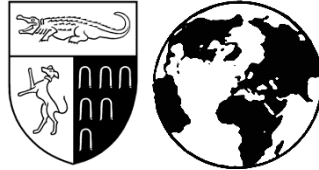


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## A General Look at Specific Jurisdiction

*Towards a unified theory of “arising out of” or “related to” jurisdiction where the defendant’s forum conduct contributed to the plaintiff’s claims*

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### INTRODUCTION

Success, in domestic and international litigation alike, depends on finding a court with jurisdiction over the defendant. American constitutional law, which governs assertion of jurisdiction even over international defendants in American courts, has developed the subject of personal jurisdiction into a fine art. It’s all a question of whether “minimum contacts” exist between the defendant and the forum, and whether the assertion of jurisdiction satisfies a standard of “fair play and substantial justice.”<sup>1</sup>

A central element of this constitutional assessment is whether the defendant’s contacts are “related to” the dispute or, differently phrased, whether the dispute “arises out of” the defendant’s contacts with the forum. If so, the ques-

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1. *See Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also* *Milliken*, 311 U.S. at 462-63 (“Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied.”)).

tion is said to be one of specific jurisdiction; if not, the higher threshold for general jurisdiction must be met.<sup>2</sup>

Almost identical logic prevails in the international context. Given the realities of international commerce today, it's unsurprising that many of the cases at the core of any study of American personal jurisdiction arose out of cross-border transactions. In *Asahi Metal Industry*,<sup>3</sup> a Japanese valve manufacturer sold products to a Taiwanese tire assembler, which then sold its tires all over the world. After an alleged defect in one of the tires caused a motorcycle accident in California, courts had to decide whether the Japanese valve manufacturer was subject to California's jurisdiction. In *Helicopteros Nacionales de Colombia*,<sup>4</sup> a Colombian corporation contracted with a Peruvian company, which was part of a joint venture based in Texas, to provide helicopter transportation services for the venture. When one of the helicopters crashed in Peru with Americans onboard, courts had to decide whether the Colombian corporation could be sued for wrongful death in Texas. In *J. McIntyre Machinery, Ltd.*,<sup>5</sup> a British company manufactured a shearing machine that injured a plaintiff in New Jersey. In *Goodyear Dunlop Tires*,<sup>6</sup> North Carolina residents travelling on a bus in France were harmed by an accident allegedly caused by an international subsidiary of an American corporation. All such cases implicate international law, business, and politics. Where personal jurisdiction is concerned, domestic law has global consequences.

It is clear that assertions of jurisdiction that target international defendants must meet the same contacts requirement as assertions of jurisdiction that target purely interstate defendants. Moreover, the jurisdiction law of foreign nations and international or regional governance institutions in many cases reflects the same or similar concepts.<sup>7</sup> What is called for is a unified theory of specific jurisdiction, relying on concepts of general applicability, to explain the common-

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2. See *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) ("Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida."); *Int'l Shoe Co.*, 326 U.S. at 318 ("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.") (internal citations omitted).

3. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) (Discussing the application of the stream of commerce doctrine in a case between a Taiwanese and a Japanese company).

4. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (Discussing the sufficiency of a Colombian defendant's contacts with the state of Texas to justify personal jurisdiction).

5. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (Discussing the requirement of purposeful availment and its application to a case against an English company).

6. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (Establishing the "at home" test used for determining general jurisdiction, which is used in the interstate context).

7. See, e.g., Council Regulation 44/2001, Regarding Jurisdiction, Recognition, and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) (EC) (Recognizing jurisdiction over citizens of another EU country for "matters relating to liability for wrongful acts" (emphasis added)); Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (entered into force Oct. 1, 2015) (Recognizing the ability to voluntarily submit to jurisdiction of a foreign court through a forum selection clause); Rome Statute of the International Criminal Court art. 12, U.N. Doc. A/ Conf.183/9 (July 17, 1998) (Stating the preconditions to the exercise of jurisdiction of the International Criminal Court).

alities underlying all of these examples of the concept of “arising out of” or “related to” jurisdiction.

If negligent driving causes a car crash in Berlin, Connecticut, and suit is brought in New York, then the question of jurisdiction in the Empire State is one of general jurisdiction and a very substantial connection must be established. For individuals, New York domicile or residence would be enough. For corporations, jurisdiction would exist if the defendant was incorporated or had its principal place of business there. The same substantial connections between New York and the defendant are required if the crash occurred in Berlin, Germany.

If suit was filed in Connecticut, however, it *would* matter whether this crash occurred in Berlin, Connecticut or Berlin, Germany. If the case were filed in the Nutmeg State, the Berlin, Connecticut suit would be one of specific jurisdiction because the connections to the forum would be “related to” the accident. A smaller number of contacts would be enough. For both interstate and international cases, that is to say, the requirements for general and specific jurisdiction are sufficiently different that this initial categorization is a “make or break” matter in many cases. For both interstate and international cases, it matters whether the suit was filed in the place where the accident occurred.

