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Personal Jurisdiction over Publishers in Defamation Actions: A Current Assessment

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Freedom of the press is a fundamental principle of American government and is guaranteed by the first amendment to the United States Constitution. The Supreme Court has stated that the press must neither be censored nor subject to prior restraint. The Court has also protected the press’ right of access to information and the press’ right to attend and report on judicial proceedings.

In order to preserve and protect freedom of the press in our society, courts have fashioned stringent substantive rules which must be

1. U.S. Const. amend I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Id. The first amendment was made applicable to the states through the fourteenth amendment in Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech and freedom of the press are "protected by the due process clause of the Fourteenth Amendment from impairment by the states").

2. New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). Justice Black stated that "the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." Id.

3. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (presumption that criminal trials are open to the press because "without some protection for seeking out the news, freedom of the press would be eviscerated") (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)); First Nat’l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (the first amendment protects not only the right to free expression, but also plays a "role in affording the public access to discussion, debate, and the dissemination of information and ideas"); Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976) (order restraining newspapers from publishing accounts of confessions of accused murderer was invalid because it violated constitutional guarantee of freedom of the press); Pennekamp v. Florida, 328 U.S. 331 (1946) (freedom of the press protects newspapers' right to criticize judicial practices).

4. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964). New York Times involved a libel action by the Alabama Commissioner of Public Affairs, whose duties included supervision of the Montgomery Police Department, against a newspaper which published a paid advertisement complaining about the Montgomery Police Department’s conduct in dealing with a racial disturbance. Id. at 256-58. The Commissioner alleged that, as one of the officials responsible, he was personally defamed by the publication. Id. at 258. The Supreme Court held that a public official could not recover for a defamatory statement made about his official conduct “unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Id. at 279-80.

The Supreme Court has extended the application of the actual malice rule since New York Times. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plaintiff must prove actual malice in suit against defendant who published on a
met in order for a plaintiff to bring and to win a defamation suit against a media defendant.\(^5\) In addition, courts have developed special procedural standards for publishers in defamation actions. For example, reasoning that potential media defendants who constantly fear adverse judgments in defamation suits will resort to self-censorship and refrain

\(^5\) See PROSSER AND KEETON ON THE LAW OF TORTS §§ 111-112 (W. Keeton 5th ed. 1984) [hereinafter cited as PROSSER AND KEETON]. Defamation is generally defined as the unprivileged publishing of false statements which causes injury by harming the plaintiff's reputation. \textit{Id.} § 111, at 771. Largely for historical reasons, there are two forms of action for defamatory publications. \textit{Id.} Libel normally involves that which is written and permanent and includes pictures, signs, telegraph messages and motion pictures. \textit{Id.} § 112, at 752. An action for slander lies when the plaintiff is injured by oral expressions or transitory gestures. \textit{Id.} Courts have disagreed over the characterization of radio and television broadcasts, some finding that they constitute libel, others that they constitute slander. \textit{Id.} § 112, at 787.

In order to establish a prima facie case of defamation, the plaintiff must plead the following: the publication conveyed a defamatory meaning (interpretation); the facts which gave rise to the defamatory meaning if they are not apparent on the face of the publication (inducement); the publication was defamatory in light of the facts (innuendo); and the defamatory meaning attached to the plaintiff (colloquium). \textit{Id.} § 111, at 780-83.
from discussing controversial issues of public importance, courts have developed special rules governing summary judgment.6

Similarly, courts have recognized that the fear of "chilling" the press becomes great when the publisher-defendant is subject to the jurisdiction of a foreign and often distant state.7 As a result, courts have

6. See Schuster v. U.S. News & World Report, Inc., 602 F.2d 850, 855 (8th Cir. 1979) (courts must keep in mind that the cost of defending a lawsuit may chill first amendment rights and grant summary judgment in favor of libel defendants where appropriate). Although courts are usually reluctant to grant summary judgment on issues like actual malice, which involve determining a subjective state of mind, a number of federal courts have recognized that the litigation costs of defending a defamation suit may chill first amendment expression and have approved of a more liberal use of summary procedures in defamation actions. See, e.g., Anderson v. Stano Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976) ("summary judgment is especially appropriate in libel cases, for prolonging a meritless case through trial could result in further chilling of First Amendment rights"); National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374, 379 (S.D.N.Y. 1980) (granting summary judgment in favor of defamation defendants is "rooted as deeply as judicial precedents can reach"); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) (summary procedures are more essential in the first amendment area since "the stake here, if harassment succeeds, is free debate"), cert. denied, 385 U.S. 1011 (1967).

Although the United States Supreme Court has not ruled directly on the issue, the Court questioned the propriety of granting summary judgment in actual malice cases in a footnote in Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). The Hutchinson Court stated, however, that the question was not presented by the facts of the case before it. Id.


One commentator has suggested that if the Supreme Court rejects the policy of liberal summary judgments in defamation actions, it will become very important to consider first amendment concerns at the jurisdictional stage. See Note, Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis, 9 HASTINGS CONST. L.Q. 975, 989 n.80 (1982).


In the traditional sense, a "chilling effect" on the press refers to the fear that the press will exercise self-censorship and refuse to comment about certain controversial topics. In the context of personal jurisdiction over publishers,
permitted nonresident media defendants to assert first amendment concerns in the personal jurisdiction analysis, and still other courts have suggested that media defendants may inject first amendment values into a venue analysis.

These decisions have given rise to the question of the effect that first amendment concerns should have on the exercise of long-arm jurisdiction over media defendants. This note will first review the general principles of personal jurisdiction. Second, it will discuss the ways in which the courts have interjected first amendment values into jurisdiction and venue determinations in defamation actions brought against nonresident publishers. Third, the note will analyze the Supreme

however, the concept of self-censorship refers to the fear that a publisher may not distribute in certain geographical areas if the risk of being sued in a foreign forum outweighs the benefits of distribution there.

Because of the multistate nature of defamation suits and the exercise of long-arm jurisdiction in these suits, media defendants are often forced to defend suits in foreign states. A multistate defamation action occurs when the plaintiff is allegedly libeled by a publication that circulated in more than one state. See, e.g., Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1st Cir. 1982), rev'd, 104 S. Ct. 1473 (1984) (suit against publisher whose allegedly libelous magazine circulated nationwide). For a further discussion of the facts in Keeton, see infra notes 106-09 and accompanying text.

In a multistate defamation action, the "single publication rule" allows a plaintiff to recover in one action for damages to his or her reputation suffered in all jurisdictions in which the defamatory material circulated. Restatement (Second) of Torts § 577A(4) (1977). Any later action for damages between the parties is barred by the initial judgment. Id.


10. For a discussion of personal jurisdiction, see infra notes 15-17 and accompanying text.

11. For a discussion of the three general ways in which courts have treated jurisdiction over publishers, see infra notes 42-44 and accompanying text.
Court's treatment of the effect of first amendment values on the jurisdictional determination in the recent personal jurisdiction cases of *Calder v. Jones* ¹² and *Keeton v. Hustler Magazine, Inc.* ¹³ Finally, this note will suggest that *Calder* and *Keeton* have properly resolved the split in the courts of appeals by clearly defining the correct standard for the exercise of long-arm jurisdiction over media defendants in defamation actions. ¹⁴

Personal, or *in personam* jurisdiction, refers to the court's power over the person of the defendant.¹⁵ In order to assert personal jurisdiction over a defendant who is a nonresident of the state in which the suit is brought, the court of the forum state must first invoke the state's long-arm statute providing for substituted service of process on nonresidents under specified circumstances.¹⁶ Second, the court must examine whether the nonresident defendant's contacts with the forum state are such that the exercise of long-arm jurisdiction over him will not violate the due process clause of the fourteenth amendment.¹⁷

Although the United States Supreme Court has not established a specific test to determine when the assertion of personal jurisdiction over nonresident defendants meets due process requirements,¹⁸ the

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¹⁴. For an analysis of the *Calder* and *Keeton* decisions, see infra notes 117-51 and accompanying text.

¹⁵. C. WRIGHT, LAW OF FEDERAL COURTS § 8 (1983). Subject matter jurisdiction refers to the power of a court to hear the suit. *Id.* § 7. Because the federal courts are courts of limited jurisdiction, it is unconstitutional for them to hear suits not within their jurisdiction. *Id.* Therefore, the party bringing the action in federal court is required to prove that the court has the power to hear the controversy. *Id.*

¹⁶. For a further discussion of state long-arm statutes, see supra note 7. Rule 4(e) of the Federal Rules of Civil Procedure authorizes the federal courts to make service upon a nonresident party in the circumstances and manner prescribed by the long-arm statute of the state in which the district court sits. *Fed. R. Civ. P.* 4(e).

¹⁷. C. WRIGHT, supra note 15, § 64. The due process clause of the fourteenth amendment requires that no state shall "deprive any person of life, liberty, or property without due process of law." *U.S. Const.* amend. XIV, § 1. A state violates the due process clause if it exercises personal jurisdiction over a defendant who does not have adequate contacts with the forum state because the nonresident must defend suit in a forum with which he has no relationship. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (exercise of jurisdiction violated due process). For a further discussion of *World-Wide Volkswagen*, see infra notes 28-38 and accompanying text.

¹⁸. See *Lewis*, The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction, 58 NOTRE DAME LAW. 699, 699 (1983) ("Few fields of legal thought have been so plagued by a penchant for abstraction as has personal jurisdiction."). The lower courts have endeavored to define the amount and type of contacts which a nonresident must have with the forum state for the exercise of long-arm jurisdiction to comport with due process. C. WRIGHT, supra note 15, § 64. For a discussion of several courts' assessments of
Court's general guidelines have required that jurisdiction be fair. The Court's starting point for the expansion of jurisdiction beyond a state's territorial boundary was the case of *International Shoe Co. v. Washington*. In *International Shoe*, the Court stated that a nonresident defendant could be subject to *in personam* jurisdiction if he had certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The *International Shoe* Court recognized that this "minimum contacts test" is not "mechanical or quantitative," but demands a balancing of the defendant's activity against the purpose of the due process clause, see infra notes 25-38 and accompanying text.


21. 326 U.S. 310 (1945). *International Shoe* involved an action by the State of Washington against a nonresident corporation, having salesmen residing and working in Washington, to compel the corporation to make payments to the state unemployment compensation fund. *Id.* at 311.

Prior to the *International Shoe* decision, in order to assert personal jurisdiction over a nonresident corporation, the Supreme Court had required the plaintiff to show that the nonresident corporation had "consented" to the state's exercise of jurisdiction by conducting business in the state. See, e.g., *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*, 289 U.S. 361 (1933). Alternatively, the Court upheld a state's assertion of personal jurisdiction by engaging in the fiction that the corporation was "present" in the state because of its activities there. See, e.g., *International Harvester Co. of America v. Kentucky*, 234 U.S. 579 (1914). See generally *Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts, From Pennoyer to Denckla: A Review*, 25 U. Chi. L. Rev. 569, 577-86 (1958).

22. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The *International Shoe* Court explained that in order to determine whether due process is satisfied, the court must look at the quality and nature of the defendant's activities. *Id.* at 319. Continuous activities by a corporation within a state, if they are of a substantial nature, may justify subjecting the defendant corporation to suit there even on a cause of action unrelated to the corporation's in-state activities. *Id.* at 318 (citations omitted). The commission of single or occasional acts by a defendant in a state may, depending on their nature and quality and the circumstances regarding their commission, be sufficient for the state to exercise its long-arm jurisdiction. *Id.*

23. *Id.* at 319. See also *Olsen v. Government of Mexico*, 729 F.2d 641, 649 (9th Cir. 1984) (the decision to exercise long-arm jurisdiction is not based upon a mechanical or quantitative test but upon reasonableness); *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982) (jurisdiction depends on the quality and nature of the defendant's contacts).
Since *International Shoe*, the Supreme Court, in struggling to define what kinds of minimum contacts make jurisdiction fair, has tended to limit the exercise of long-arm jurisdiction. For example, the Court found that a unilateral act of a defendant in the forum state was not enough to subject that defendant to the reach of the state's long-arm statute. Rather, the Supreme Court has required that "there be some

24. 326 U.S. at 319. The Court found that the corporation's systematic and continuous employment of salesmen who resided and worked in Washington resulted in a large volume of business for the defendant corporation. *Id.* at 320. This contact was sufficient for Washington to exercise long-arm jurisdiction over the corporation in an action related to its activities in the forum state. *Id.* The Supreme Court recognized that this balancing test is difficult to apply in *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). The Court explained that "the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. . . . We recognized that this determination is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'" *Id.* (citations omitted). The Supreme Court subsequently indicated its continuing approval of this formulation by stating that the "minimum contacts" test was not too high a price to pay for "fair play and substantial justice." *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977). For a discussion of the relationship of the due process clause to personal jurisdiction, see *supra* note 17 and accompanying text.

25. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the Supreme Court rejected Delaware's assertion of quasi-in rem jurisdiction over the nonresident defendants based on the sequestration of the stock of the defendant's corporation which was incorporated in Delaware. *Id.* at 213. The Court held for the corporation on the grounds that the mere presence of property in the forum state does not establish a sufficient contact between the owner of the property and the forum state to serve as the basis for personal jurisdiction over an unrelated cause of action. *Id.*

26. *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hanson*, the decedent, while a Pennsylvania domiciliary, executed a revocable trust in Delaware which made a Delaware company the trustee of certain securities. *Id.* at 238. After
becoming domiciled in Florida, the decedent gave certain other beneficiaries a power of appointment over the trust property. Id. at 239. The residuary legatees of the decedent's estate, the holders of the power, brought this action in Florida against the potential beneficiaries of the Delaware trust who were nonresidents. Id. at 240-41. The Supreme Court held that the Florida court lacked personal jurisdiction over the defendants on the ground that the unilateral act of the decedent in exercising the power of appointment in Florida was insufficient to confer jurisdiction. Id. at 253. 27.

27. Id. at 253 (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). The Court found that the potential beneficiaries did not act to purposefully avail themselves of the privilege of conducting activities within Florida. Id.

Many years later, in World-Wide Volkswagen Corp. v. Woodson, the Supreme Court stated that when a nonresident "purposefully avails itself" of the benefits of the forum state by carrying on activities there, it has notice that it can be sued in that state. 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). For a further discussion of the facts and holding of World-Wide Volkswagen, see infra notes 28-38 and accompanying text.

Courts may hold that a nonresident publisher purposefully avails itself of the privilege of conducting activities within the forum state when it circulates its product in the forum state or makes efforts to enroll subscribers in the forum state. See, e.g., Army Times Publishing Co. v. Watts, 730 F.2d 1398, 1400-01 (11th Cir. 1984). For a discussion of circulation as a relevant contact in the determination of long-arm jurisdiction over publishers, see infra notes 37, 111 & 113 and accompanying text.

modern trend toward multistate transactions. The Court stated that
the due process minimum contacts test has two functions: first, to pro-
tect the defendant from burdensome litigation in a foreign forum, and
second, to ensure that the states do not overreach "the limits imposed
on them by their status as coequal sovereigns in a federal system." World-
Wide Volkswagen further emphasized that due process requires that
the exercise of long-arm jurisdiction be reasonable or fair. The Court
then set forth five factors which it had previously considered in deter-
mining whether the due process test was met: (1) the burden on the
defendant; (2) the forum state's interest in the controversy; (3) the

29. 444 U.S. at 292-93. The Court explained that the due process limits on
state long-arm jurisdiction have been "substantially relaxed" since the early re-
quirement that the defendant be present within the state. Id. at 292. The Court
attributed this to the increase in multistate lawsuits due to the national expan-
sion of commerce, transportation, and communication. Id. at 293. See also Note,
Minimum Contacts, supra note 28, at 796 (World-Wide Volkswagen Court recognized
a change in American economy and the limited inconvenience to defendant
caused by an out-of-state suit).

30. 444 U.S. at 292. Many commentators have focused on the relationship
between state sovereignty and personal jurisdiction. See Ripple & Murphy, supra
note 28, at 72 (restrictions on jurisdiction result from territorial limitations on
states' power); Posnak, supra note 28, at 788 (interest of states as governmental
units is clearly a relevant factor in a jurisdictional determination); Note, Minimum
Contacts, supra note 28, at 797 (World-Wide Volkswagen Court placed the sover-
eignty issue above all others and refused to uphold jurisdiction which would
infringe on sovereignty of defendant's state). The Supreme Court first dis-
cussed the limitations that state sovereignty placed on another state's assertion
of personal jurisdiction in Pennoyer v. Neff, when it limited a state's jurisdiction to
those defendants within the state boundary. Pennoyer v. Neff, 95 U.S. 714
(1877) (overruled by International Shoe Co. v. Washington, 326 U.S. 310
(1945)). Much later, in World-Wide Volkswagen, the Supreme Court stated that the
concept of due process as an "instrument of interstate federalism" may require a
court to refuse to exercise long-arm jurisdiction even when other requisite jurisdic-
tional contacts are met. 444 U.S. at 294. Thus, a state is prevented from
unduly infringing upon the sovereignty of another state.

For a general discussion of federalism and the retention by each state of
certain individual sovereign powers, see Note, Separating Myth from Reality in Fed-
eralism Decisions: A Perspective of American Federalism—Past and Present, 35 Vand. L.
Rev. 161 (1982).

31. 444 U.S. at 292. The concept that the exercise of long-arm jurisdiction
must be fair was first articulated by the Supreme Court in McDonald v. Mabee,
243 U.S. 90, 91 (1917) (jurisdiction must not be contrary to natural justice). Since McDonald, the Court has frequently reiterated this fairness standard. See,
e.g., Kulko v. Superior Court, 436 U.S. 84, 92 (1978); Shaffer v. Heitner, 433
U.S. 186, 212 (1977); International Shoe Co. v. Washington, 326 U.S. 310, 316
(1945); Milliken v. Meyer, 311 U.S. 457, 463 (1940).

220, 223 (1957)). The burden placed on the defendant includes the geographic
convenience of the forum and the economic expense involved in defending a
suit in a foreign state. Lewis, The "Forum State Interest" Factor in Personal Jurisdic-
tion Adjudication: Home-Court Horses Hauling Constitutional Carts, 33 Mercer L.
Rev. 769, 810 (1982). In McGee, a California resident bought a life insurance policy
from a Texas corporation which had no office or agent in California and never
solicited or did any business there other than the policy in question. 355 U.S. at
plaintiff's interest in obtaining relief;\textsuperscript{34} (4) the interest of the interstate judicial system in resolving the dispute;\textsuperscript{35} and (5) the interest of all the states in promoting fundamental social policies.\textsuperscript{36} To these considerations the \textit{World-Wide Volkswagen} Court added a sixth requirement: that the defendant's contacts with the forum state allow him to anticipate

\textsuperscript{221-22.} The beneficiary of the policy brought an action in California against the Texas corporation which refused to pay the claim. \textit{Id.} The Court held that the facts that the insurer delivered the contract to California, that the premiums were mailed from California, and that the insured died in California constituted sufficient contacts to require the insurer to defend there. \textit{Id.} at 223. The Court explained that although the insurer may suffer some inconvenience by defending in California, modern transportation and communications are such that this burden does not amount to a denial of due process. \textit{Id.} at 223-24.

\textsuperscript{33.} 444 U.S. at 292 (citing \textit{McGee v. International Life Ins. Co.}, 355 U.S. 220, 223 (1957)). The interests of the forum state include facilitating plaintiffs' suits, applying local law to multistate controversies, and expanding the jurisdiction of the forum's courts. Lewis, \textit{supra} note 18, at 769. The \textit{McGee} Court reasoned that claimants, especially those of moderate incomes, would be severely disadvantaged if they were forced to sue the insurance company in a foreign state. 355 U.S. at 223. For a discussion of the facts of \textit{McGee}, see \textit{supra} note 32. The focus on the forum state's interests is indicative of the Supreme Court's concern over the impact of state sovereignty on the jurisdictional analysis, which first emerged in the Supreme Court's decision in \textit{Pennoyer}. \textit{See supra} note 20. For a discussion of state sovereignty's relation to personal jurisdiction, see \textit{supra} note 30.

\textsuperscript{34.} 444 U.S. at 292 (citing \textit{Kulko v. Superior Court}, 436 U.S. 84, 92 (1978); \textit{Shaffer v. Heitner}, 433 U.S. 186, 211 n.37 (1977)). This factor concerns, at least in part, convenience to the plaintiff. Lewis, \textit{supra} note 18, at 771. In most cases, this element is very easy to satisfy since the plaintiff usually brings an action in a convenient forum and has an interest in adjudicating the dispute in that forum. \textit{See Note, Personal Jurisdiction, supra note 28, at 304.} For an analysis of a nonresident plaintiff's interest in obtaining relief in the forum state when the statute of limitations has expired in all states except the forum state, see \textit{infra} notes 107-08 & 111 and accompanying text.

\textsuperscript{35.} 444 U.S. at 292. The judicial system is interested in efficiently resolving cases. Lewis, \textit{supra} note 18, at 772. An analysis of this factor should include the availability of witnesses, choice of law principles and standards of proof. 444 U.S. at 292.

\textsuperscript{36.} 444 U.S. at 292 (citing \textit{Kulko v. Superior Court}, 436 U.S. 84, 93, 98 (1978)). In \textit{Kulko}, a divorced wife, who recently had moved with her child from New York to California, brought a child support action in California against her former husband, who had remained in New York. 436 U.S. at 87-89. The Court held that California's exercise of jurisdiction over the husband would not be fair due to his less than minimal contacts with the forum. \textit{Id.} at 92. In evaluating the states' shared interests in furthering social policies, the Court reasoned that all the states shared a policy of encouraging family values. \textit{Id.} at 98-99. However, the Court then found that subjecting one parent "to suit in any State of the Union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement" would not promote a policy of encouraging reasonable separation agreements. \textit{Id.} at 93.

