CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW: THE SPECIAL CASE OF MULTISTATE DEFAMATION

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INTRODUCTION

Last year the Supreme Court held that nonresident plaintiffs may sue publishers for defamation in any state where the publisher regularly circulates materials.¹ In *Keeton v. Hustler Magazine, Inc.*² the Court upheld the New Hampshire courts' assertion of jurisdiction over a claim for nationwide damages by a nonresident who had only inconsequential connections to the state, even though New Hampshire was the only state in which the statute of limitations had not run.³ This ruling potentially enables many defamation plaintiffs to forum shop and to file suit in states whose defamation laws are most favorable to their claims.⁴

Although defamation defendants are now subject to the jurisdiction of the courts in any state in which they regularly distribute materials, the conclusion that they may also be subject to the defamation laws of any state with jurisdiction does not automatically follow. In *Keeton* the Court explicitly distinguished choice of law issues from its jurisdictional inquiry and declined to resolve them.⁵ The Court thereby left unsettled whether the Constitution limits a state's ability to apply its defamation law.⁶ In addition, even if a state with jurisdiction may constitutionally apply its law in a defamation action, its choice of law principles may lead it to decline to do so. In short, whether a state with jurisdiction in a defamation case may apply its laws and, if it may, under what cir-

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¹ 104 S. Ct. 1473 (1984).

² See *id.* at 1480, 1481-82.

³ See *id.* at 1477, 1480. Although regular circulation was necessary to establish minimum contacts between New Hampshire and the defendant, the Court disclaimed any reliance on the plaintiff's connection with New Hampshire in reaching its decision. See *id.* at 1495 n.5.

⁴ Indeed, the Court suggested as much. See *id.* at 1480 ("Petitioner's successful search . . . is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules . . .").

⁵ See *id.* at 1480 & nn.9-10.

⁶ Dictum elsewhere in the opinion suggests that New Hampshire could, consistent with constitutional principles, apply its own defamation law. See *id.* at 1479; *infra* notes 170-76 and accompanying text.

cumstances it should apply them are important questions that remain after *Keeton*. The first question is one that the Supreme Court has never addressed directly, and the second lies outside its jurisdiction.⁷ And recent literature on the application of choice of law principles to defamation cases has been surprisingly sparse.⁸

This Article addresses these questions. Part I outlines some of the issues upon which defamation laws differ from state to state. It demonstrates that many states' laws are intentionally more lenient towards defamation defendants, reflecting policy determinations by those states to subordinate their interest in compensating plaintiffs to their interest in enhancing free speech.

Part II surveys choice of law approaches used by courts today and their actual or probable application to multistate defamation cases. It shows that many approaches favor the application of forum law. Therefore *Keeton* potentially enables defamation plaintiffs to shop effectively, not only for their forum, but for the law most favorable to their claims. This could result in subjection of the multistate media, in every case, to nationwide damages based on the most hostile defamation law of any of the states to which its products travel.

Part III then addresses whether the Constitution limits the states' choice of law in defamation actions. *Allstate Insurance Co. v. Hague*⁹

⁷ In the absence of federal or constitutional questions, the Supreme Court has no jurisdiction to dictate state law. As the Court stated in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981),

It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.

Id. at 307. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-32, at 119-20 (1978).

⁸ The problem has long been subject to academic analysis. See, e.g., Note, *The Choice of Law in Multistate Defamation—A Functional Approach*, 77 HARV. L. REV. 1463 (1964); Comment, *An Examination of Publication and Choice of Law Problems in Multi-State Libel*, 56 NW. U.L. REV. 823 (1962); Note, *Conflict of Laws—Multi-State Defamation—Constitutional Limitations on Choice of Law*, 28 N.Y.U. L. REV. 1006 (1953). These articles are out of date, having been written without the benefit of more recent Supreme Court decisions that address the conflict of laws, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), and that impose constitutional guarantees in the area of defamation, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964)). In the twenty years since *New York Times v. Sullivan*, only one article has focused on choice of law in the defamation context: Rose, *Interstate Libel and Choice of Law: Proposals for the Future*, 30 HASTINGS L.J. 1515 (1979). The thesis of this Article diverges substantially from Professor Rose's, which argued that courts must apply the law of the place of the defendant's actions. See *id.* at 1532.

⁹ 449 U.S. 302 (1981).

is the Supreme Court's most recent decision delimiting when a state may apply its law consistently with due process and full faith and credit requirements. A superficial reading of *Hague* suggests that any state with jurisdiction on the basis relied on in *Keeton* could constitutionally apply its defamation laws. However, a careful analysis of the consequences that would follow in the defamation context suggests a different result. The application of forum law in this type of case would substantially jeopardize constitutional values that are not so clearly threatened by the application of *Hague's* standards in other types of cases.

In particular, such a practice may totally undermine the ability of states with relatively speech-enhancing¹⁰ rules to further their legitimate sovereign interests. This result would be clearly inconsistent with fundamental precepts underlying the Supreme Court's full faith and credit decisions.¹¹ Further, the application of forum law by courts with such incidental connections to the action would inappropriately deter the dissemination of information among the states and could result in the practical federalization of law governing multistate defamation, which traditionally has been the province of the states. Finally, such a practice would impinge substantially on first amendment principles requiring that states have strong and legitimate justifications for their laws that intrude upon protected speech. In light of these dangers to constitutional values, Part IV proposes a model for the choice of law in defamation actions. It concludes that forum states are constitutionally restrained from applying to the entirety of a multistate defamation claim law that is more speech-inhibiting than that of a state that has a significant interest, relative to other states, in compensating the plaintiff.

In conclusion, Part V suggests that appreciation for the concerns elucidated above should lead courts properly applying extant choice of law theories to reach results consistent with those suggested in Part IV. They follow not only as a matter of constitutional compulsion but also from sound application of well-accepted common law choice of law principles. This Article is thus intended as a guide to choice of defamation law problems in the wake of *Keeton's* validation of expansive jurisdiction over the multistate media.

¹⁰ Throughout this Article, "speech-enhancing" and "speech-inhibiting" will be used to describe the effects of the application of one state's rule of law as opposed to another's. If one state's law is more likely to result in a defendant's liability, it will be characterized as "speech-inhibiting." The law of another state will be "speech-enhancing" if its application is less likely to result in liability.

¹¹ See *infra* notes 177-200 and accompanying text.

I. INTERSTATE DIFFERENCES IN DEFAMATION LAW

The basic elements of a defamation action are relatively consistent from state to state. They are (1) publication (2) of a statement of fact (3) that is false and (4) defamatory and (5) that reasonably refers to the plaintiff, (6) is made with the requisite degree of fault, and (7) causes actual injury.¹² Many variations exist, however, as to what constitutes sufficient proof of these elements, whether particular defenses are available, and whether special procedural rules apply. Because of these differences, application of one state's defamation laws rather than another's can substantially affect the outcome of a defamation case. This Part highlights several of the differences among state laws and demonstrates that these differences reflect deliberate state policy choices, stemming from a balance of free speech values against interests in compensating injured plaintiffs.

The requisite degree of fault may be the most significant defamation element upon which state laws differ because it prescribes the basic standard of conduct that publishers must meet. The Supreme Court has held that public officials and public figures may recover for defamation only upon a showing of actual malice by the publisher,¹³ a standard that requires a showing of knowledge of falsity or reckless disregard of the truth.¹⁴ As for the defamation of private persons, however, the Court has left to the states the option of defining for themselves the appropriate standard, "so long as they do not impose liability without fault."¹⁵ Accepting this invitation, several states have held that, in defamation actions brought by private persons, the requisite standard of fault is simple negligence.¹⁶ Others require a showing of actual malice

¹² See S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTER, AND REPORTERS § 1.01 (1982); RESTATEMENT (SECOND) OF TORTS § 558 (1976).

¹³ See *New York Times v. Sullivan*, 376 U.S. 254, 283-84 (1964) (public officials); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring, joined in relevant part by Black, Douglas, Brennan & White, JJ.) (public figures).

¹⁴ *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). The meaning of "reckless disregard" was refined in *St. Amant v. Thompson*, 390 U.S. 727, 730-32 (1968), in which the Court stated that the standard required "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 390 U.S. at 731.

¹⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (reversing use of actual malice standard for private plaintiff).

¹⁶ See, e.g., *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886 (Ky. 1981) (Kentucky Constitution mandates simple negligence standard), *cert. denied*, 456 U.S. 975 (1982); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596, 350 A.2d 688, 697 (1976) (adopting simple negligence standard of RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975)).

in any case involving reports on events of public interest.¹⁷ New York has adopted an intermediate approach requiring gross irresponsibility in all cases.¹⁸ And even among the states adopting a simple negligence standard, there are variations. Some judge negligence by the standards of the publishing community,¹⁹ while others employ only an ordinary care standard.²⁰

Other elements upon which state laws differ include the requirement of falsity, the defamatory nature of the statement, and the requisite reference to the plaintiff. For example, although some courts require the plaintiff to prove falsity,²¹ others continue to place the burden of proving truth on the defendant.²² Some jurisdictions have found words capable of a defamatory meaning that others have not.²³ Illinois judges defamatory meaning by its "innocent construction rule," whereby a publication, as a matter of law, cannot be deemed defamatory if the words may reasonably be given an innocent interpretation.²⁴ Other states, however, leave to the trier of fact any statement that is capable of either innocent or defamatory meaning.²⁵ Illinois also applies

¹⁷ See, e.g., *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982) (en banc); *AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 679, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976); *Lins v. Evening News Ass'n*, 129 Mich. App. 419, 434-35, 342 N.W.2d 573, 580-81 (Mich. Ct. App. 1983).