The matter is clear enough in hypothetical examples, but reality is, as usual, more complex. In close cases, how can we tell whether a dispute “arises out of” some particular contact with the forum?<sup>8</sup> Enter the United States Supreme Court. Existing authority on specific jurisdiction, I argue here, supports the requirement that for “arising out of” or “related to” jurisdiction, the defendant’s forum activities must have somehow *contributed to* the plaintiff’s claim.

Assertion of personal jurisdiction over nonresidents is not an end in itself.<sup>9</sup> It is a means to the end of promoting the public good in the forum state by supporting socially desirable behavior and discouraging the infliction of harm. It does this, in part, by requiring defendants to compensate those they injured within the forum state, or who were injured by conduct directed at the forum state.

Supreme Court precedents upholding specific jurisdiction all involve forum contacts which made the plaintiff’s injuries possible, or more probable; in such cases, assertion of jurisdiction reinforces the deterrent effect of substantive law.<sup>10</sup> The requirement that specific jurisdiction rest on forum contacts that “contributed to” the plaintiff’s claims is thus a consequence of the rational basis test; state action is constitutional only where it bears a rational relationship to a legitimate state interest.<sup>11</sup>

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8. For the few Supreme Court precedents that bear on the issue, see *infra* text accompanying notes 22-26.

9. See *infra* text accompanying notes 43-44.

10. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

11. Traditional notions of federalism and individual liberty foreclose states’ ability to exercise extraterritorial power (such as one state regulating the national market) from being legitimate. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (“[T]he requirement that a court have personal jurisdiction comes from the Due Process Clause’s protection of the defendant’s personal liberty interest, and . . . the requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”) (internal citation omitted).

The generality of this reasoning is what accounts for the possibility of a unified theory of specific jurisdiction, applicable in both interstate and international cases. The task of developing such a unified theory has fallen to the highest courts of the states in the international system because no international court with the responsibility over international civil cases has been established. The general principle is that a state has no rational basis for adjudicating cases in which the defendant's behavior in the forum did not contribute to the plaintiff's injury. A court must ask, "in what way did this forum event, forum person, or forum property contribute to the plaintiff's alleged harm?" If the answer is that it did not, the forum contacts can be counted only towards general jurisdiction.

### I. A REPRESENTATIVE CASE

While obviously important from a theoretical perspective, interest in the issue is not limited to law professors. For lawyers and judges, distinguishing between specific and general jurisdiction is probably the most important single jurisdictional problem remaining to be resolved. At stake in the determination of jurisdiction is more than just litigation convenience; there are also serious choice of law implications. For example, under settled choice of law principles, the forum's statute of limitations is considered "procedural" and therefore, like other "procedural" rules, applies to all of the cases that are brought there.<sup>12</sup> Also at stake are matters such as variation among juror attitudes in different regions of the country; the availability of punitive damages (a "remedial" question); and the differences in choice of law approaches that states in the country employ to decide which substantive law should govern a dispute.

The issue's practical significance stems from the frequency with which it arises in mass tort litigation against large corporations. One of the standard problems involves product liability disputes against large manufacturers.<sup>13</sup> The defendant typically has his or her home base in one state (call it Alpha), and the plaintiff lives and was injured in another (Beta). The defendant's alleged malfeasance may be limited to Alpha (the defendant's home base), but for many manufacturers markets are nation- or worldwide, and injuries may occur all around the country and across the globe.

In the hypothetical under construction, I will call the forum – a third state – Gamma. Alpha and Beta both seem like logical places to sue, but what ex-

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12. This practice was upheld against a Due Process Clause challenge in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

13. The case that the Court agreed to hear on January 19, 2017, involves the pharmaceutical giant Bristol-Myers Squibb (BMS) which owns the patent to, and now manufactures, the blood thinner drug Plavix. At issue in the Plavix litigation is whether BMS can be sued in California for sales and injuries, allegedly caused by the drug all around the nation. The contacts with the California forum were, first, that some fraction of the claims arose in California, and, second, that BMS has offices there to facilitate its California operations. *See Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 886 (Cal. 2016) ("In the present matter, there is no question that BMS has purposely availed itself of the privilege of conducting activities in California, invoking the benefits and protection of its laws, and BMS does not contend otherwise. Not only did BMS market and advertise Plavix in this state, it employs sales representatives in California, contracted with a California-based pharmaceutical distributor, operates research and laboratory facilities in this state, and even has an office in the state capital to lobby the state on the company's behalf.").

plains the choice of Gamma? Sometimes the defendant has additional activities in Gamma, such as parts of its distribution network or sales of the product to locals. There may also be persons claiming to have been injured who are now living in Gamma. It is not clear what to make of these connections with the forum if the specific plaintiff whose jurisdictional claim is under consideration was not among them. Our plaintiff purchased the drug and was injured at her home in Beta.