In a multistate defamation action, the interstate judicial system has an interest in allowing the plaintiff to recover in one action for injuries to his reputation caused by the circulation of the defamatory material in several states. This interest has manifested itself in the single publication rule. For a further discussion of the single publication rule, see \textit{supra} note 7.
defending suit there.\textsuperscript{37} In developing this last factor, the Court held that
\begin{quote}
the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.\textsuperscript{38}
\end{quote}

In addition to finding that it has personal jurisdiction before it hears a case, the court may also be asked to determine whether the venue is proper. Although jurisdiction and venue both concern where the suit will be heard, the concepts differ in that jurisdiction refers to the power of the court to hear the claim, while venue deals with determining the place where the judicial authority is most properly exercised.\textsuperscript{39} The


In the defamation context, the Supreme Court held that a publisher could reasonably anticipate being sued in any state where a "substantial number of copies" of the magazine are regularly sold. Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473, 1481-82 (1984). For a discussion of \textit{Keeton}, see infra notes 106-16 and accompanying text.

\textsuperscript{38} 444 U.S. at 297. In \textit{World-Wide Volkswagen}, the plaintiffs were injured when their automobile crashed and caught fire in Oklahoma while they were driving from their former home in New York to their new home in Arizona. \textit{Id.} at 288. They brought a products liability suit in an Oklahoma court against the regional distributor, the importer, the manufacturer and the retail dealer who sold the allegedly defective car to the plaintiffs. \textit{Id.} The retail dealer and the regional distributor were both incorporated and had their principle places of business in New York. Neither did any business in Oklahoma. \textit{Id.} at 288-89. However, the Court further indicated that it would not be unreasonable for a distributor who made efforts to serve the markets in other states to be subject to suit in those states. \textit{Id.} at 297. Nonetheless, the \textit{World-Wide Volkswagen} Court distinguished the case before it on the ground that the distributor's market was limited to retailers in New York, New Jersey, and Connecticut. \textit{Id.} at 298. The Supreme Court concluded that Oklahoma lacked jurisdiction over the nonresident dealer and distributor who sold the defective automobile to the plaintiffs who were injured in Oklahoma. The Court reasoned that although it was foreseeable to the defendants that the plaintiffs would drive the automobile to the forum state, the defendants' ties with that state were not such that they could anticipate being sued there.

\textsuperscript{39} Clark, \textit{Venue in Civil Actions}, 36 \textit{Okla. L. Rev.} 643 (1983). Jurisdiction and venue differ in that venue may be waived by the defendant. \textit{Id.} at 644-45. \textit{See also} FED. R. CIV. P. 12(b). In addition, a default judgment entered by a court which lacks personal or subject matter jurisdiction is void and therefore subject
purpose of venue considerations is to assure that a lawsuit is litigated in a
place convenient to the parties and witnesses. Thus, in the federal
system, a district court which has personal jurisdiction over a suit may,
for the convenience of parties and witnesses, transfer the suit to another
district court where venue is also proper.

Federal courts have espoused three views as to the exercise of long-
arm jurisdiction over media defendants in defamation actions. Several
circuits, led by the Fifth Circuit, have required a greater showing of con-
tact between the media defendant and the forum state than between
other defendants and the forum state as a predicate to the assertion of
jurisdiction. In contrast, other circuits have rejected the notion that
free speech concerns should enter the jurisdictional determination;
these courts apply the usual due process test. Still another set of
courts has suggested a third approach which, while rejecting the idea
that a defamation defendant must have greater contacts with the forum
state in order to be subject to long-arm jurisdiction, considers first
amendment values in determining whether to grant a media defendant’s
motion for transfer or change of venue.

to collateral attack. Clark, supra, at 644. However, a court will enforce a default
judgment entered by a court lacking venue. Id.

40. Clark, supra note 39, at 643 (citing Denver & R.G.W.R. Co. v. Brother-
hood of R.R. Trainmen, 387 U.S. 556, 560 (1967)). In a diversity action in federal
courts, venue is proper in the districts where all the plaintiffs or all the
defendants reside, or in which the claim arose. 28 U.S.C. § 1391(a) (1982). If
jurisdiction is not founded solely on diversity, venue is proper where all the de-
fendants reside or where the claim arose. Id. § 1391(b).

41. 28 U.S.C. § 1404(a) (1982). Section 1404(a) provides as follows: “For
the convenience of the parties and witnesses, in the interest of justice, a district
court may transfer any civil action to any other district or division where it might
have been brought.” Id. For a discussion of the possible use of transfer in suits
against nonresident publishers, see infra note 81.

42. Federal courts in the Third, Fifth, Eleventh and District of Columbia
Circuits have adopted this view. See Cox Enters. v. Holt, 678 F.2d 936 (11th Cir.),
reh'g granted, 691 F.2d 989 (11th Cir. 1982); New York Times Co. v. Con-
nor, 365 F.2d 567, 572 (5th Cir. 1966) (holding that first amendment concerns
require a greater showing of contact to exercise personal jurisdiction over pub-
lishers); McCabe v. Kevin Jenkins & Assoc., 531 F. Supp. 648 (E.D. Pa. 1982);
Cir. 1973). For a discussion of Connor and other cases setting out a stricter mini-
imum contacts requirement for jurisdiction over publishers, see infra notes 45-60
and accompanying text.

43. Federal courts in the Tenth and Fourth Circuits rejected the greater
requirement of contacts test. See, e.g., Anselmi v. Denver Post, Inc., 552 F.2d
316 (10th Cir.), cert. denied, 432 U.S. 911 (1977); David v. National Lampoon,
Inc., 432 F. Supp. 1097 (D.S.C. 1977). For a discussion of cases which reject the
Connor holding and apply the traditional minimum contacts analysis unaffected
by first amendment concerns, see infra notes 61-75 and accompanying text. For
a discussion of due process analysis in personal jurisdiction, see supra note 17.
For a discussion of the traditional minimum contacts test, see supra notes 22-24
and accompanying text.

44. Federal courts in the Second and Sixth Circuits suggested that first
amendment concerns may be considered when a nonresident media defendant
The seminal case declaring that due process requires a special jurisdictional standard for long-arm jurisdiction over defendant-publishers is the Fifth Circuit’s decision in *New York Times Co. v. Connor*. In *Connor*, the plaintiff, an Alabama official, brought a defamation action against the *New York Times* in the District Court for the Northern District of Alabama. The plaintiff argued that the paper’s circulation in Alabama was sufficient in and of itself to meet the minimum contacts test for the exercise of long-arm jurisdiction. The Fifth Circuit held that first amendment concerns demand “a greater showing of contact” between a defendant publisher and the forum state to satisfy due process in a defamation action than is required to exercise jurisdiction over other defendants. The Fifth Circuit was concerned that without this makes a motion for a transfer or change of venue. See *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212 (E.D. Tenn. 1968), *aff'd*, 419 F.2d 989 (6th Cir. 1969). For a discussion of these cases, see infra notes 76-85 and accompanying text. For a further discussion of venue, see supra note 39-41 and accompanying text.


46. 365 F.2d at 568. The *New York Times* Co. was a New York corporation which maintained no offices or employees in Alabama, although the staff reporter who wrote the article in controversy spent five days in Alabama on the assignment. *Id.* at 570.

47. *Id.* at 570-71. The *Times* had an average daily circulation in Alabama of 395 copies out of a total daily circulation of 650,000. The average Sunday circulation in Alabama was 2,455 of approximately 1,300,000 copies. *Id.* at 570. Sales revenue from the Alabama circulation accounted for 0.23% of the total sales revenue for the *Times*. *Id.* All of the newspapers which were circulated in Alabama were mailed from New York to individual subscribers, wholesalers, and retailers. *Id.*

The plaintiff in *Connor* attempted service under the Alabama long-arm statute. *Id.* at 568 n.1. See *Ala. Code* § 199(1) (1960) (service on nonresidents doing business in the state). The Alabama Supreme Court had construed the statute to be as broad as the constitutional limits of due process. 365 F.2d at 569 (citing *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964)). For a discussion of the role of the Constitution’s due process requirement in personal jurisdiction, see supra note 17 and accompanying text.

requirement of greater contacts, publishers, fearing libel actions and judgments, would avoid potentially damaging lawsuits by self-censorship in states where they had low distributions.49

One year later, in Curtis Publishing Co. v. Golino, the Fifth Circuit re-examined the Connor holding in a libel action against a national magazine.50 Connor, on the other hand, involved a libel action against a local newspaper, albeit one with a significant national circulation.51 In Golino, a Louisiana resident brought a suit in Louisiana against the publisher of The Saturday Evening Post.52 The Fifth Circuit in Golino declined to apply the Connor heightened due process test, which required a greater showing of contacts in order to assert jurisdiction over a publisher.53 In reaching this result, the court described the impact that first amendment considerations have on the jurisdictional analysis: while first amendment free speech protections do not mean that a publisher can never be

The Times had no offices, agents, or employees in Louisiana. Id. at 473. The publisher's contacts in the forum state consisted of sending less than 0.001% of its newspapers to subscribers and independent distributors in Louisiana. Id. at 474-75. The Fifth Circuit found that these activities constituted "at most a 'casual presence' in" Louisiana, and were insufficient to permit the exercise of long-arm jurisdiction. Id. at 475. In Elkhart Eng'g, the Fifth Circuit upheld Alabama's exercise of personal jurisdiction over a nonresident defendant whose plane crashed in Alabama during a single demonstration flight. Elkhart Eng'g Corp. v. Dornier Werke, 343 F.2d 861, 868 (5th Cir. 1965). The Connor court reconciled these cases by holding that first amendment concerns required "a greater showing of contact" to exercise personal jurisdiction over publishers. 365 F.2d at 572. Thus, the court determined that the plaintiff in Buckley, although alleging a greater number of contacts than the plaintiff in Elkhart, failed to make this showing. Id. For a further discussion of the Connor court's analysis of these two cases, see Comment, Long-Arm Jurisdiction Over Publishers, supra note 45, at 351-53.

49. 365 F.2d at 572. The court reasoned that newspapers would not circulate in any states where the income from the circulation there did not outweigh the danger of defending a defamation action. Id. As a result, the court found that the press would be chilled, not because the papers would refuse to comment on certain topics, but because they would refuse to distribute to the residents of these states. Id. Until Calder v. Jones, the United States Supreme Court had not ruled specifically on the validity of Connor. See Calder v. Jones, 104 S. Ct. 1482, 1487 (1984). For a discussion of Calder, see infra notes 86-105 and accompanying text. The Court has, in other contexts, found stricter procedural rules to be appropriate where the first amendment is concerned. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130, 142-45 (1967) (because of the first amendment values at stake, Court refused to find that respondent, by failing to assert the constitutional defense of actual malice at trial, waived his right to assert it in the Supreme Court).

50. 383 F.2d 586, 592 (5th Cir. 1967). The Golino decision was written by Judge Thornberry, who also authored the Connor opinion.

51. 365 F.2d at 570. For a further discussion of the facts and holding of Connor, see supra notes 46-49 and accompanying text.

