes the Court's use of the phrase "arises out of," her paraphrase of my language implies that my test is more stringent than the Court's because it adds the requirement of directness. Second, it suggests that my test is unusually stringent, because mere "arising out of" will not satisfy it. Because one of

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22 Twitchell, supra note 6, at 679–80.
24 See Twitchell, supra note 6, at 654.
25 See id.
Professor Twitchell’s objections to my test is precisely that it requires too close a connection between the forum and the dispute, the addition of the word “directly” is misleading.

A second respect in which Professor Twitchell misconceives my position is that she assumes that cases of specific jurisdiction, as I define them, are necessarily those in which the forum is required to apply its own law. She points out that this cannot be correct because the Supreme Court has expressly stated that the right to adjudicate is not the same as the right to apply one’s own law, and vice versa. The claim that she refutes, however, is not a claim that I have ever made. She infers that I require that a state apply its own law from the fact that I base specific jurisdiction upon the forum’s claim to regulate occurrences and property within its own territory. This, however, assumes that the only way to regulate an occurrence is to apply one’s own law.

To the contrary, it is entirely reasonable to speak of the exercise of adjudicatory authority as itself a form of regulation. Indeed, Professor Twitchell herself uses the term “regulating” in this way. Regardless of terminology, the point is that the forum is engaged in enforcing the applicable legal norms (whether foreign or domestic) with regard to local occurrences implicated in the plaintiff’s request for legal redress.

More generally, Professor Twitchell suggests that the requirement of substantive relevance is unclear. Obviously the initial exposition of the idea was not as clear as it should have been, or it would not have provoked the misunderstandings that it has. In the next two sections of this article, I will explore the substantive relevance test in greater depth, in order to clarify its contours and expose some areas of disagreement (and, perhaps, agreement) between myself and my critics. In unpacking the notion of substantive relevance, I will differentiate between a stronger and a weaker form of the requirement. The weaker form, I suspect, would be much more acceptable to Professor Twitchell; indeed, it represents one common intuition about the nexus upon which specific jurisdiction depends. After setting it out, I will return to the stronger version and argue in favor of it.

III. Weak Substantive Relevance: Connection to the Plot

Imagine that you are a torts professor, telling the story of World-Wide Volkswagen v. Woodson. Many torts professors, it seems, are

26 See id. at 654-55.
27 See id. at 655.
28 See id. at 647 (referring to the forum's interest in regulating behavior within its borders and assuming that only forum choice of law rules will apply).
29 See id. at 656-57.
entirely innocent of any interest in subjects like personal jurisdiction, so assume that you are telling it simply from a products liability standpoint and are not concerned with questions about the appropriate forum in which to litigate. Perhaps you are interested in the problem of liability for design defects; perhaps you are concerned about contributory negligence, or assumption of risk, or the method for assigning liability among the various defendants. What story would you tell to your class; or, to put it the other way around, if you were teaching socratically, what story would you want your class to tell to you? You would want to mention the accident itself, of course. You would want to mention the fact that Harry and Kay Robinson purchased the car from a particular retailer, who received it from a particular distributor, and you would tell what you knew about the circumstances of the automobile’s design. There are many other facts that might be worth telling from a substantive point of view. You might go beyond the most skeletal substantive description in order to set the background for the story. The Robinsons, it turns out, were in the process of moving to a new home. This is probably not of any particular legal relevance, but it helps to set the stage. It is the sort of thing that one might very well include in the story without the listener simply dismissing it as a digression.

Other factors do seem to be digressions, however. One might, perhaps, include some discussion of why the Robinsons were moving (a sick parent? a new job? tired of snow and attracted to the Sunbelt?). One might even include a subplot about this decision to move (Kay’s employer went bankrupt and she took the new job after reading about it in the *New York Times* classified section, because she had heard that employment opportunities for accountants were really opening up in the Southwest). At this point we seem to be digressing a fairly long way from the “real” plot of *World-Wide Volkswagen*. This notion of centrality to the plot line can be used to differentiate related from unrelated contacts.

Events

1) Design

Relevant to the Plot:

2) Purchase

3) Accident

4) Moving to new home, etc.

Digressions:

1) Sick parent

2) New job, etc.