Does it matter that there are other plaintiffs who, having been injured in Gamma, are permitted to sue in Gamma? Does it matter that the defendant marketed its products in the forum, when our plaintiff only purchased the product that injured her at her home? Are the defendant's Gamma-located contacts "related to" the dispute between it and our Beta plaintiff? Does her cause of action "arise out of" the defendant's Gamma-situated conduct?

Jurisdictional requirements such as the "arising out of" requirement determine the ultimate size of such cases, that is, the number of plaintiffs who are permitted to sue in a particular forum. These cases can be so massive that a loss in the courts would threaten to bankrupt even the very largest defendant. Restrictive jurisdictional rules promise to prevent a case from being financially devastating, even if it remains incredibly expensive. Defendants love them.

One intuition that plaintiffs' lawyers commonly rely on is that the Beta plaintiff's case is "related to" the litigation in Gamma because of its substantive similarity to injuries occurring in Gamma.<sup>14</sup> If followed, such intuitions often result in giving the plaintiff – who of course picks the forum that is best from her own point of view – her choice of fifty places to sue.

Appealing as this intuition may sound to plaintiff-friendly lawyers, it is of doubtful constitutional stature under existing Supreme Court precedent.<sup>15</sup> Americans sometimes characterize the jurisdictional practice of other nations as "exorbitant."<sup>16</sup> But the reach of the American long arm in such cases strikes some commentators as truly scandalous.<sup>17</sup>

## II. PROPOSALS FOR A STANDARD

There is little in the way of clear standards for what makes a contact with the forum "related to" the litigation or qualifies a dispute as "arising out of" the defendant's contacts with the forum. There is no consensus approach – either academic or judicial – and the few writers who have addressed the question

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14. Another common reaction is that Gamma is the logical place to consolidate all of the litigation. The constitutionality of this argument is highly suspect after *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding that jurisdiction in a nationwide class action might not be established by considerations of convenience of litigation consolidation.)

15. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) ("Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Internal citation omitted)); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985).

16. See, e.g., Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006).

17. This reaction is not limited to jurisdiction in mass tort cases. For example, the American practice of "tag jurisdiction" has been the subject of considerable condemnation. *Id.* at 478.

have mostly fallen victim to the lure of “sliding scales” and “nexus tests.”<sup>18</sup> Meanwhile defendants complain bitterly as injured people (and of course their lawyers) energetically shop around for the advantageous place to litigate.

Increasingly, these hunting expeditions zero in on the United States.<sup>19</sup> U.S. domination of the market for international tort litigation supports a new form of imperialism in which economic migrants vie for entry into the most plaintiff favoring forum in the (interstate) market in the most plaintiff favoring (international) state. This does a disservice (defendants argue) to the orderly administration of justice, confirming stereotypes about American lawyers chasing ambulances and holding the Due Process Clause up to ridicule. It creates the unattractive impression that anything less than American justice is a half measure, second best if that.

There is reason to think that time may be running out on this era of *laissez faire*. On January 19, 2017, the Supreme Court granted certiorari on a case that squarely presents the issue of distinguishing specific from general jurisdiction.<sup>20</sup> Whether or not the Court pays heed to proposals debuted in the academic literature – none of which have been widely adopted – the chances are good that it will somehow clarify the jurisdictional standard in the near future. Here I survey the available models.

#### A. *Substantive Relevance*

In earlier articles, I have argued that the test for specific jurisdiction includes a requirement that the contact with the forum be “substantively relevant” to the dispute.<sup>21</sup> Supreme Court cases cited as illustrating this line of reasoning included *Shaffer v. Heitner* and *Rush v. Savchuk*.

The earlier of these cases was *Shaffer*. Ownership of stock in a company incorporated in Delaware was held not to be a sufficient basis for Delaware jurisdiction despite the claim that this property was located in the forum.<sup>22</sup> The Court revolutionized personal jurisdiction doctrine by requiring that to serve as a basis for jurisdiction, property not be “completely unrelated to” the plaintiff’s cause of action:

[W]here, as in the instant quasi in rem action, the property now serving as the basis for state-court jurisdiction is completely unrelated to the plaintiff’s cause of action,

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18. See, e.g., *Bristol-Myers Squibb Co.*, 377 P.3d at 885.

19. As an example of the attractiveness of a U.S. forum for cases originating outside the United States, see the eagerness of foreign plaintiffs to bring claims under the Alien Tort Statute, largely rejected in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). In the tort context, consider the litigation against Union Carbide arising out of the 1984 chemical spill in Bhopal, India. See generally Mark A. Chinen, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multi-national Corporations*, 28 HARV. INT’L L. J. 202 (1986).

20. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 377 P.3d 874 (Cal. 2016), cert granted, (U.S. Jan. 19, 2017) (No. 16-466). Lea Brilmayer worked as a consultant for Bristol-Myers Squibb before the California Supreme Court.

21. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 [hereinafter *How Contacts Count*]. See also Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988).