52. 383 F.2d at 587-88. The publisher was a Pennsylvania corporation which circulated one percent of the allegedly libelous magazines in Louisiana. 383 F.2d at 588.

53. 383 F.2d at 592. For a discussion of the greater showing of contacts test required by Connor, see supra notes 47-49 and accompanying text.
sued in a distant forum, they "are a factor relevant to a determination of the jurisdictional question" which must be viewed in the context of the facts of each case.54

The Fifth Circuit in *Golino* distinguished *Connor* on the ground that while newspapers depend primarily upon circulation in a local area, national magazines purposefully avail themselves of a national market.55 The court reasoned that while the possibility of defending lawsuits in a distant forum could chill the desire of a newspaper to distribute there, fear of self-censorship would be less likely in the case of a defendant-magazine which, for economic reasons, strives for the widest possible circulation and intentionally exploits a national market.56 Thus, the court concluded that due process does not require a "greater contacts" test where the exercise of long-arm jurisdiction is unlikely to cause self-censorship.57 Following *Connor* and *Golino*, the Eleventh Circuit,58 to-

54. 383 F.2d at 592 (footnote omitted).
55. Id. at 590. The court stated that "valid factual distinctions in the instant case require a different result [from *Connor*]. These distinctions are predicated upon basic differences between the business activities, purposes, and motivations of a publisher of a newspaper, albeit one of world-wide influence, and a publisher of national magazines." Id. For a further discussion of *Golino*, see Note, supra note 6, at 993-95. For an analysis of the *Golino* rationale, see infra note 142.
56. 383 F.2d at 590. The Fifth Circuit noted that this decision did not apply in the case of a smaller magazine intended primarily for a local market. Id. at 592 n.13.
See also *McBride* v. Owens, 454 F. Supp. 731 (S.D. Tex. 1978) (refusing to permit exercise of long-arm jurisdiction over small out-of-state newspaper). *McBride* involved a libel action brought by a Texas resident against *The Los Angeles Times*, three smaller out-of-state newspapers, and two syndicated columnists. Id. at 733-34. The court granted two of the smaller newspapers' motions to dismiss for lack of personal jurisdiction on the ground that, because of the papers' small percentage of circulation in Texas, the exercise of jurisdiction "might limit the circulation of information to which the public is entitled." Id. at 735-36 (citing *Rebozo* v. Washington Post Co., 515 F.2d 1208, 1215 (5th Cir. 1975)). The court allowed the exercise of long-arm jurisdiction over the syndicated columnists because the "pecuniary benefits derived from national syndication greatly lessen any chilling effect caused by the prospect of litigation." Id. at 737. For a discussion of the relationship between a publisher's circulation and the "purposely avails" factor of the minimum contacts test, see supra note 27. For a discussion of the potential chilling effect on the press resulting from long-arm jurisdiction over publishers, see supra notes 7 & 49.
57. 383 F.2d at 592 (footnote omitted). The Fifth Circuit continued to apply the *Connor* test to cases in which the exercise of long-arm jurisdiction would potentially chill free press. See also *Wolfson* v. Houston Post Co., 441 F.2d 735 (5th Cir. 1971) (citing *Connor*, 365 F.2d 567 (5th Cir. 1966)). In *Wolfson*, the court held that the Florida long-arm statute did not extend over a nonresident newspaper whose only contacts with the state were .15% of the total circulation of the Sunday edition and .008% of the daily circulation in Florida. Id. at 736. Accord *Edwards* v. Associated Press, 512 F.2d 258 (5th Cir. 1975). In *Edwards*, the Fifth Circuit found that the defendant, a nonprofit news gathering agency, had such contacts with the forum state that due process was not offended by the exercise of the Mississippi long-arm statute. Id. at 268. The court emphasized that because the transmission of the news report in question was aimed almost
together with federal district courts in the Third Circuit and the District of Columbia Circuit, also have held that first amendment concerns require "a greater showing of contacts" between the defendant and the forum state to satisfy due process concerns when the defendant is a publisher in a defamation action than when some other defendant is involved.

In sharp contrast to Connor and its progeny, courts in the Tenth and Fourth Circuits have completely rejected the idea of incorporating special first amendment protections into the jurisdictional analysis, and have applied the traditional minimum contacts test to jurisdiction over exclusively at the forum state, Mississippi, the defendant had a "purposeful" connection with Mississippi and could expect to be sued there. Id. The court further reasoned that the assertion of jurisdiction over the Edwards defendant was unlikely to chill free expression since the Associated Press could avoid the risk of expensive litigation by apportioning the cost of defending lawsuits among its subscribers. Id. at 268 n.41. See also Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975). In Rebozo, the Fifth Circuit held that the defendant publishing company, which in 1973 derived $42,000 from Florida-related advertising in its Washington, D.C.-based newspaper, employed reporters who spent substantial amounts of time in Florida, and benefitted economically from a news service that distributed material to 10 newspapers based in Florida, was subject to jurisdiction in Florida for an allegedly defamatory news story which had circulated in Florida. Id. at 1215-16.

58. See Cox Enters. v. Holt, 678 F.2d 936 (11th Cir.), rehe'g granted, 691 F.2d 989 (11th Cir. 1982). The court in Cox applied the Connor standard and declined to assert long-arm jurisdiction over a publisher with a limited distribution of newspapers, through vending machines, in the forum state. Id. at 939. The court declared that "[t]he purpose of the standard enunciated in Connor is to encourage the flow of information across state lines and not to deter relatively minor press activities within a state." Id.

59. See McCabe v. Kevin Jenkins & Assoc., 531 F. Supp. 648, 655 (E.D. Pa. 1982) (citing Connor, 365 F.2d 567 (5th Cir. 1966)). In McCabe, the court, in an opinion by Chief Judge Lord, stated that if publishers were subject to ordinary standards for the assertion of in personam jurisdiction, "the legendary 'free marketplace of ideas', . . . would be transformed into a marketplace of ideas limited to those who can afford the cost of litigation in that particular marketplace." Id. at 654. The court declined to assert long-arm jurisdiction over the California publisher which had no offices or employees in Pennsylvania, and never solicited any business in the state, but whose publication circulated in the forum state through an unauthorized newsstand. Id. at 652, 654.

60. Margoles v. Johns, 333 F. Supp. 942 (D.D.C. 1971), aff'd, 483 F.2d 1212 (D.C. Cir. 1973) (applying Connor to an action for slander against newspaper defendant). Margoles involved an action for slander by an Illinois resident against a Wisconsin reporter who made allegedly defamatory statements in two telephone calls from Wisconsin to the District of Columbia. Id. at 942-43. The Margoles court granted the defendant's motion to dismiss for lack of personal jurisdiction, and rested its holding on two grounds. Id. First, the court adopted the Connor standard. Id. Second, Margoles explained that because the District of Columbia is a national focal point, the courts have consistently refused to consider a foreign newspaper's office and correspondents located in the District as sufficient for personal jurisdiction over a reporter affiliated with that paper who does not work out of the Washington office. Id. at 946.
publishers in defamation actions. For example, in Anselmi v. Denver Post, Inc., Wyoming residents brought a defamation action against The Times Mirror, a California corporation, for an article on alleged criminal activities in Wyoming which appeared in the Los Angeles Times and expressly named the plaintiffs. The Tenth Circuit declined to weigh first amendment considerations in determining whether the defendant's contacts were sufficient. The court questioned the strength of Connor in the Fifth Circuit after Golino, and recognized that other circuits had rejected a requirement of greater contacts, preferring to measure a publisher's contacts within the Supreme Court's traditional due process test. The Anselmi court determined that since first amendment concerns are evaluated at trial, interjecting them in an assessment of whether the defendant has sufficient minimum contacts with the forum state for the exercise of jurisdiction would "give to the media an additional arrow which is not appropriate."

61. For a discussion of the origins and contents of the minimum contacts requirement, see supra notes 22-38 and accompanying text.


63. Id. at 317. The allegedly libelous article discussed organized crime in a Wyoming town, and named the plaintiffs as having been asked by a Los Angeles grand jury whether they had knowingly bought stolen guns in Wyoming. Id. The plaintiffs also alleged that the article implied that they were involved in organized crime and assorted felonious activities. Id.

64. Id. at 324.

65. Id. The court cited Buckley v. New York Post Corp. to suggest that the circuits were refusing to follow the Fifth Circuit's requirement that first amendment values demanded a greater showing of contacts to assert jurisdiction over a media defendant in a defamation action. Id. See Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967). The Anselmi court also cited Golino to argue that even the Fifth Circuit had weakened its adherence to a special jurisdictional standard for media defendants. 552 F.2d at 324. See Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967) (refusing to apply Connor in case of action against a magazine which had a nationwide market). For a further discussion of Buckley, see infra notes 76-82 and accompanying text. For a further discussion of Golino, see supra notes 50-57 and accompanying text.

66. 552 F.2d at 324. Media defendants are protected by the New York Times Co. v. Sullivan requirement that a public official, or other qualifying plaintiff, must prove that the publisher made the defamatory statement with actual malice. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For a discussion of this requirement and the difficulty of proving actual malice, see supra note 4 and accompanying text.

Media defendants may assert other substantive defenses as well. Prosser and Keeton, supra note 5, § 116. For example, the publisher may defend on the ground that the allegedly defamatory statement is true. Id., at 840-42. Media defendants may also assert a qualified privilege to fairly and accurately report on public proceedings. Id. § 115, at 826-34. For a discussion of the elements which a defamation plaintiff must prove, see supra note 5.

The Anselmi court's reliance on the substantive defenses available to publishers is similar to the Second Circuit's reasoning in Buckley, which also rejected the Connor special jurisdictional standard for publishers. See Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967).

The Ninth Circuit has also rejected Connor on the grounds that publishers are adequately protected by substantive defenses. See Church of Scientology v.
The Anselmi court emphasized that even if first amendment concerns were appropriate to the jurisdictional determination, they would be outweighed by the countervailing policy considerations against forcing the plaintiff, left without a remedy in his own state, to travel to the newspaper's forum to vindicate his reputation. Having rejected a special standard, the Tenth Circuit invoked the World-Wide Volkswagen analysis, and found that since the article focused upon a Wyoming event, it was foreseeable to the paper that it could be "haled into court" there.

Adams, 584 F.2d 893, 899 (9th Cir. 1978). For a further discussion of Adams, see infra note 69.

Moreover, the United States Supreme Court recently reasoned that media defendants are protected by substantive laws, and that to introduce first amendment concerns into the jurisdictional analysis would be a form of "double counting." Calder v. Jones, 104 S. Ct. 1482, 1488 (1984). For a discussion of Calder, see infra notes 86-105 and accompanying text.

The Tenth Circuit was concerned that if it adopted a special jurisdictional standard, its citizens, as potential defamation plaintiffs, would be placed in an "extremely disadvantageous position." Id. at 325.

See World-Wide Volkswagen, 444 U.S. 286 (1980) (a nonresident defendant may be subject to long-arm jurisdiction of a forum state where his contacts were such that he could reasonably anticipate defending suit there). For a further discussion of World-Wide Volkswagen, see supra notes 28-38 and accompanying text.