In order to use centrality to the plot to identify related contacts, each of these occurrences can be assigned a geographical location; they

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31 These facts are purely hypothetical and are provided for illustrative purposes only.
are contacts with one state or another. Where did the sale take place? The accident? Where were the Robinsons moving? Where does the sick parent live? Where is the new job? The suit might arguably be brought in any one of these states on the grounds that it has some “connection” with the dispute. The question would be whether the connection is sufficiently tight that specific jurisdiction analysis is appropriate.

This weak version of substantive relevance treats as “related” any facts that are properly part of the story. For instance, if the story properly included the fact that the Robinsons were moving to Arizona, then there would be sufficient connection with Arizona that continuous and systematic contacts sufficient for general jurisdiction would not have to be shown. Under this view, one would eliminate things that were patently digressions. Thus it would not count as a contact with Minnesota, for instance, that the Robinsons were driving through Oklahoma as they were moving to Arizona because Harry, when he was a child growing up in Minnesota, had developed a fascination with the Grand Canyon.

Events

Relevant to the Plot:

1) Design . . . . . . . . . . (unknown)
2) Purchase . . . . . . . New York
3) Accident . . . . . . . Oklahoma
4) Moving to new home . . . . Arizona

Specific Jurisdiction

Digressions:

1) Sick Parent . . . . New Mexico
2) Place where Harry lived when forming desire to live in Arizona . . . . Minnesota

Is this sense of relatedness the one that Professor Twitchell has in mind? It is hard to tell, for she has not set out specifically what sort of connection she would require. Yet her treatment of the Helicopteros case suggests that it may capture some or all of her intuition. In Helicopteros, the factors connecting the dispute with Texas were the negotiations in Texas leading up to the contract in question and the manufacture and sale in Texas of helicopters and helicopter parts. Whether these factors are substantively relevant or not in the restrictive sense is not easy to say without knowing more about the applicable substantive law. Without this knowledge, I do not consider Helicopteros a “compelling” case for specific jurisdiction, as Professor

32 See Twitchell, supra note 6, at 639–43.
Twitchell does. I would want to know more about the substantive cause of action and whether any of the Texas activities figured into the merits of the case. But if Professor Twitchell considers these factors adequately connected to support specific jurisdiction, then perhaps the reason is that she thinks they are a proper part of the story of the case.

The weak version of the substantive relevance hypothesis is simply that any factor alleged as a connection in support of specific jurisdiction must be part of the substantive story underlying the dispute. Clearly, some line must be drawn to identify those factors that are sufficiently connected to the forum. Limiting these factors to parts of the story is a somewhat appealing way to draw the line because it captures the intuition that "the dispute" must be connected to the state. After all, what does "the dispute" consist of? It consists of the underlying story of the case, ruling out completely fanciful digressions and including any aspects that a person telling the story might include.

This intuition explains how there might be a spectrum of easier and harder cases for personal jurisdiction, even where the elements of purposefulness and fairness remain constant. It would explain how Professor Twitchell sees connections with a state as more or less attenuated; the central substantive elements of a dispute are clearly counted towards specific jurisdiction, whereas other factors are less probative. This analysis requires that there be some meaningful connection between the dispute and the forum, in the sense that the plaintiff cannot simply conjure up any event that happened in the forum and claim that it counts towards specific jurisdiction. Harry cannot simply choose Minnesota on the basis of his happy childhood memories. The forum event must be properly a part of the circumstances underlying the dispute.

IV. THE STRONGER VERSION: SUBSTANTIVE LEGAL RELEVANCE

Note that construing relatedness in terms of storytelling does emphasize the substantive aspects of the dispute. In fact, it is indeed a version of the substantive relevance test — it just construes "relevance" in an informal, storytelling way. The strong version of the substantive relevance hypothesis assesses substantive relevance in a more restrictive sense. It requires that the applicable rules of law actually make the contact in question one of substantive relevance. "Relevance" is a legal concept, not a storytelling standard. The mere fact that one might mention an occurrence in attempting to get to the

33 See id. at 652.

34 See id. at 647–48 (differentiating between contacts out of which the dispute directly arises and those that are more attenuated).
point of the central substantive issues is not enough; the occurrence must itself make a difference in the dispute's legal treatment.

At the outset, a minor choice-of-law element must be addressed. Relevance, as those who teach evidence constantly remind their students, depends upon the applicable legal rules. Identifying what is of substantive relevance requires knowing something about what those legal rules require. It is not enough to take the general view of the torts professor at a national law school; tort law varies from state to state. It is for this reason that I initially suggested that the factor in question must be relevant from the point of view of some state law that would arguably govern the case. At this threshold point, one need not make a full-fledged choice of law determination: one need merely consider the laws reasonably vying for application. Thus, one might define "relevance" according to some law that ultimately is held not to govern the case.