22. *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977) (“Appellants’ holdings in *Greyhound* do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State’s courts over appellants.”).

the presence of the property alone, i.e., absent other ties among the defendant, the State, and the litigation, would not support the State's jurisdiction.<sup>23</sup>

Then three years later, the Court revisited the matter. In *Rush*, the plaintiff was injured in a car accident allegedly caused by the defendant in Indiana. The plaintiff moved to Minnesota, where he proceeded to sue the defendant in Minnesota state court. The plaintiff sought to obtain “quasi in rem” jurisdiction by garnishing the obligation of defendant's insurance company to defend him in court. This obligation was said to be located in Minnesota, one of the places where the insurance company did unrelated business.

It was arguable that the insurance policy was “related to” the auto accident because it was an auto insurance policy purchased specifically to ensure the legal representation to and indemnification of the defendant in the event of an accident. The Supreme Court, however, put its foot down. Neither Minnesota nor any other state could “constitutionally exercise quasi in rem jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit.”<sup>24</sup> *Rush* definitively abolished jurisdiction based on the presence of a third party insurance policy, emphasizing that the policy was not the subject matter of the cause of action:

The insurance policy is not the subject matter of the case, . . . nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.<sup>25</sup>

As this line of argument makes clear, *Rush*, like *Shaffer* before it, can be interpreted as an application of the “substantive relevance” standard.<sup>26</sup>

The fact pattern in *Helicopteros Nacionales de Colombia* illustrates what is at stake.<sup>27</sup> The forum, Texas, sought to exercise jurisdiction over legal claims arising out of a helicopter crash in Peru. Texas was the site of some discussions leading up to the signing of the contract arranging the helicopter services in question. The defendant had also purchased helicopters from a manufacturer in Texas. Its personnel occasionally went to Texas for training and some payments had been made from a bank in Houston.

The Court sidestepped the issue of whether these contacts were related to the dispute by asserting that this issue had not been raised by the parties; they had, it wrote, framed the argument in such a way as to concede the non-existence of specific jurisdiction.<sup>28</sup> It seems clear, however, that the contacts would not have satisfied the substantive relevance test. The cause of action brought in Texas was not connected to the contract arranging transportation services – a contract to which the plaintiff was not a party. These contacts were

23. *Id.* at 187 (emphasis added).

24. *Rush v. Savchuk*, 444 U.S. 320, 322 (1980).

25. *Id.* at 329.

26. Brilmayer, *How Contacts Count*, *supra* note 21.

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

28. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 415 (“All parties to the present case concede that respondents’ claims against Helicol did not ‘arise out of,’ and are not related to, Helicol’s activities within Texas.”).

alleged not for reasons of their substantive connection to the dispute, but solely as a means of obtaining jurisdiction.

The substantive relevance test has been criticized for its supposed focus on technical pleading requirements.<sup>29</sup> As Justice Brennan wrote in his dissent in *Helicopteros*:

Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State. For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action 'did not "arise out of," and [is] not related to,' that training. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for the pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the Court would concede that the specific jurisdiction of the Texas courts was applicable.<sup>30</sup>

The existence of personal jurisdiction, it is argued, should not depend on the formal requirements of the cause of action.

The substantive relevance test need not be interpreted that way, however; other areas of law impose requirements of substantive relevance without facing such objections. One particularly useful example is the evidentiary requirement that, to be admissible at trial, evidence must be legally relevant to the dispute.<sup>31</sup> Rule 401 of the Federal Rules of Evidence reflects the common logic underlying the substantive relevance test and (as I will argue below) both the test of but/for causation and the "contributing to" requirement. According to Rule 401, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Although this rule requires that careful thought be given to the legal prerequisites of the cause of action, it has not been understood to tie evidentiary rulings to technical pleading requirements.<sup>32</sup>

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29. See, e.g., Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U. CAL. DAVIS L. REV. 207, 234 (2014) ("Briefly stated, the substantive relevance test is considered too narrow and dependent upon formal pleading requirements."). See also *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 427 (1984) (Brennan, J., dissenting) ("Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State."); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 656 (1988) ("Although the substantive relevance standard can eliminate some contacts as clearly not relevant, it is difficult in other cases to know which facts 'go to make up' the cause of action, what constitutes a 'geographical qualification' of a fact relevant to the merits, when an act is 'in the forum,' or when a forum event is sufficiently attributable to the defendant to call it a 'contact' at all.")

30. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 427 (1984) (Brennan, J., dissenting)

31. FED. R. EVID. 402 ("Relevant evidence is admissible . . . Irrelevant evidence is not admissible.")

32. The Advisory Committee wrote, "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand." Notes of Advisory Committee on Proposed Rules. FED. R. EVID. 401 advisory committee's note.