The Tenth Circuit stated that when the story was written and published it was foreseeable that it would be given substantial attention within the State of Wyoming since there was more reader interest there than in any of the other states. Thus it was no accident that it had substantial effect in Wyoming. So, then, the Times developed and prepared a story which had greater reader interest, was colorful, explosive and capable of inflicting injury within Wyoming and which also was capable of producing litigation such as that which is before the court. Id. Based on this reasoning, the court concluded that it was consistent with due process to assert jurisdiction over the nonresident publisher which had only five to eight Wyoming subscribers, but solicited advertising from Wyoming, and published an article focusing on a Wyoming event. Id.

The Tenth Circuit recently applied this reasoning in a case involving a slander action brought by a California corporation against a Dutch journalist and Dutch publisher. See American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, 710 F.2d 1449 (10th Cir. 1983). A similar approach was followed by the Ninth Circuit in Church of Scientology v. Adams, 584 F.2d 893 (9th Cir. 1978). Adams involved a libel action by a California church in a California court against a Missouri publisher. Id. at 895. The allegedly libelous newspaper articles discussed Scientology generally and made no reference to the California church. Id. The publishers sent only a small percentage of the articles to mail subscribers and independent news dealers in California. Id. at 895-96. Like the Tenth Circuit in Anselmi, the Ninth Circuit stated that in defamation actions, first amendment considerations are inappropriate at the jurisdictional stage, and are better developed as substantive defenses. Id. at 899. For a discussion of the substantive defenses available to a defamation defendant, see supra note 66.

However, the Adams court was uncomfortable in totally abandoning free press values. Reasoning that the structure of the newspaper business is such that copies of major papers will be found nationwide, the Ninth Circuit rejected the applicability of a jurisdictional standard over publishers based upon the fore-
A federal court in the Fourth Circuit also rejected the Connor holding that jurisdiction over publishers requires a greater showing of contacts with the forum state than that needed to exercise jurisdiction over other defendants. In David v. National Lampoon, Inc., the South Carolina District Court held that it was not a violation of due process for South Carolina to exercise jurisdiction over a New York publisher which circulated a small percentage of its national magazine in the state. In concluding that the first amendment did not entitle the publisher to a higher jurisdictional standard, the David court reasoned that consideration of free press values at the jurisdictional stage would “cloud” the valid procedural issues. In addition, the court noted that the Connor seeability of the product entering the forum state. The court adopted a narrower jurisdictional standard for libel cases, requiring an inquiry into "whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state." The court explained:

In products liability cases, this determination resolves into an inquiry as to whether the defendant could reasonably foresee that his product, when injected into the stream of commerce, would come to rest in the forum. . . . Physical presence of the product within the forum state is thus the critical factor in conferring jurisdiction, and the due process inquiry turns in large part on whether it was foreseeable that the defective product would be introduced into the state. In a libel case, however, we do not think the likelihood that an offending publication will enter a forum is a fair measure of the reasonableness of the exercise of jurisdiction over a publisher. The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state.

The Adams court applied its jurisdictional standard and found that since California events were not the topics of the articles, California readers were not the targets of the articles, and the articles were not written or researched in California, the Missouri publishers could not have reasonably foreseen that any substantial risk of defamation would arise from the circulation of the articles in California. Therefore, the court held that the publisher's circulation in the forum state was an insufficient contact to support jurisdiction over the publishers.

The Adams standard for jurisdiction aimed to evaluate whether the defendant could reasonably foresee a risk of injury by defamation in the forum state. In contrast, the World-Wide Volkswagen test looks at the defendant's contacts with the forum state, rather than the likelihood of injury there, to evaluate whether the defendant could anticipate being sued in the forum.

71. Id. at 1100. In David, the plaintiff brought an invasion of privacy claim in South Carolina against a magazine publisher which printed a picture of the plaintiff accompanied by an offensive caption. Id. at 1098. The defendant was a New York corporation which derived less than one percent of its revenues from South Carolina sales. Id. However, the publisher actively solicited both subscriptions and retail distributors in the forum state. Id. at 1099.
72. Id. at 1100. In addition, the court stated that the substantive law would
ruling had been criticized by scholars\(^7\) as well as the Fifth Circuit itself.\(^7\) Applying the traditional jurisdictional standard of *International Shoe*, the court held that since the publisher actively attempted to establish a national market, its small circulation in the forum state constituted a purposeful contact sufficient to allow South Carolina to exercise long-arm jurisdiction.\(^7\)

In contrast to these decisions which consider the propriety of introducing first amendment values into the minimum contacts jurisdictional analysis, another line of reasoning suggests that a court should analyze whether the exercise of jurisdiction violates the first amendment. In *Buckley v. New York Post Corp.*\(^7\) the Second Circuit rejected the *Connor* holding.\(^7\) The *Buckley* court reasoned that the actual malice standard of *New York Times Co. v. Sullivan*\(^7\) affords enough protection to the media defendant and therefore found that there is no need to infuse the minimum contacts determination with first amendment considerations.\(^7\)

The Second Circuit explained that if media defendants are to be protected from defending burdensome suits in distant forums, the proper analysis is not whether the first amendment requires a greater showing of contacts for long-arm jurisdiction to satisfy due process, but whether the exercise of jurisdiction over a publisher with insignificant forum state contacts is so inappropriate as to violate the first amendment itself.\(^8\) The *Buckley* court explained this approach by stating that "the adequately protect the first amendment values when the case was argued on the merits. *Id.*

\(^7\) *Id.* (citing Comment, *Long Arm Jurisdiction Over Publishers*, supra note 45; Comment, *Constitutional Limitations*, supra note 45).

\(^7\) *Id.* at 1100. The court argued that the Fifth Circuit appeared to have disregarded *Connor* by its opinion in *Golino*. *See* Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967) (*Connor* does not apply to national magazine). For a further discussion of *Golino*, see *supra* notes 50-57 and accompanying text.

\(^7\) 432 F.2d at 1100. *But cf.* Note, *supra* note 6, at 1004 n.152 (the *David* court could have asserted jurisdiction over *The National Lampoon* by following *Golino* and distinguishing *Connor*). For a discussion of the *Golino* rationale, see *supra* notes 50-57 and accompanying text.

\(^7\) 373 F.2d 175 (2d Cir. 1967).

\(^7\) *Id.* at 183. *Buckley* involved a libel action brought in Connecticut by a Connecticut resident against a newspaper which was incorporated in Delaware, and which had its principal place of business in New York City. *Id.* at 177. The defendant distributed 2,100 copies of its weekend edition in the forum state by wholesale agents, mail or bus shipments consigned to dealers, and mail subscription, and also received Connecticut advertising. *Id.* The great majority of the defendant's papers were sold in New York. *Id.*

\(^7\) 376 U.S. 254 (1964) (public officials must prove defamatory statement about their official conduct by newspaper publisher was made with actual malice). For a further discussion of *New York Times Co. v. Sullivan* and the actual malice rule, see *supra* note 4 and accompanying text.

\(^7\) 373 F.2d at 182. Other courts have taken the position that media defendants are adequately protected by the substantive law of defamation when the case is heard on the merits. See *supra* note 66.

\(^8\) 373 F.2d at 183. The court explained that this approach was supported
First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters.81 According to Buckley, even if a court's jurisdiction over a publisher is properly within the long-arm statute and constitutional standards, the court's *exercise* of jurisdiction in that forum may be inappropriate because it violates first amendment guarantees.82

A district court in the Sixth Circuit approved of the Buckley analysis in *Cordell v. Detective Publications, Inc.*83 There, the District Court for the Eastern District of Tennessee rejected *Connor* on the ground that a defamation suit should be maintainable in the state of the plaintiff's residence, where the plaintiff's good reputation has been damaged.84 The

by Justice Brandeis' opinion in *Davis v. Farmers' Co-operative Equity Co.*, 262 U.S. 312 (1932). In *Davis*, the Supreme Court held that a statute requiring railroads to defend against claims in a foreign forum in which the railroad had no operations violated the commerce clause. *Id.* at 318. The Davis Court stated that it therefore had no occasion to even consider whether the legislation also violated the fourteenth amendment. *Id.*

81. 373 F.2d at 183-84. See C. Wright, supra note 18, § 44, at 259-67 (1983) (discussion of doctrine of *forum non conveniens*). The doctrine of *forum non conveniens* allows a court to dismiss a suit over which it has personal and subject matter jurisdiction if there is a more convenient forum than the one which the plaintiff has chosen. *Id.* at 259. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (applying common law doctrine of *forum non conveniens*). This common law doctrine was codified by § 1404(a), which provides that if an action is filed in a district court where venue and jurisdiction are proper, that district court may, in the interest of justice, transfer the action to another district court in which venue is also proper rather than dismiss it completely. 28 U.S.C. § 1404(a) (1982). For a further discussion of venue and transfer under § 1404(a), see *supra* notes 39-41 and accompanying text. Since the enactment of § 1404(a), the common law doctrine of *forum non conveniens* is available in the federal courts only to dismiss a case where a state court is the appropriate forum or where a court in a foreign country is the appropriate forum. See Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1980) (dismissal on ground of common law *forum non conveniens* on condition that defendant agree to submit to jurisdiction of court in Trinidad); Gross v. Owen, 221 F.2d 94 (D.C. Cir. 1955) (common law *forum non conveniens* dismissal instead of transfer from federal to state court still available despite § 1404(a)).

82. 373 F.2d at 183. However, in the case before it, the Second Circuit found that Connecticut had jurisdiction because Connecticut and New York share a state border, and the defendant could expect that commuters returning home to Connecticut from work would carry New York papers with them. *Id.* at 184. "While the Post was unable to determine how many copies are tucked each day under the arms of commuters bound for Greenwich, Stamford, New Canaan and other places in Connecticut, we do not have to shut our eyes to what a trip to Grant [sic] Central Station late any afternoon would reveal." *Id.* The court did not reach the question of whether the exercise of jurisdiction was inconsistent with the first amendment and should therefore be subject to a venue analysis.

83. 307 F. Supp. 1212 (E.D. Tenn. 1968), aff'd, 419 F.2d 989 (6th Cir. 1969). *Cordell* involved a Tennessee plaintiff who brought an invasion of privacy claim against a nonresident publisher who published an article relating to the murder of the plaintiff's daughter. *Id.* at 1217.