Although Professor Twitchell interprets this as a major concession, it isn't. In the first place, as pointed out earlier, even if the state does not apply its own law, it is still regulating in-state occurrences. Thus, the choice of law problem does not deprive a state of its claim to regulate the in-state events. The fact remains that something has occurred within the state that, under one party's version of the applicable law, is of legal significance. The fact that the court defers to a colorable claim of substantive relevance is not fatal either. All that one ever knows at this threshold stage is what the parties allege; there are many ways in which a finding of jurisdiction may depend upon assumptions later shown to be mistaken. For instance, jurisdiction may depend upon factual assumptions that are also part of the plaintiff's case-in-chief; these factual assumptions may later be found unwarranted. One does not adjudicate the merits before deciding whether jurisdiction exists.

Second, it would be extremely unusual for this choice-of-law problem to make any difference. World-Wide Volkswagen itself illustrates how choice-of-law concerns are unlikely to matter. The event that occurred in Oklahoma was the explosion of the car; under any of the applicable laws, this fact would be relevant. The only situation in which choice of law would really matter would be where the in-state occurrence was relevant under one state's law but not under another

36 See Brilmayer, supra note 23, at 82-85.
37 See Twitchell, supra note 6, at 656.
38 For example, it may ultimately turn out that a product sent into the forum did not cause injury there because the product, on the merits, was not the legal cause of the injury. Similarly, diversity jurisdiction depends upon reasonable allegations that the amount in controversy exceeds $10,000, but these allegations may later turn out to be untrue.
state's law. One can imagine situations of this sort, but I have not yet encountered them in practice. The problem seems academic rather than practical.

Having set this objection aside, one should inquire: what are the advantages of the more restrictive legal relevance standard? One immediately obvious advantage is that this standard is less vague than the requirement that a forum occurrence be part of the dispute in the storytelling sense. One person's plot is another's digression; when one tries to define precisely what must be told as part of the story, one is inevitably led back to the notion of substantive legal relevance. The move to Arizona might figure in some versions of the story, but not in others. To consider more than the bare substantive bones of the dispute is to open the door to widely varying notions of what the dispute is about.

Of course, the mere fact that it is easier to formalize the concept of legal relevance does not show that it is a superior test. To decide which test is preferable, one must know the rationale for treating related and unrelated contacts differently. Why are some contacts weighted more heavily than others? This is precisely the point at which Professor Twitchell leaves us guessing. She never explains why we have two different types of personal jurisdiction in the first place. Without an understanding of this essential question, it is not surprising that we are bereft of guidance on how to distinguish between the two.

The test of formal substantive relevance is based upon the notion that legal norms are designed to regulate conduct and to provide its legal consequences. A state has an interest in a specific dispute because some of the activities comprising that dispute occurred within the state. Adjudication of a dispute is a means towards the legitimate end of regulating local conduct or prescribing its legal consequences. This is the reason why a smaller number of related contacts suffice for personal jurisdiction; when substantively relevant activities occur within the forum, the forum has an interest in adjudicating their consequences. This interest tips the balance towards an assertion of jurisdiction.

It is true that some activities are "part of the dispute" in the informal storytelling sense even when they are not of formal substantive relevance. If we again consider the torts professor's perspective, however, it seems that, even in the substantive sense, unrelated oc-

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39 For instance, assume that the plaintiff purchases a drug in state A that injures her, but it cannot be determined at the time of litigation which defendant was the manufacturer. Under a "market share" rule, the mere fact of sale in the relevant market could suffice for liability, although mere sale would not be a relevant basis for liability if the state insisted on proof of actual causation. If this example seems somewhat strained, the reason is precisely that the choice-of-law problem is not much of a practical problem at all.

40 See Brilmayer, supra note 23, at 82–85.
currences are only a means to the end of explaining the factors which are of substantive relevance. It may be that the Robinson's move to Arizona is the cause of their presence in Oklahoma at the time of the accident. But this is not relevant in and of itself; it is relevant only for explaining a fact that is of legal relevance, namely, the occurrences in Oklahoma. Arizona, unlike Oklahoma, cannot claim an interest in adjudicating the dispute by pointing to a desire to regulate local activities. There are no local activities that Arizona is seeking to regulate.