The substantive relevance test appears, at any rate, to be too restrictive for its critics, who seem to want a more flexible approach that allows consideration of a broader range of forum contacts. Importantly, though critics have not argued that this test is *overly* inclusive. That is, they have not argued that substantive relevance is *insufficient* to establish “arising out” of jurisdiction. Substantive relevance is, perhaps, only one way to determine that a dispute meets the constitutional requirements of “arising out of” and “related to” contacts. Although this test satisfies all existing United States Supreme Court authority, other tests may do so as well. The test of “but/for causality” is one of the alternatives.

### B. *But/for Causality*

Another well known test is “but/for” causality.<sup>33</sup> It may be what Justice Brennan had in mind when he wrote in his dissenting opinion in *Helicopteros* that “[t]he negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash.”<sup>34</sup> One event is a “but/for” cause of another event if, had the former not occurred first, the latter would not have happened thereafter. It resembles the Rule 401 requirement that an item of evidence must “ha[ve] any tendency to make a fact more or less probable than it would be without the evidence.”

The causality test has considerable appeal, and properly understood, leads to almost the same results as “substantive relevance.” The reason is that but/for causation is often interpreted in line with substantive tort law concepts. Jurisdictional causation is thus brought into line with substantive causation, thereby limiting specific jurisdiction to considerably more manageable proportions.

The substantive causation model on which specific jurisdiction might be modeled – the doctrine of “proximate cause” – restricts recovery in tort law to situations where the harm was reasonably foreseeable. Generally, in order to be liable for a tort claim, a defendant must be found to have *proximately* caused the harm alleged. No one is held liable for everything they cause inadvertently; if the harm they cause is deemed too remote, then defendants generally escape liability. In considering satisfaction of the proximate cause requirement, courts often ask whether the harms a defendant’s conduct caused would have been foreseeable by a reasonable person at the time the defendant acted.

In an opinion by Benjamin Cardozo, that is now a favorite of introductory torts courses, a railroad company was held not liable for all of the harms caused by its employees’ negligent behavior when they helped a person try to mount a moving train. In his haste, the would-be passenger dropped the package he was carrying, which, unbeknownst to the railroad employees helping him, contained

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33. See, e.g., *O’Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322 (3d Cir. 2007); *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 864 (9th Cir. 2003); *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev’d on other grounds*, *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 553-55 (Mass. 1994). For an overview of the case law, see Rhodes & Robertson, *supra* note 29, at 232-33.

34. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 426.

explosives. The package exploded on contact with the ground, causing reverberations around the station. The reverberations in turn caused a heavy set of scales to fall on a bystander at the other end of the station. It was the bystander who sued. As Judge Cardozo wrote:

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest.<sup>35</sup>

The same or similar proximate causation limits, unsurprisingly, are placed on “but/for” tests of specific personal jurisdiction. And this is for the same or similar reasons. Were we simply to ask, “but for events taking place in the forum, would the harm have occurred?” we might find that the forum’s jurisdiction had no end. When Ted Kaczynski’s parents married and conceived a child, they set in motion a chain of events that resulted in the murders of three innocent people by letter bombs. For example, if their marital residence was in New Jersey, the families of Kaczynski’s victims would hardly be justified in suing the Unabomber there on the theory that his parents’ marital relationship was a “but/for” cause of the serial killings.<sup>36</sup>

### C. *Similarity*

Finally, the similarity test is responsible for much of the “anything goes” nature of some academic commentary.<sup>37</sup> If a defendant ships any comparable goods to a plaintiff favoring state, then all of the claims alleging injury from the product as it has been used anywhere in the world would end up being adjudicated in that state. This would be done under that state’s procedural law and with whatever other advantages to litigating in that particular forum.

The “similarity” test suffers from having no coherent theoretical justification. Why should a manufacturer be subject to jurisdiction in Gamma just because it sent similar articles into the state? If those other, similar articles caused harm, then the proper response is to litigate those injuries in Gamma – not to turn Gamma into a nationwide center for litigation. But if none of those similar articles caused any harm, then the case for jurisdiction in Gamma is even weaker.

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35. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

36. See Alston Chase, *Harvard and the Making of the Unabomber*, THE ATLANTIC (June 2000), <https://www.theatlantic.com/magazine/archive/2000/06/harvard-and-the-making-of-the-unabomber/378239/>.

37. See, e.g., Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 672 (2006) (“So too have plaintiffs languished under a doctrine that closed courthouse doors that more properly should have been open.”); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 783 (1985) (“In the last forty years, an upheaval in the procedural law of private international and interstate disputes has occurred. Every doctrine used to mediate between jurisdictions competing to resolve lawsuits having interstate connections – jurisdiction, venue, and choice of law – has undergone dramatic change. Both jurisdiction and venue have been greatly expanded, and the conflicts rules have become more diverse and manipulable.”)