¹⁸ *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

¹⁹ See, e.g., *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 233, 531 P.2d 76, 84 (1975).

²⁰ See, e.g., *Troman v. Wood*, 62 Ill. 2d 184, 197-99, 340 N.E.2d 292, 298-99 (1975).

²¹ See, e.g., *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir. 1981).

²² See, e.g., *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 147, 377 A.2d 807, 814 (Law Div. 1977), *modified on other grounds*, 164 N.J. Super. 465, 397 A.2d 334 (1979).

²³ Compare *Denny v. Mertz*, 106 Wis. 2d 636, 663, 318 N.W.2d 141, 154 (1982) (statement that person has been fired may reasonably be found defamatory by jury), *cert. denied*, 459 U.S. 883 (1982) with *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 601, 132 N.E.2d 860, 862 (1956) (report of a person's removal from office cannot be defamatory without implication that removal was due to misconduct).

²⁴ See, e.g., *John v. Tribune Co.*, 24 Ill. 2d 437, 442-43, 181 N.E. 2d 105, 108, *cert. denied*, 371 U.S. 877 (1962). The Illinois innocent construction rule was recently modified. See *Chapski v. Copley Press*, 92 Ill. 2d 344, 351-52, 442 N.E.2d 195, 198-99 (1982) (statement not actionable only if innocent construction is a reasonable construction). For a discussion of the significance of this modification, see Malone & Smolla, *The Future of Defamation in Illinois After Colson v. Stieg and Chapski v. Copley Press, Inc.*, 32 DE PAUL L. REV. 219, 289-96 (1983) (suggesting that the modification was not significant).

²⁵ See, e.g., *Fairbanks Publishing Co. v. Pitka*, 376 P.2d 190, 194 (Alaska 1962) ("[I]f the language used is capable of two interpretations, one of which would be defamatory and the other not, then it is for the jury to determine . . ."); *Denny v. Mertz*, 106 Wis. 2d 636, 663, 318 N.W.2d 141, 153-54 (1982) (remanding for jury

its innocent construction rule to the issue of whether the statement reasonably refers to the plaintiff—if the statement can reasonably be read to refer to a person other than the plaintiff, the case will be dismissed.²⁶ Other states require only that those who read or hear the statement reasonably understand that the plaintiff is the person to whom the statement refers.²⁷

Absent malice, damages are constitutionally limited to compensation for actual injury,²⁸ but the types of recoverable damages vary. Some states require proof of “special damages”—specific pecuniary losses—before permitting recovery for a false statement that is not defamatory per se.²⁹ Others do not distinguish the per se category and permit recovery of general damages without regard to the character of the defamation.³⁰ At least three different approaches exist towards punitive damages. Some states permit recovery upon a showing of knowing falsity or reckless disregard for the truth,³¹ the constitutionally required minimum.³² Others impose a requirement that the plaintiff prove common law malice, consisting of ill will, hostility, or an evil

interpretation of statement's defamatory nature), *cert. denied* 459 U.S. 883 (1982).

²⁶ See *John v. Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962); *Belmonte v. Rubin*, 68 Ill. App. 3d 700, 701, 386 N.E.2d 904, 904 (Ill. App. Ct. 1979).

²⁷ See, e.g., *Dijkstra v. Westerink*, 168 N.J. Super. 128, 133, 401 A.2d 1118, 1120 (App. Div. 1979).

²⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

²⁹ See, e.g., *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 179, 345 S.W.2d 34, 40 (1961) (only words per se injurious can support a recovery of general damages). For statements to be defamatory per se, “the words used must be so unambiguous as to be reasonably susceptible of only one interpretation—that is, one which has a natural tendency to injure another's reputation.” *Fairbanks Publishing Co. v. Pitka*, 376 P.2d 190, 194 (Alaska 1962) (footnote omitted).

³⁰ See, e.g., *Sharratt v. Housing Innovations, Inc.*, 365 Mass. 141, 147, 310 N.E.2d 343, 347 (1974) (all libel is actionable without pleading special damages); *Hinkle v. Alexander*, 244 Or. 267, 277, 417 P.2d 586, 589 (1966) (en banc) (rejecting separate category of per se libel); *Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 460-61, 113 N.W.2d 135, 139 (1962). Recoverable damages include those for impairment of reputation, personal humiliation, and mental anguish and suffering. See *Sharratt*, 365 Mass. at 148, 310 N.E.2d at 348; *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 110 n.5, 334 N.E.2d 494, 498 n.5 (1974), *cert. denied*, 423 U.S. 883 (1975).

³¹ See, e.g., *Fleming v. Moore*, 221 Va. 884, 893, 275 S.E.2d 632, 638 (1981).

³² In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court stated that states may not permit recovery of punitive damages in defamation cases, “at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” *Id.* at 349. While fault meeting this standard is clearly a prerequisite for an award of punitive damages, because of the negative phrasing of the statement in *Gertz*, the issue whether punitive damages can ever be awarded in defamation cases is regarded as still open. See M. FRANKLIN, *CASES AND MATERIALS ON MASS MEDIA LAW* 171 (2d ed. 1982).

intention to defame or injure.³³ Still others prohibit recovery of all punitive damages.³⁴

Different states also recognize different defenses. In some states, failure to demand a retraction can limit a plaintiff to special damages³⁵ or preclude the recovery of punitive damages.³⁶ In Wisconsin such a demand is a prerequisite to suit.³⁷ Yet, in many states a demand for retraction has no effect or serves only to mitigate damages.³⁸ A privilege of neutral reportage protects the accurate reporting of defamatory statements on matters of public interest in some states³⁹ and not in others.⁴⁰ The existence of other privileges also varies from state to state.⁴¹

Finally, many states apply special procedural rules. Some explicitly favor summary judgment in defamation actions;⁴² others disfavor

³³ See, e.g., *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983) (applying Florida law); *Matthews v. Deland State Bank*, 334 So. 2d 164, 166 (Fla. Dist. Ct. App. 1976).

³⁴ See, e.g., *Wheeler v. Green*, 286 Or. 99, 118-19, 593 P.2d 777, 788-89 (1979) (Oregon Constitution permits recovery for actual damages only); *Farrar v. Tribune Publishing Co.*, 57 Wash. 2d 549, 552-53, 358 P.2d 792, 794 (1961) ("Only compensatory damages can be recovered. Exemplary damages are unknown to our law.").

³⁵ See, e.g., *Kapellas v. Kofman*, 1 Cal. 3d 20, 30, 459 P.2d 912, 917-18, 81 Cal. Rptr. 360, 365-66 (1969); *ARIZ. REV. STAT. ANN.* § 12-653.01 to .03 (1982).

³⁶ See, e.g., *ALA. CODE* § 6-5-186 (1975).

³⁷ See *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 3, 259 N.W.2d 691, 692 (1977) (construing *WIS. STAT. ANN.* § 895.05(2) (West 1983)).

³⁸ See, e.g., *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 174, 345 S.W.2d 34, 38 (1961) (defendant's full retraction can only be considered in mitigating damages); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958) ("Retraction of a libel is a matter to be considered in mitigation, but does not bar punitive damages . . .").

³⁹ See, e.g., *Krauss v. Champaign News Gazette, Inc.*, 59 Ill. App. 3d 745, 747, 375 N.E.2d 1362, 1363 (Ill. App. Ct. 1978) (applying doctrine of neutral reportage). The Illinois appellate courts are divided over the continued validity of this privilege. Compare *Newell v. Field Enterprises, Inc.*, 91 Ill. App. 3d 735, 757, 415 N.E.2d 434, 452 (Ill. App. Ct. 1980) (refusing to adopt doctrine of neutral reportage). Ohio continues to apply the privilege. See, e.g., *J.V. Peters & Co. v. Knight-Ridder Co.*, No. 11335, slip op. at 11-12 (Ohio Ct. App. Mar. 21, 1984).

⁴⁰ See, e.g., *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982).

⁴¹ In some states the common law privilege of fair report protects reports of pleadings filed in court. See, e.g., *Campbell v. New York Evening Post, Inc.*, 245 N.Y. 320, 328, 157 N.E. 153, 156 (1927). In other states the privilege does not attach unless the pleading has been brought before a judicial officer. See, e.g., *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E.2d 5, 6 (1945). The same privilege protects reports of statements made by arresting police officers in some states. See, e.g., *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 66-67, 340 P.2d 396, 400-01 (1959). In some states such statements are not protected. See, e.g., *Lancour v. Herald & Globe Ass'n*, 111 Vt. 371, 385-86, 17 A.2d 253, 259 (1941). Some states have enacted statutory privileges protecting broadcasters from liability for defamatory statements made by third parties through their facilities. See, e.g., *MINN. STAT. ANN.* § 544.043 (West Supp. 1984).

⁴² See, e.g., *Khalifa v. Muslim Students' Ass'n*, 131 Ariz. 328, 329, 641 P.2d 242, 243 (Ct. App. 1981); *Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 22 Cal.

it⁴³ or are neutral.⁴⁴ A plaintiff's ability to force disclosure of the identity of a defamation defendant's sources varies, through the existence of shield laws, from total preclusion,⁴⁵ to availability conditioned upon prerequisites,⁴⁶ to availability fettered by no special limitations.⁴⁷ And, of course, the statutes of limitation for defamation actions vary from state to state.⁴⁸

This survey of state defamation law is by no means exhaustive, yet it illustrates that the differences among state laws are substantial. The extent of these disparities leads one to question why there are these differences. Although not all of the rules described above have a clearly articulated judicial or legislative history, the reasoning behind those that do provides a fairly clear answer to that question. The delineation of defamation rules requires a balancing of the values of reputation and free speech,⁴⁹ the differences among state laws are attributable to the fact that the states have chosen to weigh these values differently.