It is possible to denigrate the issue of substantive relevance by characterizing it as simply a matter of pleading. But the fact that some activity must be pleaded and proven matters, not because pleading itself is important, but because the fact that the activity must be pleaded and proven reflects concerns of substantive law. Under a test of substantive relevance, the inquiry must always be into state substantive policies, and whether they are reflected in its substantive law, its rules of evidence, or its rules of pleading.

V. OTHER TESTS FOR RELATEDNESS

Professor Twitchell seems to disagree that the local occurrences which a state has an interest in regulating are those identified by the applicable substantive laws. She discusses two types of connections, both of which were suggested briefly in an earlier article of mine and both of which I rejected as insufficient. One is similarity between the defendant's in-state activities and the out-of-state activities that gave rise to the litigation. The second is "but for" or "historical" causation between the defendant's in-state activities and the out-of-state activities that gave rise to the litigation. It is unclear whether she means that these two types of connections are always enough, but she does reject my claim that they do not substitute for legal relevance. It is fair, then, to ask whether either type of nexus ought to be sufficient for specific jurisdiction.

Our earlier hypothetical about the auto accident in Massachusetts illustrates both historical connection and similarity as a basis for specific jurisdiction. Both Maine and Connecticut have "but for" historical connections to the dispute, in the sense that "but for" the trip towards Maine, and "but for" the passage through Connecticut, the plaintiff would not have been in Massachusetts. Presumably, the defendant's conduct in Connecticut was also "similar" to the conduct that gave rise to the cause of action in Massachusetts, although we

41 See Twitchell, supra note 6, at 657 & n.205 (citing Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting)).
42 See Brilmayer, supra note 23, at 80–81.
43 See Twitchell, supra note 6, at 660–61.
will see in a moment that this conclusion is not without difficulty. The similarity is that the defendants drove in Connecticut, and it was driving that brought about the Massachusetts injury.

Note first that both “but for” historical connection and similarity are in a sense parasitic upon the notion of substantive relevance. To what must the forum contacts be “similar”? They must be similar to the activity that gave rise to the cause of action, namely the Massachusetts driving. With what must they be historically connected? Again, they must be historically connected to the activities out of which the dispute arose, namely the Massachusetts activities. Both of these tests therefore seem to recognize the primacy of substantive relevance. It is just that they do not restrict specific jurisdiction to states in which substantively relevant activities occurred. One assumes, therefore, that the justification for basing jurisdiction upon historically connected facts or similar activities would be likewise parasitic upon the justification for basing jurisdiction upon contacts of substantive relevance. Is there such a justification?

At this point, again, it becomes quite crucial to know what Professor Twitchell sees as the underlying foundation for personal jurisdiction in the first place. Why should it improve a state’s argument for jurisdiction that the cause of action (which occurred elsewhere) is based upon a fact pattern similar to things that happened in the forum? Or that the cause of action has some kind of causal link to some forum activities, either in the sense that the forum activities were part of a chain of conduct leading up to the cause of action, or that the cause of action motivated the forum activities? We shall examine these two questions in turn.

As a paradigmatic instance of specific jurisdiction based upon similar forum activities, consider the case of a manufacturer from state M who directly ships products into the forum (state F) and into one other state (state A). The products are purchased by consumers in states F and A, and used there. One of the items sent into state A malfunctions, causing an accident and injury. Presumably, if the product that the manufacturer sent into state F had been the one that caused an injury, that would be an adequate basis for jurisdiction because the defendant sent it into the forum directly. The “similarity” argument would be that since the defendant instead sent a similar product into the state, that would be an adequate basis also.

The intuition supporting jurisdiction would probably be that the forum has an “interest” in deterring defective manufacture of products, at least when they are sent into the forum. It is entirely “fortuitous” that the one sent into state A, rather than the one sent into state F, was the one that caused the injury. Therefore, state F may manifest

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44 See id. at 661.
45 See id.
its interest in deterring or otherwise regulating the sending of defective products into the state by requiring that the defendant defend in state F a products liability case actually arising in state A.