84. *Id.* at 1216. Other courts have also taken the view that a defamation plaintiff usually suffers the greatest injury to his reputation in the state of his
Cordell court then agreed with Buckley that any hardship on national publishers resulting from the requirement that they defend suits in foreign forums could be reduced by allowing the institution of suits in states where the allegedly libelous material circulates and then permitting removal to another forum by the application of the forum non conveniens doctrine.\(^{85}\)

The United States Supreme Court took the opportunity to resolve this conflict over the appropriate role of first amendment considerations in the jurisdictional analysis when it decided the case of Calder v. Jones.\(^{86}\) In Calder, actress Shirley Jones and her husband brought a libel action in California against Iain Calder, who was president and editor of the National Enquirer, and also against John South, the writer of the allegedly defamatory article.\(^{87}\) The plaintiffs were residents of California and the defendants were residents of Florida.\(^ {88}\) The article was written and edited in Florida, but was carried in a national magazine which had its highest circulation in California.\(^ {89}\) South had researched most of the story from Florida, relying on telephone calls to his contacts in California.\(^ {90}\)

The Los Angeles County Superior Court, applying the test which requires first amendment considerations to be weighed in determining in personam jurisdiction over publishers,\(^ {91}\) granted the defendants' motion to quash. See, e.g., Anselmi v. Denver Post, Inc., 552 F.2d 316 (10th Cir.), cert. denied, 432 U.S. 911 (1977). For a discussion of Anselmi, see supra notes 62-69 and accompanying text.

\(^{85}\) 307 F. Supp. at 1216. The Cordell court applied a traditional minimum contacts analysis and found that long-arm jurisdiction over the publisher was proper. Id. In dicta, the Cordell court approved of the Buckley analysis that free press concerns should be divorced from the jurisdictional due process test, but may be considered in a forum non conveniens analysis to reduce burdens on national publishers. Id.

\(^{86}\) 104 S. Ct. 1482 (1984). The case was filed in the Los Angeles County Superior Court, which granted the defendants' motion to quash out-of-state service of process. 138 Cal. App. 3d 128, 128, 187 Cal. Rptr. 825, 825 (1982). The California Court of Appeals reversed. Id. at 137, 187 Cal. Rptr. at 832.

\(^{87}\) 104 S. Ct. at 1484-85.

\(^{88}\) Id. at 1485.

\(^{89}\) Id. The Enquirer's California circulation of 600,000 was more than 11% of its total circulation. Id. at 1484-85. Sales in California were more than twice the level of sales in New York, the next highest state. Id. at 1485 n.2.

\(^{90}\) Id. at 1485. South had travelled to California more than 20 times in four years on business unrelated to the article. Id. at 1485 n.3. The Supreme Court refused to rely on a disputed fact finding by the California Superior Court that South had travelled to California in connection with the alleged defamatory article. Id. at 1485 n.4. The Court did consider the fact that before the article was published, South had called Ms. Jones' home in California and read a draft of it to her husband. Id. at 1485.

\(^{91}\) See, e.g., New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966) (publisher must have greater showing of contacts with forum state than other defendants to be subject to personal jurisdiction). Accord Cox Enters. v. Holt, 678 F.2d 936, reh'g granted, 691 F.2d 989 (11th Cir. 1982); McCabe v. Kevin Jenkins & Assoc., 531 F. Supp. 648 (E.D. Pa. 1982); Margoles v. Johns, 333 F.
tion to dismiss on the ground that the defendants' contacts with California were insufficient.\textsuperscript{92} The California Court of Appeals reversed, and held that the first amendment does not afford publishers special protection.\textsuperscript{93} For precedent, the appellate court relied upon a California Court of Appeals opinion rejecting such a special standard,\textsuperscript{94} and also noted that the \textit{Connor} decision had been extensively criticized.\textsuperscript{95} The court then applied traditional principles of long-arm jurisdiction, unaffected by free press concerns, and found that jurisdiction over the defendants was fair and reasonable. The court reasoned that even though the story was written outside the forum state, the defendants intentionally caused injury to and had an effect on the plaintiffs in California,\textsuperscript{96} and the arti-

\textsuperscript{92} Media L. Rep. (BNA) 1314, 1317 (1981).
\textsuperscript{94} Id. (citing Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978)). Sipple, who was involved in thwarting the attempted assassination of former President Ford, filed a lawsuit for invasion of privacy against an in-state newspaper and against out-of-state newspapers which had incidental circulations in California. \textit{Sipple}, 82 Cal. App. 3d at 147, 147 Cal. Rptr. at 61. In reporting on the assassination attempt, the papers stated that Sipple was a homosexual. \textit{Id.} at 146-47, 147 Cal. Rptr. at 61. The California Court of Appeals rejected the position that the first amendment gives newspapers special jurisdictional protection. \textit{Id.} at 148-50, 147 Cal. Rptr. at 62-63. Treating newspapers as any other defendant in a jurisdictional analysis, the California court found that the out-of-state papers did not have the minimum contacts required to be subject to long-arm jurisdiction in California. \textit{Id.} at 151, 147 Cal. Rptr. at 64. The court found that none of the papers had sent reporters to the forum state to research the story which gave rise to the suit, and because the story was of national importance, the papers did not expect that it would be given special attention in California. \textit{Id.} at 152, 147 Cal. Rptr. at 64.
\textsuperscript{96} 138 Cal. App. 3d at 134, 187 Cal. Rptr. at 829 (citing \textit{Restatement (Second) of Conflict of Laws} § 37 comment a (1971)). Section 37 states: A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable. \textit{Restatement (Second) of Conflict of Laws} § 37 (1971). Comment a to § 37 provides in relevant part:

A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere. The state may exercise judicial jurisdiction on the basis of such effects over the individual who did the act, or who caused the act to be done, provided that the nature of these effects and of the individual's relationship to the state are such as to make the exercise of jurisdiction fair to the individual and
The United States Supreme Court, in a unanimous opinion by Justice Rehnquist, affirmed the California Court of Appeals, thereby rejecting the view that first amendment considerations must be weighed in a personal jurisdiction analysis. The Court based its decision on three rationales. First, the Court noted that the jurisdictional determination is "already [an] imprecise inquiry" and the introduction of first amendment concerns would hopelessly complicate the analysis. Second, the Court found that the constitutional limitations of the substantive law of defamation adequately protect against any chilling effect on first amendment activity. Third, the Court noted that it previously had refused to grant special procedural protections to media defendants on first amendment grounds.

Based on this reasoning, the Supreme Court invoked the traditional minimum contacts test and held that jurisdiction over the nonresident defendants was proper because their Florida conduct had "effects" in California. The Court emphasized that the defendants acted reasonably from the standpoint of the international and interstate systems.

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97. 138 Cal. App. 3d at 135, 187 Cal. Rptr. at 830. The plaintiffs were California residents, the reporter relied on California sources for his article, and also phoned Ms. Jones' husband in California to read the article to him before it was published. Id. at 135, 187 Cal. Rptr. at 830. For a further discussion of the defendants' contacts with California, see supra notes 89-90 and accompanying text.


99. Id. (citations omitted). Because the jurisdictional determination involves a balancing of competing factors, it is already a sufficiently difficult determination. See, e.g., Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (because facts of each case must be weighed, there is rarely a clear case for or against personal jurisdiction). For a further discussion of the difficult application of the minimum contacts test, see Lewis, supra note 18, at 699 (jurisdictional determination is fraught with abstractions).

100. 104 S. Ct. at 1488 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). The Court reasoned that "[t]o reintroduce those concerns at the jurisdictional stage would be a form of double counting." Id. at 1488. Other courts have agreed that the substantive law of defamation is adequate to protect publishers. See, e.g., Church of Scientology v. Adams, 584 F.2d 893 (9th Cir. 1978); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967). For a further discussion of Adams and Buckley, see supra notes 69 & 76-82 and accompanying text. For a discussion of New York Times Co. v. Sullivan and substantive defenses available to media defendants, see supra notes 4 & 66 and accompanying text. For a discussion of courts' concern that the substantive law of defamation does not adequately protect defendants, and thus might give rise to a special jurisdictional standard, see supra notes 45-60 and accompanying text.

101. 104 S. Ct. at 1488 (citing Herbert v. Lando, 441 U.S. 153 (1979) (permits discovery into the editorial process); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (implication that first amendment concerns do not justify special rules for summary judgment)).

102. Id. at 1487 (citing World-Wide Volkswagen Corp. v. Woodson, 444
tionally in sending the article to California, that the defendants knew California was the plaintiffs' residence, and that California was where the magazine had its largest circulation. Thus, the Court found that jurisdiction was proper because the defendants' "intentional ... actions were expressly aimed" at the forum state. Furthermore, the Court reasoned that the denial of jurisdiction under these circumstances would force a plaintiff who is injured in the state of her residence to go to a distant forum to seek redress from defendants who knowingly caused the injury to occur in her resident state, but who remain outside that state.

Immediately after deciding Calder, the Supreme Court had the opportunity to reaffirm that holding in Keeton v. Hustler Magazine, Inc. In Keeton, a New York resident brought a libel action in the United States District Court for the District of New Hampshire against Hustler Magazine, an Ohio corporation having its principal place of business in California. New Hampshire was the only state in which the statute of limitations had not run on Keeton's action. The magazine's only contact with New Hampshire consisted of the regular circulation there of less than one percent of its total monthly circulation. The district

U.S. 286, 297-98 (1980); Restatement (Second) of Conflict of Laws § 37 (1971)). For a further discussion of World-Wide Volkswagen, see supra notes 28-38 and accompanying text. For the text of § 37, see supra note 96.

103. 104 S. Ct. at 1487. For a discussion of the Calder defendants' contacts with California, see supra notes 89-90.

104. 104 S. Ct. at 1487.

105. Id. This concern with forcing a libel plaintiff to travel out-of-state in order to vindicate his or her reputation was also the rationale of the Tenth Circuit in Anselmi v. Denver Post, Inc., 552 F.2d 316 (10th Cir.), cert. denied, 432 U.S. 911 (1977) (rejecting a special jurisdictional standard for publishers). For a further discussion of Anselmi, see supra notes 62-69 and accompanying text.

106. 104 S. Ct. 1473 (1984). The Court decided both Calder and Keeton on the same day. See id.

107. Id. at 1477. Keeton originally brought her libel and invasion of privacy suit in Ohio, but the libel action was barred by Ohio's statute of limitations. Id. at n.1.


109. 682 F.2d 33, 33 (1st Cir. 1982), rev'd, 104 S. Ct. 1473 (1984). The magazine had no offices, employees, bank accounts or real property in New Hampshire. Id. at 34.
court dismissed the action for lack of in personam jurisdiction. The First Circuit affirmed, holding that the due process clause of the fourteenth amendment precluded New Hampshire from exercising long-arm jurisdiction over the magazine.

A unanimous Supreme Court reversed and held that the defendant's regular circulation of a magazine in the forum state was sufficient to support New Hampshire's exercise of in personam jurisdiction in a libel action based on the magazine's contents. The Court applied the

110. Id. at 33.

111. Id. For a discussion of the relationship between fourteenth amendment due process concerns and personal jurisdiction, see supra note 17.

The First Circuit believed that the single publication rule made the exercise of long-arm jurisdiction unfair because Keeton's injury was caused, and the majority of it occurred, outside New Hampshire. 682 F.2d at 35. For a discussion of the "single publication rule," see supra note 7. The court believed that Keeton's contacts with New Hampshire were not adequate to allow her, under the single publication rule, to recover in New Hampshire for damages to her reputation suffered in all jurisdictions in which the defamatory material circulated. 682 F.2d at 35.