To illustrate, states that require private plaintiffs to show a degree of fault greater than simple negligence stress that the vagueness of a lesser standard would cast a chilling effect upon the media and that the resulting self-censorship would unduly hamper free and robust debate.⁵⁰ Believing a relatively unhampered press to be important to a

3d 672, 685, 586 P.2d 572, 578, 150 Cal. Rptr. 258, 264 (1978), *cert. denied*, 441 U.S. 961 (1979).

⁴³ See, e.g., *Hall v. Piedmont Publishing Co.*, 46 N.C. App. 760, 765, 266 S.E.2d 397, 401 (1980) (issue of malice in defamation actions renders summary judgment inappropriate).

⁴⁴ See, e.g., *American Benefit Life Ins. Co. v. McIntyre*, 375 So. 2d 239, 249 (Ala. 1979) (on rehearing) ("[T]he summary judgement procedure which must be followed in libel cases is the same as in other cases . . .").

⁴⁵ See, e.g., *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 525 (E.D.N.Y. 1979) (construing 42 PA. CONS. STAT. § 5942 (1982)).

⁴⁶ See, e.g., MINN. STAT. ANN. § 595.021-595.025 (West Supp. 1984).

⁴⁷ See, e.g., *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 298, 562 P.2d 791, 801, *cert. denied*, 434 U.S. 930 (1977); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 322, 303 N.E.2d 847, 850 (1973).

Another example of procedural differences is New York's unique rule of evidence that forbids witness testimony to the effect that she believed the communication was about the plaintiff. See *Michaels v. Gannett Co.*, 10 A.D.2d 417, 420, 199 N.Y.S.2d 778, 781 (N.Y. App. Div. 1960) ("[T]he testimony of third persons that they understood the defamatory statement to refer to the plaintiff is not admissible . . .") (dictum); see also *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681, 683 (2d Cir. 1961) (construing N.Y. case law), *cert. denied*, 368 U.S. 956 (1962).

⁴⁸ Compare, e.g., N.J. STAT. ANN. § 2A:14-3 (West 1952) (one year) and Idaho Code § 5-219(5) (1979) (two years) with MASS. ANN. LAWS ch. 260, § 4 (Michie/Law. Co-op. 1980) (three years).

⁴⁹ As the Supreme Court has noted, "Whatever is added to the field of libel is taken from the field of free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)).

⁵⁰ See, e.g., *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103,

well-informed community⁵¹ and the public interest,⁵² these states explicitly have subordinated their interest in compensating private individuals injured by negligent defamation to the free speech interests furthered by heightened standards of fault.⁵³ Similarly, California favors summary judgment in defamation actions "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights."⁵⁴

Justifications for other speech-enhancing rules stress the states' desire to encourage the free dissemination of information. The California Supreme Court has recognized that its legislature enacted a retraction statute "to encourage a more active press by means of an increased insulation of newspapers from liability arising from erroneously published statements."⁵⁵ Illinois adopted its privilege of neutral reportage because "[a] robust and unintimidated press is a necessary ingredient of self-government."⁵⁶ And Minnesota's shield law restricting access to the media's sources of information was passed to "protect the public interest and the free flow of information."⁵⁷ These statements and other speech-enhancing rules⁵⁸ reflect a common determination. In weighing

1106 (Colo. 1982) (en banc) ("[A] simple negligence rule would have a chilling effect on the press that would be more harmful to the public interest than the possibility that a defamed private individual would go uncompensated."); *AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 683, 321 N.E.2d 580, 588 (1975) ("A publisher's fear of guessing wrong about juror assessment of the . . . news gathering procedures he employs would inevitably deter 'protected' speech."), *cert. denied*, 424 U.S. 913 (1976).

⁵¹ See *AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 678, 321 N.E.2d 580, 586, (1975), *cert. denied*, 424 U.S. 913 (1976).

⁵² See *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982) (en banc) (chilling effect of simple negligence standard more harmful to public interest than uncompensated defamation plaintiffs).

⁵³ See *id.*; *AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 683, 321 N.E.2d 580, 588 (1975) (arguing that damage judgments based on a jury determination of negligence would unduly deter protected speech), *cert. denied*, 424 U.S. 913 (1976).

⁵⁴ *Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 685, 586 P.2d 572, 578, 150 Cal. Rptr. 258, 264 (1978), *cert. denied*, 441 U.S. 961 (1979).

⁵⁵ See, e.g., *Kapellas v. Kofman*, 1 Cal. 3d 20, 30, 459 P.2d 912, 917, 81 Cal. Rptr. 360, 365 (1969) (en banc) (footnote omitted).

⁵⁶ *Krauss v. Champaign News Gazette, Inc.*, 59 Ill. App. 3d 745, 746-47, 375 N.E.2d 1362, 1363 (1978).

⁵⁷ MINN. STAT. ANN. § 595.022 (West Supp. 1983).

⁵⁸ See, e.g., *Chapski v. Copley Press*, 92 Ill. 2d 344, 350, 442 N.E.2d 195, 198 (1982) (Innocent construction rule "comports with the constitutional interests of free speech and free press and encourages robust discussion of public affairs."); *Khalifa v. Muslim Students' Ass'n*, 131 Ariz. 328, 329, 641 P.2d 242, 243 (Ct. App. 1981) ("In defamation cases, because of the constitutional privilege of free speech . . . summary judgment is the rule rather than the exception . . ."); *Wheeler v. Green*, 286 Or. 99, 119, 593 P.2d 777, 789 (1979) (prohibiting "large [punitive] damage recoveries [be-

the value of free speech against the value of redressing injury to individual reputation, the people of the state, through their government, have decided to forego redress for injury in cases to which the rules would apply.⁵⁹

On the other hand, states that apply relatively speech-inhibiting rules strike the balance differently. They stress instead the importance of protecting individual reputations. For example, in announcing that its privilege of fair report does not protect reports of statements made by the police, the Vermont Supreme Court stated, "The public interest does not require that the right to enjoy a good name shall be made subservient to the right of free speech."⁶⁰ The Kentucky Supreme Court, in choosing its standard of simple negligence for private defamation plaintiffs, opined that its constitution "mandates that we adopt a standard which adequately protects the private individual from defamation."⁶¹ Addressing the same issue, the Kansas Supreme Court noted that its constitution places injury to reputation on the same plane as injury to person or property. Consequently, the court held that the negligence standard applied to the latter types of injury should also apply to defamation.⁶² Other state court decisions have favored a defamed plaintiff's interest in vindication as well as compensation.⁶³

This divergence shows that the differences among state laws are neither accidents of common law nor subtle disagreements about minor

cause they] can easily inhibit the exercise of freedom of constitutionally protected expression").

⁵⁹ *Cf. Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pa. shield law to preclude recovery):

Simply put, while an individual's interest in his reputation is a basic concern . . . its reflection in the laws of defamation is solely a matter of State law. . . .

. . . The legislature's decision then to favor the public's interest in access to information over an individual's State common law right to vindicate his reputation is a matter over which the State has almost complete control and in the circumstances of this case has exercised in a manner adverse to plaintiff's interests.

Id. at 528. *See also* *Greenberg v. CBS*, 69 A.D.2d 693, 708, 419 N.Y.S.2d 988, 996 (N.Y. App. Div. 1979) (applying N.Y. shield law).

⁶⁰ *Lancour v. Herald & Globe Ass'n*, 111 Vt. 371, 386, 17 A.2d 253, 259 (1941).

⁶¹ *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982).

⁶² *See* *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 232-34, 531 P.2d 76, 83-84 (1975). Other states have adopted a negligence standard partly on the grounds that it is the standard applied to other types of injury. *See, e.g.*, *Troman v. Wood*, 62 Ill. 2d 184, 194-95, 198, 340 N.E.2d 292, 297, 299 (1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596, 350 A.2d 688, 697 (1976).

⁶³ *See, e.g.*, *Troman v. Wood*, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 297 (1975); (adopting negligence standard); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 573, 576, 106 S.E.2d 258, 261, 263 (1958) (upholding punitive damages).

legal nuances. The differences result from a distinct diversity of opinion among states regarding the sanctity of reputation and the importance of a healthy press. Thus it should come as no surprise that these differences will frequently affect the outcome of litigation. A plaintiff who can prove simple negligence may be unable to prove reckless disregard of the truth. The existence of a privilege may assure success for a defendant; its absence defeat. A plaintiff who neglects to demand a timely retraction may forfeit substantial recovery in some states but not in others.

Because differences of state law can determine the outcome of defamation litigation, predicting which law a court will apply can be critical to a plaintiff's choice of forum. This is particularly true if the defendant is a nationally-circulated publication, for a plaintiff suing such a defendant, in light of *Keeton*, may have a choice of virtually any forum. Therefore, an understanding of choice of law principles and of any constitutional restraints on their application is necessary for competent litigation and adjudication of these claims.

II. CHOICE OF LAW APPROACHES AND THE PREFERENCE FOR FORUM LAW

Multistate defamation plaintiffs' ability to choose favorable law depends on the choice of law approaches used by each state. If every jurisdiction applied the same state's law to the same defamation action, forum shopping incentives would be miniscule. Although modern choice of law decisions in defamation cases are scant, the varying choice of law approaches applied by states today indicate that the law applied is likely to depend on the forum chosen. Indeed, because of the preference for forum law incorporated into several of the modern approaches,⁶⁴ plaintiffs may often be able to choose a state's law simply by selecting that state as the forum.