Initially, we must confront a tricky question of what constitutes adequate similarity. Must it be the identical product that is distributed? A similar make or model? From the same year? What does similarity mean in the context of goods that are not mass-produced? In the context of other sorts of tort or contract actions? It is obvious from an example elsewhere in her article that in Professor Twitchell's view not all forms of similarity will suffice.46

Implicit in the scenario I have set out also seems to be an assumption that all of the products are equally defective. Would assertion of specific jurisdiction require that a similar product sent into the forum state have an identical defect? On the one hand, it seems that it should; for, if hoping to hasten my inheritance, I send a box of poisoned candy to my wealthy uncle in Wyoming, and a perfectly innocuous box to my aunt in Arizona, it is hard to see why Arizona would have any interest in providing a forum for litigation brought by my uncle when the candy I sent makes him sick. On the other hand, this complicates the jurisdictional calculus a good bit. The plaintiff must no longer show merely that there were similar products in the state, but that they were similarly defective. This raises further problems about what constitutes a sufficiently similar defect.

Even if we take the case of greatest similarity, it is not at all clear why a defective product sent into the state but causing no injury is as strong a basis for jurisdiction as a defective product sent into the state that does cause injury. Now of course, as Professor Twitchell says, whether the injury occurred in state A or state F may be completely fortuitous.47 But in this sense, all of tort law is based upon fortuity. If none of the defendant's defectively manufactured products happens to injure anyone, this also may be a complete fortuity. But it nonetheless protects the defendant from tort liability. In some sense, everything that happens, both in the jurisdictional and the substantive contexts, is fortuitous. One might as well say that there should be no jurisdiction when the product sent into the forum is the one that causes the injury, because the fact that someone was injured is merely fortuitous. Would we denigrate state A's claim to assert jurisdiction as the place of the accident merely because the fact that the injury did occur there was pure happenstance?

46 Professor Twitchell discusses the problem of a retired General Motors employee suing GM in Florida as a case of general jurisdiction. See id. at 670. Yet the Florida activities of General Motors are "similar" to those leading up to the accident if GM has any employees or other contractual dealings in Florida; the similarity is that both activities involve employment (or other contractual) relationships.

47 See id. at 661.
What other reasons might one give for basing jurisdiction on similar products that have not caused injury? Certainly the basis for jurisdiction cannot be either litigational or party convenience. Litigational convenience is not guaranteed, for the activities in the forum had nothing to do with the cause of action. Product similarity does not ensure the presence of witnesses or tangible evidence in the forum. Because events occurring in the forum do not have to be proven in the litigation — that is, because they are not substantively relevant — these similar activities will not make the forum an efficient one for evidentiary purposes. Moreover, the mere fact that similar products were sent into the forum does not ensure that it will be convenient for the parties either. Professor Twitchell suggests at one point that the fact that similar products were sent into the forum may establish that the defendant has insurance, but whether there is insurance has nothing to do with whether any similar products are present in the forum as opposed to in any other location. The existence of some similar products in any other location would suggest the presence of insurance just as strongly because large-scale manufacturers are likely to insure. Insurance may arguably be a reason for expanding personal jurisdiction generally; however, its existence is made no more likely by the details of where those products were sent.

Perhaps the real basis for the similarity argument is expectations. If the defendant has sent similar products into the forum, then it must have anticipated that it might be subject to suit there if one of those products were to malfunction, and it would not be surprised to be sued in the forum on this particular cause of action, even though the action arose in another state. But this argument does not explain predicing jurisdiction upon the presence of similar products. First, why should we assume that, just because the defendant expects to litigate forum injuries in the forum, he or she will expect to be sued in the forum for a cause of action that did not arise there? Second, why should we assume that the defendant's surprise is reduced by virtue of the fact that the products it sent into the state were similar to those that actually caused injury elsewhere?

If one assumes that awareness of potential liability to suit on some cause of action in the forum entails awareness of potential liability on other causes of action that did not arise in the forum, then one risks turning specific jurisdiction into general jurisdiction. Under this view, the defendant should be equally unsurprised by any cause of action brought against him or her in the forum: the very definition of general jurisdiction.

The problem with the expectations argument is that it ignores the difficult question: surprise as to what? Surprise depends upon how one

48 See id.
describes the defendant's expectations. One might say, "Having shipped products into state F, the defendant expects to be subject to suit there." Or one might say, "Having shipped products into state F, the defendant expects to be subject to suit there if one of those products injures someone in state F." Or one might say, "Having shipped products into state F, the defendant expects to be subject to suit there if a similar product injures someone anywhere in the country." The first phrasing of the defendant's expectations results in general jurisdiction, since the defendant's expectations are phrased in a "dispute-blind" way. The second leads only to jurisdiction over injuries actually occurring in the forum. The third leads to "dispute-specific" jurisdiction based upon similar circumstances.