## III. FORUM EVENTS THAT “CONTRIBUTE TO” THE DISPUTE

My approach embodies elements common to the “but/for” and “substantive relevance” tests. In deciding whether specific jurisdiction exists, a court should ask whether the defendant’s forum contacts in some way *contributed to* the plaintiff’s claim. Specific jurisdiction exists only where something in the forum somehow helped to bring about the plaintiff’s alleged injury. Something happening in the forum must have made the injury more likely, more serious, or more of the defendant’s responsibility. If the defendant’s activities in the forum in no way contributed to the events making up the dispute, they do not support specific jurisdiction.

This test is securely grounded in the language of the Due Process Clause, which has been interpreted to focus on “fair play and substantial justice” – concepts that have as much relevance in the international setting as the interstate setting. If personal jurisdiction was based solely on deference to other sovereigns, then it might make sense to treat international cases differently from interstate cases. Because under the Full Faith and Credit Clause states are not required constitutionally to give the same respect to the laws of foreign countries as to the laws of sister states, a theoretical explanation for personal jurisdiction that implicated only deference to other sovereigns might treat international cases as embodying a lower standard for jurisdiction. Where the explanation rests, instead, on fairness to people it is not surprising that international and interstate cases are treated the same.<sup>38</sup>

If jurisdiction is based on a factor that does not contribute to the plaintiff’s claim, then jurisdiction is not a function of the merits of the dispute. A single substantive legal fact pattern may result either in jurisdiction, or no jurisdiction, depending on something extrinsic to the merits such as the defendant’s California offices in Bristol-Myers Squibb.<sup>39</sup> The jurisdictional result, in other words, does not depend on the merits of the dispute but on this extrinsic variable. If the defendant has no unrelated office in the forum – whether because its unrelated offices are situated elsewhere, or that it has no such unrelated offices anywhere – then there is no jurisdiction; but if it does, then jurisdiction exists. What is jurisdiction, then, a function of? What explains this difference in treatment? No rational basis for the different treatment has been suggested.

## A. Foundations of the “Contributed To” Requirement

The legal foundations of this common sense “contributed to” standard reflect both the Constitution’s general disapproval of extraterritoriality as well as its general insistence on a minimum level of rationality. The general disapprov-

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38. The question of what individual fairness requires is discussed *infra* text accompany notes 43-44.

39. In Bristol-Myers Squibb, the defendant had offices in California (the forum) which the California Supreme Court cited as supporting jurisdiction in that state. However, the offices had played no part in the harms that the plaintiff suffered in his home state. Bristol-Myers Squibb Co, 377 P.3d at 879 (“BMS further asserted that its research and development of Plavix did not take place in California, nor was any work related to its labeling, packaging, regulatory approval, or its advertising or marketing strategy performed by any of its employees in this state.”).

al of extraterritoriality, which is manifested in a number of constitutional provisions, is symptomatic of the United States' federal structure, which respects and preserves states' rights while protecting states from encroachment by one another.<sup>40</sup> The rational basis test of the Fourteenth Amendment Due Process Clause protects individuals from irrational state action.<sup>41</sup> The "contributed to" requirement is firmly grounded on explicit constitutional provisions; it is not a purely theoretical construct, and it is as consistent with existing precedents as it is with common sense.

But the constitutional logic on which the due process argument rests is equally convincing as a matter of simple fairness. The concepts of fair process and reasonableness are shared by the interstate and the international context. International and interstate cases are different for some jurisdictional purposes. In *Home Insurance Company v. Dick*, the plaintiff sought application of Texas law to his dispute with his insurer.<sup>42</sup> All of the relevant connections were with Mexico, however. In declaring the application of Texas law invalid, the Supreme Court rejected the plaintiff's argument that "the Federal Constitution does not require the States to recognize and protect rights derived from the laws of foreign countries." This would be relevant, the Court wrote, if the defense against Texas law had been based on the Full Faith and Credit Clause, which does not require deference to the laws of foreign countries. But the Due Process Clause, wrote the Court, extends equally to the international context and it would be a violation of that clause for Texas to apply its law to a case with which it had no contacts.

Due process requires that exercise of state authority be fair and reasonable. These values are as important where aliens' rights are at stake as when the

40. The chief constitutional limit on extraterritoriality is the Fourteenth Amendment Due Process Clause, U.S. CONST. amend. XIV. *See, e.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930) ("The Texas statute as here construed and applied deprives the garnishees of property without due process of law."). *See also* U.S. CONST. art. IV § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). The Commerce Clause has also played a role in federal policing of state extraterritoriality. *See, e.g.*, *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 324 (1989) (holding that Connecticut's beer-price-affirmation statute violates the Commerce Clause).

41. The first section of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV.

For a foundational case involving rational basis review, see *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938). *See also*, U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

target of the forum's exercise of power is the resident of another state of the Union. "[Due Process Clause] protection" wrote the Court "extends to aliens" and this simple assertion remains unchallenged today, when a case involves the authority of a state court to extend its long arm into the international arena. U.S. legal history of jurisdictional doctrine provides an illustration of how that reasoning plays out in one specific context. As, effectively, one of the highest courts in the international legal system, the United States Supreme Court bears considerable responsibility – and has the greatest opportunity – for developing these standards of general fairness and legitimate state authority.