Over thirty years ago, in the context of defamation law, William Prosser characterized "[t]he realm of conflict of laws [as] a dismal swamp, filled with quaking quagmires."⁶⁵ The subsequent emergence of modern approaches that require the weighing of contacts or the elucidation of state policies underlying the conflicting laws has further mired the field.⁶⁶ American courts now follow, singly or in combination,

⁶⁴ See *infra* notes 98-130 and accompanying text.

⁶⁵ Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

⁶⁶ See J. MARTIN, CONFLICT OF LAWS: CASES AND MATERIALS 166-67 (1984). See generally E. SCOLES & P. HAY, CONFLICT OF LAWS 16-42 (1982) (discussing modern approaches). The cases that first adopted modern approaches are less than thirty years old. See J. MARTIN, *supra*, at 167-71 (citing leading case of *Auten v.*

no less than ten different approaches,⁶⁷ and no single approach can claim the allegiance of a majority of states.⁶⁸ As the Supreme Court has observed, each of the fifty states "applies its own set of malleable choice-of-law rules."⁶⁹

Choice of law rules are further complicated by the principle of *depeçage*, under which a court may apply the law of one state to govern some issues and the law of a different state to govern other issues in the same action.⁷⁰ For example, courts sometimes apply foreign law to the substantive issues of a case and forum law to the procedural issues.⁷¹ *Depeçage* may also be applied to different substantive issues.⁷² One unusual consequence of this process is that the composite of law resulting from *depeçage* may permit a recovery in cases in which a recovery could not have been obtained had the law of any single state been applied to the claim in its entirety.⁷³ *Depeçage* may be applied

Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954)); W. REESE & M. ROSENBERG, *CONFLICT OF LAWS CASES AND MATERIALS* 468-70 (8th ed. 1984) (citing *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957)). But see J. MARTIN, *supra*, at 1 (a surprising number of states still adhere to the traditional territorial approach).

For interesting critiques of choice of law approaches, see Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Morrison, *Death of Conflicts*, 29 VILL. L. REV. 313 (1984).

⁶⁷ See Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 585 (1983).

⁶⁸ See *id.* at 586 n.399; cf. J. MARTIN, *supra* note 66, at 166 (No approach "has established itself as superior to the rest.").

⁶⁹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981).

⁷⁰ See generally Reese, *Depeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

⁷¹ See, e.g., *Lillegraven v. Tengs*, 375 P.2d 139, 140-43 (Alaska 1962) (combining British Columbian liability rule with Alaskan statute of limitations); *Nelson v. Eckert*, 231 Ark. 348, 351-52, 329 S.W.2d 426, 428-29 (1959) (applying forum limitations rule); *Velle Transcendental Research Ass'n, Inc. v. Esquire, Inc.*, 41 Ill. App. 3d 799, 802-03, 354 N.E.2d 622, 625-26 (1976) (forum limitations rule); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122-44 (1971) (choice of law rules governing procedure). Characterizing an issue as substantive or procedural can be difficult. Compare *Levy v. Steiger*, 233 Mass. 600, 601, 124 N.E. 477, 477 (1919) (burden of proof procedural) with *O'Leary v. Illinois Terminal R.R.*, 299 S.W.2d 873, 877 (Mo. 1957) (burden of proof substantive).

⁷² See, e.g., *Maryland Casualty Co. v. Jacek*, 156 F. Supp. 43, 44-46 (D.N.J. 1957) (applying New Jersey contract law and New York tort law to automobile accident insurance claim); *Sabell v. Pacific Intermountain Express Co.*, 36 Colo. App. 60, 64-70, 536 P.2d 1160, 1163-66 (1975) (combining Iowa standard of care with Colorado comparative negligence statute). In defamation actions, see for example, *DeRobert v. Gannett Co.*, 83 F.R.D. 574 (D. Hawaii 1979) (combining Nauru defamation law with United States constitutional protections) and see also *Ardoyno v. Kyzar*, 426 F. Supp. 78, 82-83 & n.11 (E.D. La. 1976) (applying Louisiana contract law and Mississippi slander law).

⁷³ Frequently this results from the combination of a foreign cause of action and a forum's longer statute of limitations. See, e.g., *Lillegraven v. Tengs*, 375 P.2d 139 (Alaska 1962) (combining British Columbian liability rule with Alaskan statute of limitations). However, it can arise from recognition of foreign causes of action without

under each of the choice of law approaches discussed below. Modern approaches, tending to focus on what law should govern particular issues, may increase the use of *depeçage*.⁷⁴

The peculiar nature of defamation actions further complicates the choice of law issue. The nonphysical nature of the tort and the possibility that the steps leading up to the defamation (such as investigation, editing, printing, and dissemination) may occur in several states make more difficult the determination of which factors are pertinent to the choice of law and the appropriate weighing of these factors. A final complication is that many states have yet to articulate their choice of law principles in the defamation context. Notwithstanding these difficulties, cases applying several of the current choice of law approaches provide some indication of how courts will resolve the choice of law dilemma in defamation cases.

A. *The Territorialist Approach*

Seventeen jurisdictions apply some version of the traditional territorialist approach to choice of law.⁷⁵ Under this approach, courts isolate a particular event giving rise to the cause of action and apply the law of the state where that event occurred.⁷⁶ Procedural issues are generally governed by forum law through *depeçage*.⁷⁷

Even under this method, choice of law in defamation cases has been difficult.⁷⁸ The law governing tort liability has traditionally been the "place of wrong."⁷⁹ The first *Restatement of Conflict of Laws* defined this as the place "where the last event necessary to make an actor liable for an alleged tort takes place."⁸⁰ In defamation actions this was

recognition of immunities granted by that foreign state. If the forum state would not have recognized the cause of action, a plaintiff may recover even though neither state would permit recovery had all parts of their laws been applied. For a general analysis of "impossible" recoveries discussed in the context of a hypothetical case, see D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 34-43 (1965).

⁷⁴ See Reese, *supra* note 70, at 59.

⁷⁵ See Kay, *supra* note 67, at 586 n.399.

⁷⁶ See, e.g., *Alabama Great S.R.R. v. Carroll*, 97 Ala. 126, 133-34, 11 So. 803, 806 (1892) (law of state of injury governs tort actions); *Linn v. Employers Reinsurance Corp.*, 392 Pa. 58, 60, 139 A.2d 638, 639 (1958) (law of state where contract was made governs its validity); see also *RESTATEMENT OF CONFLICT OF LAWS* §§ 332, 378 (1934).

⁷⁷ See, e.g., *Levy v. Steiger*, 233 Mass. 600, 601, 124 N.E. 477, 477 (1919) (burden of proof procedural).

⁷⁸ See, e.g., *Ehrenzweig, The Place of Acting in Intentional Multi-State Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1, 34-35 (1951) (Defamation actions "defy all traditional rules.").

⁷⁹ *RESTATEMENT OF CONFLICT OF LAWS* § 379 (1934).

⁸⁰ *Id.* § 377.

generally the state where the defamatory statement was seen or heard by others.⁸¹ In multistate defamation, therefore, the requisite last event occurs in every state in which the statement is circulated. When a plaintiff seeks to recover nationwide damages in one action,⁸² a literal interpretation of this approach would require application of the law of each state of circulation. This would necessitate separate instructions to the jury on the law of each state and a separate award of damages for the injury suffered in each state. A few courts have actually taken this tack, resulting in unimaginable complexities and confusion.⁸³

These difficulties have led many courts to adopt other versions of the territorialist approach that attempt to isolate a single significant event, other than the statement's dissemination, to single out one state's law that may be applied to the entirety of the plaintiff's claim.⁸⁴ However, no territorialist rule has gained a majority following.⁸⁵ Frequently, courts have simply applied the law of the forum without extensive analysis.⁸⁶ Courts employing the territorialist approach will usually apply only one state's law to the action in order to avoid undue complexity. But whether this should be that of the forum state, the plaintiff's domicile, or elsewhere is an issue territorialist principles do not definitively resolve.

B. *The Most Significant Relationship Approach*

The *Restatement (Second) of Conflict of Laws*, reflecting the dissatisfaction of many courts and scholars with choice of law determinations premised solely on the location of events,⁸⁷ abandoned the first

⁸¹ See *id.* n.5, illust. 7.

⁸² Most states adhere to the "single publication rule," see *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1480 n.8 (1984), under which a plaintiff can recover in an action in one jurisdiction damages suffered in all jurisdictions, see *RESTATEMENT (SECOND) OF TORTS* § 577A(4) (1977), quoted in *Keeton*, 104 S. Ct. at 1477 n.2.

If a state does not follow the single publication rule, the plaintiff must bring a separate action each time and in each state where the defamatory statement is published for damages suffered within that state. Although such a result is rare, at least one modern decision explicitly rejects the single publication rule. See *Lewis v. Reader's Digest Ass'n*, 162 Mont. 401, 406, 512 P.2d 702, 704 (1973) ("Despite the numerical weight of authority following the single publication rule, we consider it unsound.").

⁸³ See, e.g., *Hartmann v. Time, Inc.*, 166 F.2d 127, 133-136 (3d Cir.), cert. denied, 334 U.S. 838 (1948); *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364, 365 (D. Mass. 1940).

⁸⁴ For example, some territorialist courts have applied the law of the plaintiff's domicile while others have applied that of the state of the defendant's "act." See generally *Leflar, Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447, 454-456 (1953); Prosser, *supra* note 65, at 971-978.

⁸⁵ See Prosser, *supra* note 65, at 971.

⁸⁶ See *Leflar, supra* note 84, at 456; Prosser, *supra* note 65, at 977.