The court pointed out, however, that the defendant's circulation in the forum state would be a sufficient contact to support a libel action if the plaintiff were a New Hampshire resident. Id. at 34-35. The First Circuit explained that in applying the balancing test to a case in which the plaintiff was a resident of the forum state, the "defendant's minimal presence would combine with the plaintiff's many contacts, New Hampshire's interest in protecting its residents, and the fact that defendant's presence itself caused the injury—in making it fair to allow the suit." Id. at 35. In this case, however, the court stated that New Hampshire had no special interest in protecting a New York resident against out-of-state activity. Id.

The First Circuit also rested its holding on the fact that allowing Keeton to sue in New Hampshire, a state with which she had no relationship, would defeat the policies behind statutes of limitations on defamation actions in general and the statute in Keeton's own state. Id. at 36. Statutes of limitations prevent plaintiffs from "sleeping" on their rights and thereby allow defendants a fair opportunity to prepare their defenses. Comment, The Tolling Provision of the Statute of Limitations—A Haven for the Dilatory Plaintiff, 10 SETON HALL L. REV. 585, 586-87 (1980). By extinguishing the plaintiff's right to seek redress after a specified period, statutes of limitations assure that claims are not brought after evidence has been lost, witnesses have died or disappeared, and memories have faded. Id.


112. 104 S. Ct. at 1481-82. In addition, the Court rejected the First Circuit's view that the application of the single publication rule defeated jurisdiction. Id. at 1478-80.

The Supreme Court also refused to accept the First Circuit's argument that New Hampshire's long statute of limitations made jurisdiction over Hustler magazine unfair. The Court stated that ":'t]he chance duration of statutes of limitations . . . has nothing to do" with the jurisdictional determination. Id. at 1480. The Court characterized Keeton's search for the longest limitations period as "litigation strategy." Id. at 1480.
traditional minimum contacts analysis required by Calder and stated that "we reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause." 113

Stating that "[t]here is no justification for restricting libel actions to the plaintiff's home forum," 114 the Supreme Court concluded that where a publisher "has continuously and deliberately exploited the . . . market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." 115 Finally, the Keeton Court declared that a magazine must anticipate defending suit in a state where it regularly sells and distributes a "substantial number of

113. Id. at 1481 n.12. The Court reasoned that the magazine's circulation in New Hampshire, although perhaps not so substantial as to support long-arm jurisdiction over a claim unrelated to the circulation, was sufficient in this case where the cause of action arose, in part, out of the New Hampshire activity. Id. at 1481. Because the jurisdictional analysis requires a balancing of factors in determining whether jurisdiction over the nonresident is fair, the Court stated that it is more likely that a defendant will anticipate being sued in the forum when the cause of action is related to the defendant's activities in the forum state. Id. In concluding that jurisdiction was proper over the defendants in Keeton, Justice Rehnquist relied upon Perkins v. Benguet Mining Co., in which the Supreme Court had upheld jurisdiction where the plaintiffs lacked any contacts with the forum state. Id. (quoting Perkins v. Benguet Mining Co., 342 U.S. 437 (1952)). In Perkins, a nonresident brought an action in Ohio against a mining corporation which operated its mines in the Philippine Islands and was organized under the laws of the Philippines. 342 U.S. at 438-39. The corporation's president was served with a summons in the action while the corporation temporarily carried on its business in Ohio during the Japanese occupation of the Philippines. Id. at 440. The plaintiff's cause of action was unrelated to the corporation's activities in Ohio. Id. at 438. The Supreme Court held that the business done by the mining corporation in Ohio, which included directors' meetings, business correspondence, banking, stock transfers, payment of salaries, and purchase of machinery, was sufficiently substantial that permitting Ohio to exercise long-arm jurisdiction would not violate due process. Id. at 447-48.

114. 104 S. Ct. at 1481 (footnote omitted). The Court stated that "[t]he victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.""" Id. (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

115. Id. at 1481 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980)).

In World-Wide Volkswagen, the Supreme Court held that it is not unreasonable to subject the manufacturer or distributor of a product to the jurisdiction of a state in which he directly or indirectly markets his product, if the product injures someone there. 444 U.S. at 297. The World-Wide Volkswagen Court also stated that jurisdiction over a corporation which delivers its products into the "stream of commerce" does not violate due process if the corporation could expect that persons would purchase the product in the forum state. 444 U.S. at 298. For further discussion of World-Wide Volkswagen, see supra notes 28-38 and accompanying text.
It is suggested that the Supreme Court's decisions in *Calder* and *Kee-nton*, in rejecting the application of a rule requiring a nonresident publisher to have greater contacts with a forum to be subject to the long-arm jurisdiction of that state, properly resolved the controversy which had divided the circuits since the Fifth Circuit's ruling in *Connor* in 1967. First, first amendment values have no place in the minimum contacts analysis, which involves a balancing of specified factors that exist in various degrees whether or not the defendant is a publisher. First amendment concerns do not go to whether a court has jurisdiction over a defendant-publisher. As the *Buckley* court explains, if it is the first amendment which makes the exercise of jurisdiction unfair, the basis for dismissal must be not that the exercise of jurisdiction violates the due process clause of the fourteenth amendment in the minimum contacts test.

116. 104 S. Ct. at 1482. In addition to the defendant's contacts with the forum state, the Court also analyzed New Hampshire's interest in the dispute. Id. at 1479-80. Kathy Keeton was suing in part for damage to her reputation caused by the defendant's circulation in New Hampshire. *Id.* The Court concluded that New Hampshire had an interest in redressing the injury which occurred within its boundaries, and that this interest was sufficient to allow the exercise of long-arm jurisdiction. *Id.* In finding this harm significant, the Court relied upon a portion of the Restatement of Conflicts which notes that a state's special interest in jurisdiction over those who commit torts within its boundaries is based on its interest in deterring and protecting against wrongful conduct. *Id.* (citing Leeper v. Leeper, 114 N.H. 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36 comment c (1971))). In addition, the Court found that New Hampshire had interests in protecting its own citizens against reading false statements, and in cooperating with other states in applying the single publication rule. *Id.* at 1479-80. In analyzing the forum's interest in cooperating with other states to allow the plaintiff to recover multistate damages in this New Hampshire suit, the Supreme Court considered the interest of all the states in furthering the underlying social policies of the action, thereby addressing an important element of the minimum contacts balancing test. *See* Kulko v. Superior Court, 436 U.S. 84 (1978) (social policy of encouraging family values considered when determining whether to exercise jurisdiction over parent in suit by other parent who had custody of their child). For a discussion of these balancing factors, see *supra* notes 32-37 and accompanying text.

117. For a discussion of the greater requirement of contacts test, see *supra* notes 47-49 and accompanying text.

118. For a discussion of the *Connor* decision, see *supra* notes 45-49 and accompanying text. For a discussion of the conflicting views of the circuits on the proper jurisdictional standard for publishers, see *supra* notes 42-44 and accompanying text.

119. The Supreme Court has identified the following relevant factors: the burden on the defendant; the plaintiff's interest in obtaining relief; the forum's interest in adjudicating the dispute; the interstate judicial system's interest in resolving the controversy; and the shared interest of the states in furthering social policies. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). In addition, *World-Wide Volkswagen* added the requirement that the defendant's contacts with the forum state be such that he could "reasonably anticipate" defending suit there. *Id.* at 297. For a further discussion of *World-Wide Volkswagen* and these factors, see *supra* notes 28-38 and accompanying text.
analysis, but rather that it violates the first amendment itself.120

Second, Calder avoided making the already complex jurisdictional determination even less predictable.121 The minimum contacts test involves a difficult balancing of diverse factors.122 To make this inquiry even more complex by requiring courts to balance first amendment values on the scale would make it exceedingly difficult for nonresident publishers to anticipate where they might be subject to suit.123

Third, Calder properly follows the reasoning of those courts such as Adams,124 Anselmi,125 and Buckley126 which have argued against a greater showing of contacts test on the ground that the fear of “chilling” the press is adequately allayed by the substantive law of defamation.127 The actual malice rule of New York Times Co. v. Sullivan and subsequent decisions has been called “the greatest victory won by defendants in the modern history of the law of torts.”128 Even if a media defendant is subject to the jurisdiction of a foreign forum, first amendment concerns embodied in the substantive law often lead to a summary judgment in favor of the publisher.129

Fourth, if additional protections are deemed necessary to safeguard first amendment freedoms and to protect publishers, the better remedy

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120. Buckley v. New York Post Corp., 373 F.2d 175, 183 (2d Cir. 1967). For a further discussion of Buckley, see supra notes 76-82 and accompanying text.

121. For a discussion of the difficulties involved in the jurisdictional determination, see supra note 18 and accompanying text.

122. For a discussion of the factors involved in a minimum contacts analysis, see supra notes 32-38 and accompanying text.

123. For a discussion of the Supreme Court’s ruling that jurisdiction over a defendant is proper wherever he may “reasonably anticipate being haled into court,” see supra notes 37-38 and accompanying text.

124. 584 F.2d 893 (9th Cir. 1978). For a discussion of Adams, see supra note 69.

125. 552 F.2d 316 (10th Cir.), cert. denied, 432 U.S. 911 (1977). For a discussion of Anselmi, see supra notes 62-69 and accompanying text.

126. 373 F.2d 175 (2d Cir. 1967). For a discussion of Buckley, see supra notes 76-82 and accompanying text.

127. 104 S. Ct. at 1488.


129. Abrams, supra note 128, at 89. According to figures compiled by the Libel Defense Resource Center, the courts grant defendants’ motions for summary judgment in libel cases 75% of the time. Id. For a discussion of those courts which have developed more liberal summary judgment procedures for first amendment claims, see supra note 6.
is to adjust the substantive requirements of defamation,\textsuperscript{130} encourage more use of summary judgment,\textsuperscript{131} or carefully evaluate damage awards against publishers,\textsuperscript{132} rather than tamper with the jurisdictional standard.\textsuperscript{133} Such remedies are better not only because they avoid complicating the jurisdictional analysis, but also because they assure that publishers will be protected wherever they may be sued. As Keeton indi-

\textsuperscript{130} Because first amendment values are properly considered at the substantive law level, additional protections for national publishers could best be accomplished by changing the elements of a defamation action, for example, adding a requirement that the defendant act with intent to defame, so as to make it more difficult for a plaintiff to prove a prima facie case. For further discussion of the elements of a defamation action, see \textit{supra} note 5.

\textsuperscript{131} Courts have been reluctant to grant summary judgment in these cases, reasoning that the actual malice standard requires a determination of a subjective state of mind, which cannot be made as a matter of law. In certain cases, however, the facts may be undisputed and the courts could effectively reduce the burden and cost to publishers of defending defamation actions by granting defendant-publishers' motions for summary judgment. For a discussion of the use of summary judgment in defamation actions, see \textit{supra} notes 6 & 129.