More generally, all expectations arguments are incomplete bases for jurisdiction. If state F explicitly notifies me that I will henceforth be subject to personal jurisdiction in F in all cases in which I might be a defendant, I may adjust and act on my expectations accordingly — by procuring insurance, for example. But this does not make jurisdiction in state F fair. The question is, why does state F have a right to impose such a burden upon me? If state F exercises jurisdiction over me in cases that arise in state A, then the fact that I have been led to expect this seems beside the point. The relevant question is, may state F condition entry into its markets upon subjection to jurisdiction over actions involving events occurring elsewhere?

In fairness to Professor Twitchell, I should acknowledge that allowing dispute-specific analysis of a broad range of cases does not mean — even under her view — that jurisdiction will exist in all of those cases. The next step seems to be a generalized fairness analysis, and at this point she might even take substantive relevance into account. The problem is that relying so heavily upon some subsequent generalized fairness analysis simply shifts the inquiry towards this second stage of analysis, which remains quite amorphous and itself has no clear foundation. We still have no answer to the question of why similarity makes dispute-specific analysis appropriate, nor can we evaluate the results produced by such an analysis because we simply do not know what they will be.

Much of what has just been said about the similarity test for related contacts can also be said about historical connection or "but for" causation. Note first that although it bears some resemblance to our earlier test of inclusion in the plot line, it is actually more elastic. For example, it is a "but for" cause of the accident that the defendant and plaintiff were born: does this mean that specific jurisdiction analysis is appropriate in their states of birth, even if they left them years ago? One would probably not include the circumstances of the defen-

49 See id. at 663.
dendant's birth in recounting the facts leading up to the litigation; place of birth therefore flunks the test of plot-inclusion. Like similarity, historical connection is an enormously expansive test. Are all states having “but for” connections with the dispute relieved from the obligation to establish “continuous and systematic” connections and instead allowed to employ the more lenient standard for specific jurisdiction?

Finally, it seems that neither of these tests is consistent with the two cases in which the Supreme Court has directly addressed the issue of what constitutes an appropriate nexus for specific jurisdiction. In Shaffer v. Heitner and Rush v. Savchuk the Court applied the requirement that property must be related to the dispute in order to establish jurisdiction. In Shaffer, the connection between the property and the dispute was that the plaintiff in a derivative suit held stock in the defendant corporation within the forum state. In Rush, the property in question was the contractual obligation of the defendant's insurer to defend a suit arising out of an auto accident.

Both assertions of jurisdiction seem to be “dispute-specific” in the sense that Professor Twitchell requires; the arguments in favor of litigation in that particular forum support jurisdiction over some causes of action more strongly than others. But both assertions of jurisdiction were invalidated by the Supreme Court. In Rush, the Court pointed out that the insurance policy was not related to the “operative facts” of the litigation; this phrasing suggests support for a test of substantive relevance. Furthermore, in Rush it is not difficult to argue some “but for” relationship between the property and the litigation. People buy auto insurance in order to protect themselves against litigation such as the suit in question, and also because some states require it as a condition for driving on the open road. The defendant might never have had the accident and might not have been worth suing if he had not had insurance.

The challenge is to devise a test that shows why the property in Rush and Shaffer was “unrelated,” or else to offer some alternative theory about relatedness that explains why those cases were wrongly decided. If one is to maintain that there is a difference between general and specific jurisdiction, or to use Professor Twitchell's terminology, between dispute-blind and dispute-specific jurisdiction, then

52 See 433 U.S. at 189-90.
53 See 444 U.S. at 322.
54 See id. at 329.
one must have some sort of explanation for why two types of jurisdiction exist. Such an explanation would help identify those disputes that are sufficiently connected to the forum for the court to apply the more lenient test for specific jurisdiction, and those that must meet the more restrictive "continuous and systematic" test.

It used to be so easy. The ground-breaking work of Professors von Mehren and Trautman dealt with the easy cases for general and specific jurisdiction, cases in which there was a clear connection between the dispute and forum or in which it was clear that no such connection existed. The luxury of focusing on easy cases is a luxury that we don't have any more. Notwithstanding the remaining problems discussed above, we should be grateful that another scholar, Professor Twitchell, has seen fit to enter this controversy; we should eagerly anticipate her continued involvement and further investigations.