⁸⁷ See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 6, 150 (1971).

Restatement's territorialist approach. Instead, it prescribes consideration of various policies, directing courts to apply the "law of the state which, with respect to [the particular] issue, has the most significant relationship to the occurrence and the parties."⁸⁸ Yet, the policies listed for consideration⁸⁹ are sufficiently general to enable different courts to manipulate them easily and thus reach different conclusions on the choice of law issue in identical cases.

In the context of multistate defamation actions, the *Restatement (Second)* reduces the likelihood of conflicting decisions by providing directives that the state with the most significant relationship will usually be the plaintiff's domicile if the plaintiff is a natural person or its principal place of business if the plaintiff is a corporation or other legal entity.⁹⁰ This suggestion is premised on the rationale that the tort of defamation is primarily designed to redress injury to a plaintiff's reputation and the greatest injury will usually occur in the state of a plaintiff's domicile or place of business.⁹¹

These directives enable courts to avoid a complex balancing of the factors identified by the *Restatement (Second)*, and many courts follow them without extensive analysis. For example, in *Hanley v. Tribune Publishing Co.*,⁹² the district court applied the retraction statute of California, the defendant's place of business, rather than the law of Nevada, the plaintiff's domicile,⁹³ concluding after careful analysis that application of the retraction statute would be most consistent with the policies of both states.⁹⁴ In reversing, the Court of Appeals for the Ninth Circuit relied primarily on the general directive of the *Restatement (Second)*, stating that "the contacts specified by the district court do not warrant deviation from this general rule."⁹⁵

⁸⁸ *Id.* § 145.

⁸⁹ The RESTATEMENT (SECOND) lists the following factors to be considered in determining the state with the most significant relationship: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. *See id.* § 6. Although procedural rules are generally governed by forum state law, *see id.* § 122, even this determination is governed by reference to the above factors, *see id.* § 122 comments a & b. This may at times lead to application of foreign procedural law. *See, e.g., id.* § 139 (state with most significant relationship to the communication may control applicability of evidentiary privilege).

⁹⁰ *See id.* §§ 150(2), 150(3).

⁹¹ *See id.*, comments e & f.

⁹² 527 F.2d 68 (9th Cir. 1975).

⁹³ *See id.* at 70.

⁹⁴ *See id.* at 69 (citing lower court opinion).

⁹⁵ *Id.* at 70. Similarly, in *Reeves v. American Broadcasting Companies*, 719 F.2d

Although exceptions exist,⁹⁶ it is fair to conclude that the law chosen by most courts following the *Restatement (Second)* approach will be the law of the plaintiff's domicile.⁹⁷ Unfortunately, this choice may often result not from a critical review of the prescribed policy considerations, but rather from an unconsidered application of the more general directives.

C. Interest Analysis

Brainerd Currie, the principal champion of interest analysis, argued that a court faced with a conflicts dispute should first identify the governmental policies underlying the potentially applicable laws.⁹⁸ If it finds that the policies of only one state would be served by application of its law to the case, that state's law should govern.⁹⁹ If, however, the court finds that the policies underlying the conflicting laws of more than one state would be furthered by their application, it should first reconsider the policy implications to see if a more restrained interpretation of each policy would eliminate the conflict.¹⁰⁰ Where conflict is unavoidable and the court faces a "true conflict," however, Professor

602 (2d Cir. 1983), the the Second Circuit, applying New York conflicts law, relied on the general directive of the *RESTATEMENT (SECOND)* in holding an ABC broadcast to be privileged under the law of the plaintiff's domicile. Although the Court acknowledged in principle that the *RESTATEMENT (SECOND)* factors should be balanced on a case-by-case basis, it quickly resolved the matter by stating, "[The trial judge's] factual determination that Reeves would suffer the most damage to his reputation in his home state was not clearly erroneous, since the state of the plaintiff's domicile will usually have the most significant relationship to the case." *Id.* at 605 (citing *RESTATEMENT (SECOND)* § 150(2)).

⁹⁶ See, e.g., *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania shield law to prevent discovery of a Pennsylvania publisher's sources). In justifying its decision the court stated somewhat conclusorily that Pennsylvania had the greatest concern with the issue "because of its contact with, and interest in, the events here in question." *Id.* at 527. See also *Rudin v. Dow Jones & Co.*, 510 F. Supp. 210, 217 (S.D.N.Y. 1981) (requiring further development of factual record to determine choice of law issue).

⁹⁷ See, e.g., *Dowd v. Calabrese*, 589 F. Supp. 1206, 1210 (D.D.C. 1984); *Machleder v. Diaz*, 538 F. Supp. 1364, 1369-70 (S.D.N.Y. 1982) (applying New Jersey law to New Jersey plaintiff); *Fitzpatrick v. Milky Way Prods., Inc.*, 537 F. Supp. 165, 171 & n.16 (E.D. Pa. 1982) (applying Pennsylvania law to Pennsylvania plaintiff); *Velle Transcendental Research Ass'n, Inc. v. Esquire, Inc.*, 41 Ill. App. 3d 799, 802, 354 N.E.2d 622, 625 (1976) (applying California law to California plaintiff).

⁹⁸ See Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242 (1963) [hereinafter cited as Currie, *Comments on Babcock*]; Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178, reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183-84 (1963).

⁹⁹ Currie, *Comments on Babcock*, *supra* note 98, at 1242.

¹⁰⁰ *Id.* at 1242-43.

Currie recommended that forum law be applied.¹⁰¹ As a result of the latter rule, interest analysis tends to favor application of forum law.

As applied by the courts, this approach is not so straightforward. California courts, for example, use "comparative impairment" to resolve true conflicts.¹⁰² This entails a determination of "which state's interest would be more impaired if its policy were subordinated to the policy of the other state" and results in "applying the law of the State whose interests would be the more impaired if its law were not applied."¹⁰³ Other courts purportedly using interest analysis explicitly weigh the relevant states' interests¹⁰⁴ and occasionally apply nonforum law,¹⁰⁵ even to such traditionally forum-controlled procedural matters as statutes of limitation.¹⁰⁶ Even when courts supplement pure interest analysis in such ways, however, the approach retains a distinct preference for forum law.¹⁰⁷

Fleury v. Harper & Row Publishers, Inc.,¹⁰⁸ a recent defamation decision by the Ninth Circuit, applying California conflicts law, illustrates this preference. Although the case appeared to utilize a weighing of interests approach (and failed even to mention California's comparative impairment principles), the court explicitly favored the law of the forum, stating, "Libel and invasion of privacy are transitory torts to which the law of the forum will normally be applied absent a strong governmental interest of another jurisdiction."¹⁰⁹

While the forum state in *Fleury* also happened to be the plaintiff's

¹⁰¹ See *id.*

¹⁰² See, e.g., *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 320-22, 546 P.2d 719, 723-24, 128 Cal. Rptr. 215, 219-20, *cert. denied*, 429 U.S. 859 (1976).

¹⁰³ *Id.* at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

¹⁰⁴ See, e.g., *White v. Smith*, 398 F. Supp. 130, 134 (D.N.J. 1975); *Labree v. Major*, 111 R.I. 657, 668, 306 A.2d 808, 815 (1973).

¹⁰⁵ See, e.g., *White v. Smith*, 398 F. Supp. 130, 141 (D.N.J. 1975).

¹⁰⁶ See, e.g., *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28, 37 (3d Cir. 1975) (applying New Jersey conflicts law to select Quebec statute of limitations); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 141, 305 A.2d 412, 418 (1973) (applying North Carolina statute of limitations).

¹⁰⁷ For example, courts may weigh forum state interests more heavily. See, e.g., *Labree v. Major*, 111 R.I. 657, 661-74, 306 A.2d 808, 811-18 (1973) (refusing to apply Massachusetts guest statute to Massachusetts automobile accident because Rhode Island's interest in allowing recovery for passengers outweighed the Massachusetts interest in protecting drivers from guest suits); see also Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 43 (1984) ("In almost every case in which courts have resorted to interest analysis they ended up applying forum law.").

¹⁰⁸ 698 F.2d 1022 (9th Cir.), *cert. denied*, 104 S. Ct. 149 (1983).

¹⁰⁹ *Id.* at 1025. The court noted that New York, the defendant's place of business and the only other state with significant connections to the suit, would have an interest in the application of its laws for the protection of its residents. The fact that the pertinent laws of both states were identical, however, permitted it to avoid consideration of whether this was an interest sufficient to reject the law of the forum. See *id.*

domicile, the law of the forum can easily prevail under interest analysis when the plaintiff is a nonresident. In a nondefamation case the California Supreme Court acknowledged that it had no interest in compensating the nonresident plaintiff, yet it chose to apply forum law because California had an interest in deterring tortious conduct within the state.¹¹⁰ In the multistate defamation context the recognition of such an interest,¹¹¹ combined with the preference for forum law intrinsic to interest analysis, could easily justify frequent application of forum law in favor of nonresidents. While the variations of interest analysis, such as comparative impairment or a weighing of the interests, may make this result less than certain,¹¹² a forum that adopts this approach will be quite inviting to plaintiffs who prefer its laws.