### *B. Individual Rights and State Sovereignty*

The requirement that the defendant's forum activities have contributed to the plaintiff's cause of action is grounded directly in the constitutionally protected values of individual due process and state territorial sovereignty. A preliminary word is necessary to clarify the relationship between these two constitutional values, since that relationship has sometimes been misunderstood.

Deciding an issue of personal jurisdiction does not – despite some suggestions to the contrary – require a court to make a categorical choice between sovereignty and fairness, rejecting one as a basis for the doctrine and adopting the other.<sup>43</sup> It is mistaken to conceptualize personal jurisdiction issues as though they could only embody one of these; personal jurisdiction is not a binary matter. Jurisdiction cases implicate both individual rights and territorial sovereignty, and which one prevails in a particular dispute depends on the specific circumstances.

Disputes over personal jurisdiction are legal struggles between a forum attempting to assert the power of the state and a defendant trying to escape its clutches. The former's rhetorical weapon of choice is state sovereignty and the latter's, individual fairness. Personal jurisdiction involves an accommodation between these two competing values, both of constitutional stature; in the law of personal jurisdiction, neither is categorically superior. The supposed dilemma of state sovereignty versus individual rights is a false dichotomy.

These two co-equal elements combine in a familiar pattern. Assuming that it employs no invidious criteria, a legal rule need only be supported by a rational relationship to a legitimate state interest. There are at least two components to this elementary principle. First, there must be some legitimate state interest at stake, and second, the rule being challenged must further that objective to some reasonable degree.

In the context of personal jurisdiction, the legitimate interest is found in the state's right to regulate what happens within its boundaries. The requirement of a rational relationship to that interest – which protects individual fairness – is satisfied only if the state's assertion of jurisdiction really furthers that goal. A rule of personal jurisdiction meets the rational basis test – furthering the

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43. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).

objective of territorial regulation – only if it is limited to cases where the defendant’s forum activities “contributed to” the plaintiff’s claim. The same logic is applicable on general fairness grounds in international relations more generally.

C. *What Counts as a Legitimate Objective?*

The requirement of a rational relationship to a legitimate objective is, admittedly, not difficult to meet. But that does not mean that it is always satisfied, or that a frivolous or circular objective should be rubber stamped as satisfactory. In the present context, it does place limits on what a state might allege as a basis for jurisdiction. In particular, legitimacy must be established by reference to domestic policies; a domestic forum must promote the domestic policy objectives of the people of the state.

Thus, for example, the requirement of a rational connection to a legitimate objective cannot be satisfied by the simple fact that the majority of legislators, and the executive, happened to *want* the law. The desire to maximally extend state court jurisdiction cannot be the objective cited in support of the adoption of a long-arm statute. If that were sufficient, the Due Process Clause would be either circular or vacuous. A state’s assertion of jurisdiction does not count as an end in itself but must be a means to the end of an interest that is already concededly legitimate. In this regard, a legitimate objective supporting a state’s assertion of power over foreigners is regulation of local activities.

States are entitled to regulate harmful conduct within the state; they are entitled to enforce causes of action arising there. A sovereign (or quasi-sovereign, in the case of a state) has a recognized interest in regulating conduct within its borders. It reflects the state’s obligation to protect its citizens and their interests within the state. These factors come together to support the most recognizable form of personal jurisdiction exercised by states: jurisdiction over conduct of those within its territorial boundaries. They also form the core of the justification for a state’s exercise of power over those who act outside of its boundaries, but whose conduct affects people present or residing there.

The analysis would be different if the defendant was a forum resident. For local defendants, the legitimacy of forum authority stems from the defendant’s right to participate in the forum’s democratic political processes.<sup>44</sup> The state is asserting jurisdiction over its own people. This justification for state power gives rise to general jurisdiction. Insiders are subject to jurisdiction over any cause of action regardless of where it arose.

Jurisdiction over foreigners, however, has been designated “specific jurisdiction.” Outsiders are only subject to jurisdiction over causes of actions that “arose inside” or were “related to” events occurring within the state’s borders. And they are subject to jurisdiction in such cases only where territorial sovereignty interests are at stake. The state’s attempt to impose its judicial authority

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44. See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (U.S. 2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.”); Brilmayer, *How Contacts Count*, *supra* note 21; Brilmayer et. al, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

must bear a reasonable relationship to the regulation of conduct or injuries occurring within the state. The contribution requirement is grounded on that requirement of a rational relationship.

*D. Rational Relationships and the “Contribution” Requirement*

The “contributed to” test is motivated, first and foremost, by common sense. As a matter of purely domestic legal reasoning, a state cannot claim to be trying to reduce injuries when it penalizes a defendant whose conduct played no part in causing, aggravating, or intensifying those injuries. Penalizing the defendant for an action that played no role in bringing an injury about is simply not an effective deterrent.