\textsuperscript{132} Jury awards against publishers when a defamation plaintiff is successful are often large. \textit{See} Note, \textit{supra} note 6, at 976-77 n.11 (size of recent libel verdicts is monumental). The Libel Defense Research Center reports that the average initial award for a plaintiff in a libel suit is $2 million. \textit{The Media In the Dock, Newsweek}, Oct. 22, 1984, at 66. In 1982, a $2.2 million jury award was entered against \textit{The Washington Post} in a suit by Mobil Oil Corp. president William P. Tavoulareas. \textit{Id.} This verdict, which was reversed on appeal, was recently reinstated against the \textit{Post}. \textit{N.Y. Times}, Apr. 14, 1985, § 4, at 1, col. 6. The \textit{Wall Street Journal} recently settled out of court for $800,000 in a case brought by two federal Strike Force prosecutors who alleged that the \textit{Journal} libeled them in an article about organized crime. \textit{Id.} General Westmoreland originally sought $120 million in damages in his suit against CBS. \textit{Westmoreland Takes On CBS, Newsweek}, Oct. 22, 1984, at 60. For a further discussion of \textit{Westmoreland v. CBS}, see \textit{supra} note 4. Courts could protect publishers against excessive verdicts by subtracting the excess verdict by remittitur. \textit{See}, e.g., \textit{Glazer v. Glazer}, 278 F. Supp. 476, 481-82 (E.D. La. 1968) (standard governing the question of excessiveness is whether the verdict was within the bounds of reasonable inference from the evidence). It is submitted, however, that it is as improper to consider first amendment values after the trial in an action for remittitur as it is to consider them before trial in the jurisdictional determination. Therefore, it is suggested that review of libel verdicts should be based not on the defendant's status as a publisher, but rather on whether the verdict was excessive in light of the evidence.

\textsuperscript{133} Discontinuance of the "single publication rule" may also ultimately lessen the burden on national publishers by forcing defamation plaintiffs to bring suits in every state in which the allegedly defamatory material circulated in order to recover for all damages suffered by the circulation. Because defamation plaintiffs are unlikely to meet this burden, discontinuing the use of the "single publication rule" would lead to a decrease in judgments adverse to publishers in defamation actions, though the merits of such a decrease are questionable. For further discussion of the "single publication rule" and its relationship to the jurisdictional analysis, see \textit{supra} note 7 and accompanying text. It is suggested that although the effect of discontinuing the "single publication rule" may ultimately lessen the burden on national publishers, it will also cause a waste of judicial resources to the extent that some plaintiffs will file suits against national publishers in every state in order to recover all damages.

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cates, courts must accord great weight in the jurisdictional balancing to the defamation plaintiff's interest in having a forum to seek redress for the harm done to his or her reputation. It is likely, therefore, that if jurisdiction over the defendant is denied in one forum, the plaintiff will be successful in bringing his or her defamation action against the defendant in another state.

However, it is submitted that the Calder and Keeton holdings do not require all media defendants to defend suits wherever their publications circulate. The Supreme Court in these cases provides some guidance as to where a publisher may be sued. It appears from Calder that a nonresident publisher who intentionally sends to the forum state a publication focusing on the forum state or a resident of the forum state will be subject to suit there. According to Keeton, even if the allegedly defamatory publication does not focus on an event or person specific to that forum, the publisher will be subject to the long-arm jurisdiction of that state if it regularly circulates "a substantial number" of copies there.

Within this framework, courts can develop more specific guidelines as to how many and what other types of contacts will be sufficient for that state's exercise of long-arm jurisdiction. Contacts such as the presence of the publisher's employees in the state, the distribution in a neighboring state, the means by which the distribution is made, the advertising revenue obtained from the forum state, the advertising designed to reach residents of the forum state, and solicitation by the publisher in the forum state are all relevant to this determination. When a framework involving the amount and types of contacts necessary has evolved, publishers may be able to predict more accurately the forums in which they may be sued. A uniform application of the Calder/Keeton standard will allay any uncertainty which plaintiffs may have previously experienced when anticipating which of the various other tests a particular court would decide to apply.

134. 104 S. Ct. at 1480-81. For a discussion of Keeton and the importance of the defamation plaintiff's interest in having a forum to resolve the dispute, see supra note 114 and accompanying text.

135. Keeton, which allowed the plaintiff to bring her defamation action in New Hampshire, the only remaining state where the statute of limitations had not run, indicates the Court's interest in giving plaintiffs a forum in which to adjudicate their claims. 104 S. Ct. at 1480-81.

136. 104 S. Ct. at 1487. In Calder, the Court stated that it is proper for a court to exercise personal jurisdiction over nonresident defendants in a libel action arising out of intentional conduct outside the forum which is calculated to cause injury to the plaintiff in the forum. Id.

137. 104 S. Ct. at 1482. The Keeton Court held that a publisher may be subject to personal jurisdiction in a suit based on the contents of its publication "wherever a substantial number of copies are regularly sold and distributed." Id.

138. See Scott, supra note 45, at 40-46 (discussion of contacts relevant to jurisdiction over publishers).

139. For a discussion of tests which courts have used to determine if a pub-
It is submitted that there is an additional reason why *Calder* and *Keeton* will not require all publishers to defend suits wherever their publications circulate. *Calder* and *Keeton* both applied the traditional minimum contacts test to national magazines—the *National Enquirer* and *Hustler* magazine—and held that these publishers were subject to the long-arm jurisdiction of the forum state.\(^{140}\) It is suggested that the application of this minimum contacts test to publishers of local, as opposed to national, magazines and newspapers might reach a different result.\(^{141}\) Publishers of papers and magazines seeking a nationwide audience derive economic benefit from each state in which their publication circulates.\(^{142}\) National publishers thus are more likely to be subject to each state’s jurisdiction because they meet the requirement of purposefully availing themselves of the benefits of each state in which they circulate. This rationale clearly comports with a traditional *Calder*, *Keeton*, and *World-Wide Volkswagen* minimum contacts analysis under which national publications, which purposefully avail themselves of the benefits of each state, are more amenable to long-arm jurisdiction than publications which seek only local readers.\(^{143}\) Therefore, even though the Supreme Court categorically rejects a special jurisdictional standard for any publishers, a publication with a local audience will be able to argue under the *Calder/Keeton* standard that it has not purposefully availed itself of the foreign state and for that reason does not come within its long-arm reach.\(^{144}\)

Although it is clear that first amendment values have no place in a minimum contacts analysis, it is suggested that they may be appropriate when the publisher is subject to the long-arm jurisdiction of a state, see *supra* notes 42-44 and accompanying text.

\(^{140}\) For a discussion of the facts of *Calder*, see *supra* notes 87-90 and accompanying text. For a discussion of the facts of *Keeton*, see *supra* notes 107-09 and accompanying text.

\(^{141}\) The Fifth Circuit used similar reasoning in *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967). For a discussion of *Golino*, see *supra* notes 50-57 and accompanying text.

\(^{142}\) The *Golino* court, however, seemed to present this distinction not in terms of the economic benefit which the publication derived from circulation in each state, but rather in terms of the character of the publication, i.e., newspapers, which primarily seek a local distribution, and magazines, which strive for the widest possible circulation. 383 F.2d at 590-92. Selecting the proper jurisdictional standard as *Golino* would, on the basis of the form of the publication—magazine versus newspaper—would be misleading, as many newspapers are national in character, and many magazines seek a local circulation. It is suggested that the better approach is to look at the character of the readership sought by the publication and to determine from that the extent to which the publisher purposefully avails himself of the benefits of each state in which the publication circulates.

\(^{143}\) For a discussion of the traditional minimum contacts test and the *World-Wide Volkswagen* analysis, see *supra* notes 22-24 & 31-38 and accompanying text.

\(^{144}\) For a discussion of the jurisdictional test applied in *Calder* and *Keeton*, see *supra* notes 102-05 & 113-16 and accompanying text.
ately considered in a venue determination. For the reasons discussed above, *Calder* and *Keeton* properly rejected the introduction of first amendment values into a jurisdictional analysis which determines whether the court has the power over the parties to hear the case. However, in *Cordell* and *Buckley*, the Sixth and Second Circuits suggest that after the court has determined that it has personal jurisdiction over the publisher, the court may consider first amendment values in deciding whether to exercise that power in a particular case.

It is submitted that this two-tiered analysis may survive *Calder* and *Keeton*. Thus, after a federal court determines that it has long-arm jurisdiction in a particular forum, the nonresident publisher may move for change of venue or for transfer of the case to another forum. In the federal system, the transfer motion will be granted when one judge determines that the transfer of the case is “in the interests of justice.” It is suggested that a judge who fears that subjecting the defendant to suit in the selected forum may encourage the publisher to engage in self-censorship may properly consider first amendment values in determining whether to grant the defendant’s transfer motion. In this way, the interest in promoting free press values may be accommodated by the broad statutory standard of “in the interests of justice.” Such an analysis of a transfer decision may protect defendant-publishers from what some may perceive as the harshness of *Keeton* and *Calder*.

145. For an analysis of the *Calder* and *Keeton* standard, see supra notes 117-51 and accompanying text.

146. See *Buckley v. New York Post Corp.*, 373 F.2d 175, 183 (2d Cir. 1967) (“First Amendment could be regarded as giving forum non conveniens special dimensions”); *Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212 (E.D. Tenn. 1968), aff’d, 419 F.2d 989 (6th Cir. 1969) (court may consider first amendment values in determining whether suit brought in convenient forum). For a further discussion of *Buckley*, see supra notes 76-82 and accompanying text. For a further discussion of *Cordell*, see supra notes 83-85 and accompanying text.

147. Because the holding of *Calder* was narrow and only resolved the extent to which first amendment values could be considered in a minimum contacts analysis, the Court did not consider whether first amendment concerns could enter into a transfer of venue determination. For a discussion of the specific holding of *Calder*, see supra notes 103-04 and accompanying text. It is suggested that the Court left this venue possibility open if it proves to be necessary to protect free press concerns.

148. For a further discussion of venue and motions to transfer under § 1404(a), see supra notes 39-41 & 81 and accompanying text.


150. Id.

151. Although the decision to transfer under § 1404(a) is left to the discretion of the judge, among the factors influencing such a decision are the convenience of the parties and the convenience and availability of the witnesses. C. Wright, supra note 15, at 265-66. In a defamation action it is likely that those witnesses who the plaintiff will call to testify to the effect which the publication had on the plaintiff’s reputation will reside in the forum of the plaintiff’s residence.

On the other hand, it is likely that in an action where actual malice must be
After the United States Supreme Court's rulings in *Calder* and *Kee-ton*, it appears clear that publishers of newspapers or magazines which are distributed nationwide may be subjected to suit in a defamation action in any jurisdiction in which their media circulate. The Court did not give guidance on whether a defamation plaintiff may sue a primarily local newspaper or magazine in a foreign forum. It is submitted, however, that if a local publisher is subjected to the jurisdiction of a distant forum, the Supreme Court has left open the possibility for the publisher to assert first amendment considerations in a motion for a change of venue.

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proven, those who will testify as to the publisher's state of mind will reside in the publisher's residence where the editorial work is performed. For this reason, in the case of a small or local publisher, the court may grant the transfer motion because of the burden on the publisher to defend out-of-state.