D. *The "Better Rule" Approach.*

The "better rule of law" approach to resolving choice of law conflicts issues stems from Dean Robert Lefflar's scholarship suggesting that choice of law issues should be resolved by reference to five considerations:

- (1) predictability of results,
- (2) maintenance of interstate and international order,
- (3) simplification of the judicial task,
- (4) advancement of the forum's governmental interests, and
- (5) application of the better rule of law.¹¹³

In theory, all five factors should be considered in resolving any given choice of law issue. However, courts utilizing this approach in

¹¹⁰ See *Hurtado v. Superior Court*, 11 Cal. 3d 574, 582-84, 522 P.2d 666, 671-72, 114 Cal. Rptr. 106, 111-12 (1974). The decision not to apply a Mexican law, which limited the amount of damages recoverable, was based in part on the conclusion that Mexico had no interest in limiting the recovery obtained by its residents from nonresident defendants. See 11 Cal. 3d at 580-82, 522 P.2d at 670-71, 114 Cal. Rptr. at 110-11.

¹¹¹ Cf. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1479 (1984) (finding that New Hampshire's interest in deterring false and defamatory statements within its borders to be one ground for the state's assertion of jurisdiction).

¹¹² See, e.g., *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28, 35, 37 (3d Cir. 1975) (applying New Jersey interest analysis to select Quebec law); *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 167-68, 583 P.2d 721, 727-28, 148 Cal. Rptr. 867, 873-74 (1978) (comparative impairment analysis resulting in application of Louisiana law).

¹¹³ Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-88 (1966). According to Dean Lefflar, rules that appear to be procedural "ought to be analyzed . . . in terms of the relevant choice-influencing considerations, just as rigorously as other rules of law are analyzed." R. LEFFLAR, *AMERICAN CONFLICTS LAW* 240 (3d ed. 1977).

tort cases have focused only on the last two.¹¹⁴ Consequently, better rule courts normally apply the law of the forum.¹¹⁵ Courts use the fifth factor to justify infrequent exceptions—when they believe, for example, that foreign law better reflects modern developments.¹¹⁶ Illustrative of this pattern, Minnesota has applied non-Minnesota law only when the law of another state has been more plaintiff-oriented.¹¹⁷

Research discloses no instances in which the better rule approach has been applied to multistate defamation cases. *Gravina v. Brunswick Corp.*,¹¹⁸ however, provides a close analogy; there the court applied the better rule factors¹¹⁹ to a case of invasion of privacy through unauthorized publication. Ms. Gravina sued for the unauthorized use of her photograph in Brunswick's nationwide advertisements.¹²⁰ Rhode Island, the forum state and Ms. Gravina's domicile, did not recognize a cause of action for invasion of privacy.¹²¹ Delaware, the state of defendant's incorporation, and Illinois, the location of its principal business office from which the advertising presumably originated, did recognize such a cause of action.¹²² After finding that no state's aggregate interests were superior or inferior to those of another, the court used the tie-breaking fifth factor to apply Illinois law because it reflected "the steady trend toward recognition of the right of privacy . . . across the country."¹²³

Gravina is consistent with the trend of Minnesota decisions utilizing the better rule approach to apply forum law unless another jurisdiction's law is more plaintiff-oriented. Although at least one Wisconsin decision has deviated from this pattern,¹²⁴ these cases suggest that better rule decisions in defamation cases frequently will follow this trend.

¹¹⁴ See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 170, 203 N.W.2d 408, 416-17 (1973); *Clark v. Clark*, 107 N.H. 351, 355-56, 222 A.2d 205, 209-10 (1966). For a criticism of courts that discount the first three factors, see E. SCOLES & P. HAY, *CONFLICT OF LAWS* 584 n.16 (1982).

¹¹⁵ See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 170-71, 203 N.W.2d 408, 417 (1973); *Clark v. Clark*, 107 N.H. 351, 356-57, 222 A.2d 205, 209-10 (1966).

¹¹⁶ See, e.g., *Bigelow v. Halloran*, 313 N.W.2d 10, 12-13 (Minn. 1981) (tort action applying foreign survival statute).

¹¹⁷ See Danforth, *Developments in the Minnesota Law of Conflict of Laws*, 8 WM. MITCHELL L. REV. 785, 785-786 & nn.5-6 (1982).

¹¹⁸ 338 F. Supp. 1 (D.R.I. 1972).

¹¹⁹ Although the court did not explicitly state that it was following the "better rule" approach, the factors it applied were virtually identical to those set forth by Dean Lefflar. See *id.* at 4.

¹²⁰ *Id.* at 2.

¹²¹ *Id.* at 3.

¹²² *Id.* at 6.

¹²³ *Id.* at 6, 7.

¹²⁴ See *Hunker v. Royal Indem. Co.*, 57 Wis. 2d 588, 610, 204 N.W.2d 897, 908 (1973) (applying law of plaintiff's domicile to bar Wisconsin automobile accident claim).

E. *Lex Fori*

Although interest analysis and the better rule approach will frequently result in the application of forum law, there is sentiment in some courts to apply forum law in nearly all cases. For example, the Kentucky Supreme Court has announced that in conflict of law settings its primary responsibility is to follow its own substantive law.¹²⁵ As a result, it appears inclined to apply its law whenever it may constitutionally do so;¹²⁶ it has stated, "[I]f there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied."¹²⁷ Although such a deliberate forum preference has been characterized as "suspect"¹²⁸ and "ostrich-like,"¹²⁹ Kentucky has not shown any sign of retreating from it in tort cases and presumably will pursue it in defamation cases, even though it has not yet done so.¹³⁰

¹²⁵ See *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972).

¹²⁶ The constitutional limits on choice of law require only that a state have significant contacts creating state interests sufficient to justify application of its law. See *infra* notes 143-44 and accompanying text.

¹²⁷ *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972). The Kansas Supreme Court also appears to have adopted the *lex fori* approach recently in a class action on behalf of a nationwide class of plaintiffs. See *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1181 (Kan. 1984) (law of the forum will be applied unless compelling reasons exist for a different law), *cert. granted*, 53 U.S.L.W. 3269 (U.S. Oct. 9, 1984). A justice of the Michigan Supreme Court has urged that that court take a similar stance. Concurring in *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982), in which the court held Michigan law applicable in cases of out-of-state accidents involving Michigan residents, Justice Levin stated, "[W]e should go the distance and declare that Michigan law will apply in all personal injury and property damage actions without regard to whether the plaintiffs and defendants are all Michigan persons, unless there is a compelling reason for applying the law of some other jurisdiction." *Id.* at 442, 320 N.W.2d at 858 (Levin, J., concurring) (footnote omitted).

¹²⁸ R. LEFLAR, *AMERICAN CONFLICTS LAW* 182 (3d ed. 1977).

¹²⁹ R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 292 (2d ed. 1980).

¹³⁰ Kentucky has arguably adopted the most significant relationship approach in two recent contract cases. See *Breeding v. Massachusetts Indem. & Life Ins. Co.*, 633 S.W.2d 717, 719 (Ky. 1982) (choosing Kentucky law); *Lewis v. American Family Ins. Group*, 555 S.W.2d 579, 581-82 (Ky. 1977) (choosing foreign law). Nevertheless, the strong preference for forum law has not been questioned in tort cases and *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972), remains valid. See *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069, 1071-73 (6th Cir. 1983) (choosing foreign law in quasi-contractual claim but stating that "it is apparent that Kentucky applies its own law unless there are overwhelming interests to the contrary"); *Landrum v. Jordan*, 565 F. Supp. 90, 92-93 (W.D. Ky. 1983) (applying Kentucky law to accident involving nonresident plaintiff); *Kennedy v. Ziesmann*, 522 F. Supp. 730, 731-32, (E.D. Ky. 1981) (relying on *Foster v. Leggett*, which "clearly stated its preference for the application of Kentucky law" to apply forum law in malpractice action).

F. *The Interaction of Choice of Law Approaches and Keeton's Jurisdictional Holding*

The foregoing summarizes the principal choice of law approaches American courts presently follow.¹³¹ Many states, however, use variants or combinations¹³² of these approaches, and some have moved through a succession of tentative theories.¹³³ Because of the number of approaches used, generalized statements about prevailing choice of law principles are difficult. However, the extant approaches suggest that frequent application of forum law can be expected in the future. Interest analysis reflects a distinct preference for forum law. The better rule approach, as commonly applied, effectuates this preference even more so. And courts following the *lex fori* approach will virtually always follow their own law.

The consequences of *Keeton v. Hustler Magazine, Inc.*¹³⁴ for the multistate media are thus substantial. Not only can plaintiffs obtain jurisdiction in any forum where the defendant distributes, they can also expect many such forums to apply their own law. Plaintiffs naturally will choose the forum whose law will be most favorable to their claims.¹³⁵ With forum-shopping season therefore open, the issue of whether there are limitations on choice of defamation law will come to the fore.

¹³¹ Variants of other approaches, such as "principles of preference," see D. CAVERS, *THE CHOICE OF LAW PROCESS* 114-224 (1965), and "functional analysis," see A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76-79 (1965), have also surfaced in judicial opinions. See Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535, 541, 392 N.E.2d 1045, 1049 (1979) (functional analysis); Cipolla v. Shaposka, 439 Pa. 563, 567, 267 A.2d 854, 856 (1970) (principles of preference); see also Kay, *supra* note 67, at 585.

¹³² See Kay, *supra* note 67, at 572. For an example of a court combining approaches, see Ardoyno v. Kyzar, 426 F. Supp 78, 82-84 (E.D. La. 1976) (combining elements from interest analysis, the most significant relationship test, and the comparative impairment approach).

¹³³ See R. LEFLAR, *supra* note 128, at 197.

¹³⁴ 104 S. Ct. 1473 (1984).