The same principle applies in the interstate context. The state is entitled to discourage harmful behavior that occurs within its territorial boundaries or that is directed at the state and causes harm within those boundaries. But it is completely irrational – and thus a violation of Due Process – to go about this by taking jurisdiction over cases where the purported local aspects in no way contributed to the dispute’s occurrence. And while some states might conceivably have the desire to discourage harmful conduct which is wholly foreign – which occurred in other states and which caused no local injury – this is not a legitimate state interest. Disregard for the limitations on specific jurisdiction thus reveals either an irrational choice of method or an illegitimate choice of objective.

An out-of-state party’s contacts must be related to the plaintiff’s claim because the legitimate objective of promoting domestic policy is not furthered by penalizing defendants for conduct that did not contribute to the plaintiff’s claim. The mere fact that a party has contacts with a state in one area does not give the state the unfettered right to regulate all of that party’s conduct, however unrelated to the state it may have been. Moreover, there is no reason that a state should gain the ability to regulate out-of-state conduct through exposure to litigation simply because the party has parallel or similar contacts with it. The state is certainly permitted to regulate the defendant’s in-state contacts/conduct, but lacks jurisdiction over the defendant for the conduct unrelated to the party’s contacts with the state.

CONCLUSION

The proposal that specific jurisdiction exists only where the defendant’s forum contacts somehow contributed to the plaintiff’s claim is intended to fill a gap in the doctrine, not to change any rules or principles that have already been recognized as law. The reason for proposing this formulation is precisely that the Court has not yet articulated the difference between the two forms of personal jurisdiction in a way that can be applied as a test. This is as true in the international context as in the interstate context. Although the Court has given reasons to assume that it will treat both the same – sometimes simply by citing international and interstate cases interchangeably, without remarking on the equivalence in treatment – it has given few hints about what that common treatment might involve. Current Supreme Court jurisprudence would all re-

main unaltered if this interpretation of the existing case law were adopted. For example, this proposal would not alter the requirement of *attribution*: the defendant must somehow have “purposefully availed himself” of the benefits of forum law.<sup>45</sup> The plaintiff would still have to show that the forum contacts are the responsibility of the defendant; for example, the plaintiff’s own unilateral action cannot establish jurisdiction.<sup>46</sup> The purposefulness requirement has always formed part of a standard that had to be met *after* the case was made that specific jurisdiction would otherwise be available.<sup>47</sup> My argument addresses only the logically prior point about specific jurisdiction’s availability. My interpretation, also, would not alter the test for general jurisdiction, which now seems to have been settled by the “at home” formula. The function of this “contribution” formulation is simply to clarify what makes general jurisdiction and specific jurisdiction different.

The significance of the proposal lies in the likelihood that fewer disputes qualify for specific jurisdiction. As a result, more plaintiffs would find general jurisdiction to be the sole remaining alternative. To prove the existence of general jurisdiction, the contacts must be quite extensive, such as a domicile or residence for individuals or place of incorporation or principal place of business for corporations. However, for contacts that bear the appropriate relationship to the plaintiff’s claim, a single contact can be sufficient if it is of the right kind. For this reason, it is natural for plaintiffs to push the boundaries of specific jurisdiction to qualify for a quantitatively less demanding test.

This proposal lends clarity to the concept of jurisdiction by asking whether the defendant’s forum activities contributed to the plaintiff’s claim. But the reasons for adopting this proposal are not merely practical; there is also a strong basis for the “contributes to” standard in constitutional law and, indeed, in legal theory. Defendants’ foreign activities and any foreign injury that they cause do not give rise to a rational basis for imposition of forum authority. If the defendant engaged in conduct in the forum that contributed to the plaintiff’s claim, then the state has a rational basis for asserting jurisdiction as a means of regulating that in-state conduct. If nothing about the defendant’s in-state conduct contributed to the plaintiff’s injury, then the forum has no rational basis for flexing its legal muscles. It is an element of basic fairness, reflected in our constitutional text, that a sovereign must have some rational basis for asserting its power. But our constitutional text incorporates preexisting notions of fair-

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45. For cases deploying purposeful availment reasoning, see *Burger King Corp.*, 471 U.S. at 473 (“We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who ‘purposefully directs’ his activities toward forum residents.”); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (“The district court found that ‘[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state.’”); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (“[The] non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof . . .”).

46. *Brilmayer, How Contacts Count*, *supra* note 21, at 91-92 (discussing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)).

47. *E.g.* *Burger King Corp.*, 471 U.S. at 474 (“Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established “minimum contacts” in the forum State.”); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 315 (1980) (“It is misleading for the majority to characterize the argument in favor of jurisdiction as one of ‘foreseeability’ alone.”).



ness – that is to say, of “fair play and substantial justice” – which are applicable to international authority generally and thus provide the framework for a unified theory of specific jurisdiction.