¹³⁵ Of course, selecting a forum to obtain the benefits of forum law is not the only type of forum shopping possible. A plaintiff may also choose a forum because it will apply nonforum law to her benefit. For example, a New York plaintiff may forego suit in a New York court that would apply Pennsylvania's speech-enhancing law and sue in a Pennsylvania court that may apply New York's relatively speech-inhibiting law. Compare, e.g., Mazzella v. Philadelphia Newspapers, Inc., 479 F. Supp. 523, 527 (E.D.N.Y. 1979) (applying Pennsylvania shield law against New York plaintiff) with Fitzpatrick v. Milky Way Productions, 537 F. Supp. 165, 171-72 (E.D. Pa. 1982) (applying law of state of plaintiff's residence).

III. CONSTITUTIONAL LIMITS ON CHOICE OF DEFAMATION LAW

A. Generally Applicable Constitutional Constraints

1. The Constraints of *Allstate Insurance Co. v. Hague*

The Supreme Court has shown a distinct disinclination to interfere with state choice of law decisions. The last case to hold that a state's choice of law was unconstitutional was decided in 1947,¹³⁶ and it was later discounted as "a highly specialized decision dealing with unique facts."¹³⁷ *Allstate Insurance Co. v. Hague*¹³⁸ is the only case decided in the last twenty years in which the Court has squarely addressed the issue. Yet, in *Hague* all eight participating Justices agreed that the full faith and credit and due process clauses of the Constitution place some limits on state choice of law decisions.¹³⁹

Ralph Hague, a Wisconsin resident, died in an automobile accident in Wisconsin that involved two uninsured Wisconsin drivers. Allstate Insurance had insured all three of his cars, which were licensed and garaged in Wisconsin. The policy insured Mr. Hague against accidents with uninsured motorists in amounts up to the stated coverage of \$15,000 for each automobile. His widow, as representative of his estate, sued Allstate in Minnesota for a declaration that this coverage for each car could be "stacked" to provide a total coverage of \$45,000.¹⁴⁰

The Minnesota courts, applying Minnesota law, issued the declaration, disregarding Allstate's request for application of Wisconsin law, which did not permit stacking.¹⁴¹ On appeal the Supreme Court held that, despite the fact that the accident occurred in Wisconsin, that all persons involved were from Wisconsin, that the insurance policy was purchased and delivered in Wisconsin, that the policy covered Wisconsin automobiles, and that the Hagues at the time of the accident lived in Wisconsin, Minnesota's decision to apply its law did not violate due process or full faith and credit.¹⁴²

In reaching this conclusion the plurality and the three dissenters¹⁴³

¹³⁶ See *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947).

¹³⁷ *Clay v. Sun Ins. Office*, 377 U.S. 179, 183 (1964).

¹³⁸ 449 U.S. 302 (1981).

¹³⁹ See *id.* at 308, n.10 (plurality opinion of Brennan, White, Marshall & Blackmun, JJ.); *id.* at 322-23 (Stevens, J., concurring); *id.* at 333 (Powell, J., dissenting, joined by Burger, C.J. & Rehnquist, J.). Justice Stewart did not participate.

¹⁴⁰ *Id.* at 305-06 & n.21.

¹⁴¹ *Id.* at 305-06.

¹⁴² *Id.* at 320.

¹⁴³ The dissent argued for a more specific examination of the state policies implicated by the plurality's significant contacts. See *infra* notes 181-85 and accompanying text. Nevertheless, the dissenters agreed that the plurality opinion set forth appropriate

agreed that "for a State's substantive law to be selected in a constitutionally permissible manner . . . that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁴⁴

Applying this test to permit application of Minnesota law, Justice Brennan, writing for the plurality, identified three Minnesota contacts: Mr. Hague had been a member of the Minnesota work force and had commuted there daily, Allstate was present and had done business in Minnesota, and Mrs. Hague had become a Minnesota resident prior to instituting the litigation, having been appointed representative of her husband's estate there.¹⁴⁵ The plurality concluded that these contacts implicated Minnesota state interests in such matters as the safety and well-being of its work-force,¹⁴⁶ its regulation of insurance company obligations in Minnesota "insofar as they affected both a Minnesota resident and court-appointed representative . . . and a longstanding member of Minnesota's work force,"¹⁴⁷ and compensation of its resident accident victims.¹⁴⁸ Noting also that Allstate could not claim "unfair surprise or frustration of legitimate expectations" since it could anticipate that Minnesota law might apply to an accident involving an insured Minnesota employee,¹⁴⁹ the plurality held that this "aggregation of contacts" and the resulting state interests were sufficient to permit application of Minnesota's stacking rule.¹⁵⁰

Justice Powell, writing for the three dissenters, agreed that Allstate's reasonable expectations were not frustrated by application of Minnesota law.¹⁵¹ He contended, however, that the plurality's contacts were "trivial or irrelevant to the furthering of any public policy of Minnesota"¹⁵² and that it therefore could not apply its law.¹⁵³

Only Justice Stevens, who concurred with the plurality, separated the full faith and credit issue from the due process issue. He stated that the full faith and credit inquiry should focus on whether choice of a given state's law "threatens the federal interest in national unity by

basic principles and that "[t]he Court should invalidate a forum state's decision to apply its own law only when there are no significant contacts between the state and the litigation." 449 U.S. at 332 (Powell, J., dissenting).

¹⁴⁴ *Id.* at 312-13.

¹⁴⁵ *See id.* at 313-19.

¹⁴⁶ *See id.* at 314.

¹⁴⁷ *Id.* at 318.

¹⁴⁸ *See id.* at 319.

¹⁴⁹ *Id.* at 318 n.24.

¹⁵⁰ *See id.* at 320.

¹⁵¹ *See id.* at 336 (Powell, J., dissenting).

¹⁵² *Id.* at 337.

¹⁵³ *Id.* at 336.

unjustifiably infringing upon the legitimate interests of another State."¹⁵⁴ It was obvious to the parties that the insurance policy, covering accidents in all states, might give rise to application of non-Wisconsin law. Therefore, the contract was not formed in reliance on Wisconsin law, and Wisconsin accordingly had no interest in ensuring that it be construed consistent with its law.¹⁵⁵ Because Wisconsin interests were not threatened, the full faith and credit clause did not preclude application of Minnesota law.

With respect to the due process inquiry, Justice Stevens stated that the "desire to prevent unfair surprise to a litigant [is] the central concern"¹⁵⁶ Like the other Justices, he found no serious question of unfairness to Allstate because of the policy's nationwide coverage.¹⁵⁷

The three *Hague* opinions share threads of reasoning. To allow a forum to apply its jurisdiction's law, seven Justices would require significant contacts creating state interests, and Justice Stevens would consider whether other states interests were unjustifiably infringed by the forum's choice of law. In addition all eight Justices deem unfair surprise to be an important consideration in determining whether a state's law could be applied. Yet, despite these apparent consistencies, several commentators have argued that *Hague* has failed to provide guidance or identify constitutional parameters for choice of law decisions.¹⁵⁸

Scholarly disappointment with *Hague* has centered on its apparent lack of standards for determining the significance of contacts or the legitimacy of state interests.¹⁵⁹ Some commentators have characterized *Hague* as unprincipled and arbitrary,¹⁶⁰ unsound and filled with arguments amounting to "pure unadulterated foolishness,"¹⁶¹ even as an opinion in which the plurality ignored its stated test.¹⁶² Others have

¹⁵⁴ *Id.* at 323 (Stevens, J., concurring).

¹⁵⁵ *See id.* at 324.

¹⁵⁶ *Id.* at 327.

¹⁵⁷ *See id.* at 329-30.

¹⁵⁸ *See, e.g.,* Cavers, *Introduction to Symposium: Conflict-of-Laws Theory After Allstate Insurance v. Hague*, 10 HOFSTRA L. REV. 1, 3 (1981); Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1659 (1981); Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889, 890 (1981); Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 34 (1981).

¹⁵⁹ *See* Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1349 (1981).

¹⁶⁰ *See* von Mehren and Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 43 (1981).

¹⁶¹ Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 156, 163, (1981).

¹⁶² Hay, *supra* note 158, at 1659 (arguing that the artificial contacts cited by the plurality did not reach the level of "significant contacts" under the announced standard).

found the result quite appropriate.¹⁶³

This disparity of opinion results from differing views as to the appropriate analysis for identifying a state interest sufficient to permit application of that state's law. One approach, articulated by Justice Powell in his dissent, defines the requisite interest in specific terms: "[a] State has a legitimate interest . . . only if the facts to which the [State's] rule will be applied have created effects within the State, toward which the State's public policy is directed."¹⁶⁴ This analysis requires a rather precise identification of the policies the state law in question reflects and a determination whether those policies would be advanced within the state by its application. A second approach, advocated by some commentators, views the requisite interest as a general and perhaps viscerally-discerned one that is premised simply on factual connections between the state and the litigation.¹⁶⁵

The *Hague* dissenters would clearly apply the first, more specific analysis, but it is unclear which approach the plurality followed. Commentators have asserted that the plurality took the second, according a "broad and indiscriminating meaning to the term 'state interest.'"¹⁶⁶ Yet, the language of the plurality opinion suggests that, in determining the existence of state interests, the in-state effects of the application of a state's law should be a focus of attention.¹⁶⁷ This implies scrutiny beyond finding a mere collection of factual connections.

Thus the constitutional limits on choice of law are not clearly defined. However, the debate over the appropriate method of analysis may be irrelevant in the defamation context because under either approach a court's decision to apply forum law appears to be permissible.

2. The Implications of *Hague* in Multistate Defamation

Under either a specific or a general analysis, a state court with

¹⁶³ See, e.g., Professor Lowenfeld's comments in Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 U.C.D. L. REV. 841, 842, 860, 863 (1981) (but note that Lowenfeld argued *Hague* for the prevailing party); Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 80 (1981); Weintraub, *supra* note 158, at 26.

¹⁶⁴ *Hague*, 449 U.S. at 334 (Powell, J., dissenting).

¹⁶⁵ See Sedler, *supra* note 163, at 72, 74; Weintraub, *supra* note 158, at 28.

¹⁶⁶ Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 200 (1981). See also Sedler, *supra* note 163, at 72. Justice Powell, in his dissent, asserted, "The plurality focuses only on physical contacts *vel non* . . ." *Hague*, 449 U.S. 339-40 (Powell, J. dissenting).

¹⁶⁷ See *Hague*, 449 U.S. at 315 (noting effect of employee injury or death on Minnesota work force); *id.* at 319 (noting in-state financial consequences that might follow if resident accident victims went uncompensated).

jurisdiction premised on the *Keeton v. Hustler Magazine, Inc.*¹⁶⁸ requirement of regular in-state circulation seems, at least superficially, to have an interest sufficient to justify application of forum law. Justice Rehnquist's opinion for the Court in *Keeton* discerned two New Hampshire interests as partial warrants for its assertion of jurisdiction: an interest in redressing the in-state portion of the plaintiff's injury—"however small"—and an interest in deterring the deception of its citizens caused by the defamatory statements.¹⁶⁹ If a state's defamation laws reflected these interests, they presumably would be advanced whenever courts applied them in actions against publishers who circulated defamatory materials in the state. The regular in-state circulation contact would thus seem to implicate sufficient interests to support the application of the state's defamation law under either mode of analysis.

Indeed, although the Court in *Keeton* explicitly disclaimed any determination of choice of law issues,¹⁷⁰ its language strongly suggests the relevance of New Hampshire's governmental interests to the choice of law decision. For example, the Court stated that "New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."¹⁷¹ Narrowly defined, these interests of deterrence and compensation are directed only towards remedying the in-state effects of defamation. Therefore, they would justify application of forum law only with respect to the in-state portion of a multistate defamation claim. Yet, the

¹⁶⁸ 104 S. Ct. 1473 (1984).

¹⁶⁹ *Id.* at 1479. The pertinent language in the opinion is extensive:

[P]etitioner was suing, at least in part, for damages suffered in New Hampshire And it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens

New Hampshire may also extend its concern to the injury that in-state libel causes within New Hampshire to a nonresident The reputation of the libel victim may suffer harm even in a state in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished.

New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods. Its criminal defamation statute bears no restriction to libels of which residents are the victim. Moreover, in 1971 New Hampshire specifically deleted from its long-arm statute the requirement that a tort be committed "against a resident of New Hampshire."

Id. (footnotes omitted). Justice Brennan concurred on the ground that these interests were not crucial to the jurisdictional inquiry. *See id.* at 1482 (Brennan, J., concurring).

¹⁷⁰ *See id.* at 1480, nn.9-10.

¹⁷¹ *Id.* at 1479 (emphasis added).

Court also hinted that use of New Hampshire law to redress nationwide injuries may be acceptable. The opinion states, for example,

New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule," to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a *unitary* proceeding. This rule reduces the potential serious drain of libel cases on judicial resources.¹⁷²

This language implies that concerns for efficiency might justify a court's application of a single state's law—forum law, for instance—to the entirety of a multistate defamation plaintiff's claim. This hint grows louder and more pertinent to the unfair surprise considerations of *Hague* when the Court states, "Certainly *Hustler Magazine, Inc.*, which chose to enter the New Hampshire market, can be charged with knowledge of its laws"¹⁷³ And after conceding that the bulk of plaintiff's harm occurred outside New Hampshire, the opinion continues in a similar fashion:

And, since respondent can be charged with knowledge of the "single publication rule," it must anticipate that such a suit will seek nationwide damages. Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.¹⁷⁴

One might reasonably infer from this language that the Court would have little trouble in permitting the application of New Hampshire's libel law to the entirety of plaintiff's nationwide defamation claim.¹⁷⁵ New Hampshire's compensation and deterrence interests, combined with its interest in judicial efficiency, may suffice to allow the state court's choice of forum law to overcome any constitutional hurdles. Of course, this reliance on efficiency is questionable, for efficiency interests historically have been deemed insufficient to justify the avoid-

¹⁷² *Id.* at 1480 (footnote omitted) (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1481-82.

¹⁷⁵ Indeed, the Court appeared to validate forum-shopping in noting that "[p]etitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Id.* at 1480.

ance of constitutional limitations.¹⁷⁶ Nevertheless, on a superficial level, this analysis squares with both the plurality and dissenting opinions in *Hague*. The circulation of defamatory materials within a state constitutes a contact that has domestic effects—deception and injury to reputation—towards which the policies underlying a state's defamation rules may be directed. Yet, there are serious questions about the propriety of this result. Holding aside, for the moment, first amendment considerations, this conclusion raises substantial federalism issues.

B. *The Constraints of Federalism*

Federalism and the tenth amendment generally restrict federal power to interfere with matters of state concern,¹⁷⁷ and they may therefore support a recognition of state freedom to apply forum law in conflict of law settings. Indeed, *Hague*'s result has been characterized as substantially extending state autonomy.¹⁷⁸ Yet, unfettered state power to apply forum law poses a substantial threat to state autonomy.¹⁷⁹ Taken too far, such a practice can destroy the sovereignty of sister states.

In apparent recognition of this danger, the Supreme Court has interpreted the full faith and credit clause¹⁸⁰ to protect state sovereignty by barring states from refusing, on grounds of their public policy, to recognize judgments from other states.¹⁸¹ This prohibition prevents judgment debtors from frustrating a state's sovereign interest in holding

¹⁷⁶ See, e.g., Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383, 425-29 (1983).

¹⁷⁷ See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as 'Our Federalism' . . .").

¹⁷⁸ See Kozyris, *supra* note 158, at 896 ("[I]n terms of result the plurality opinion . . . and the concurrence of Justice Stevens substantially extend the frontiers of state autonomy in choice of law.").

¹⁷⁹ For example, Wisconsin recently objected to Minnesota's attempts to apply its laws to Wisconsin businesses. In *Hennes v. Loch Ness Bar*, 117 Wis. 2d 397, 344 N.W.2d 205 (Ct. App. 1983), the Wisconsin Court of Appeals refused to recognize a Minnesota judgment imposing dram shop liability for a Minnesota accident on a Wisconsin bar. The refusal was premised in part on Minnesota's lack of personal jurisdiction. However, the court added, in an apparent reference to Minnesota's attempt to apply its law, that "Wisconsin has rejected dram shop liability, and Loch Ness was entitled to rely on this in insuring and conducting its bar business in Wisconsin. Minnesota is not entitled to export its public policy to Wisconsin, a coequal sovereign." *Id.* at 205 (citation omitted).

¹⁸⁰ U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

¹⁸¹ See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

them to its judgments by removing their assets to a sister state.¹⁸²

The Supreme Court has been less forceful in requiring states to recognize the laws of other states than in requiring them to recognize the valid judgments of other states. *Hague* itself demonstrates the Court's willingness to permit a forum state to ignore other states' laws when it has an interest in applying its own. Notwithstanding this permissive approach to choice of law, however, the Court's decisions reflect two principles that mandate limits on state freedom in this area: (1) states are coequal sovereigns, and, accordingly, (2) no state's valid interests may be totally subordinated to the will of other states. The Court's choice of law decisions have assumed that in a given case the subordination of one state's interests to the interests of another, forum state will be offset by an equivalent subordination of the latter state's interests when a case is brought in the former state. Consequently, through this structure requiring the passive mutual accommodation by the states of their interests to the interests of forum states, all states are accorded roughly equal respect in that all have the ability to further their interests when they are forums—in the aggregate, the subordination of interests presumably¹⁸³ "washes."

In *Pacific Employers Insurance Co. v. Industrial Accident Commission*,¹⁸⁴ for example, California was permitted, over a full faith and credit challenge, to apply its worker's compensation law to an in-state accident, notwithstanding a Massachusetts statute that restricted the Massachusetts plaintiff's rights to Massachusetts law "whether within or without the commonwealth."¹⁸⁵ Addressing the competing claims of the two states' laws, the Court noted that granting "[f]ull faith and credit [to the Massachusetts statute] would deny to California the right to apply its own remedy Similarly, the full faith and credit demanded for the California Act would deny to Massachusetts the right to apply its own remedy" ¹⁸⁶ Faced with this dilemma, the Court sought an appropriate accommodation. Emphasizing California's interest in the bodily safety and economic protection of persons injured

¹⁸² See *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977).

¹⁸³ But this wash is imperfect because plaintiffs are generally more inclined to sue in recovery than in nonrecovery states when able to do so. The interests of recovery states are thus furthered more frequently than those of nonrecovery states. See Korn, *supra* note 66, at 781, 791-92. Current limits on choice of law and jurisdiction, however, will generally make this disparity in the treatment of states less stark than that which potentially exists in the defamation context. See *infra* text accompanying notes 184-200. This Article is not intended, however, to support the position that disparate treatment of states in other contexts is proper.

¹⁸⁴ 306 U.S. 493 (1939).

¹⁸⁵ *Id.* at 498.

¹⁸⁶ *Id.* at 502.

within the state, the Court declared, "[T]he full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state."¹⁸⁷ Sixteen years later, the Court characterized *Pacific Employers* as requiring that "the State where the injury occurs need not be a vassal to the home State."¹⁸⁸ "Were it otherwise," said the Court, "the State where the injury occurred would be powerless to provide any remedies or safeguards to nonresident employees working within its borders."¹⁸⁹

More recently, in *Nevada v. Hall*,¹⁹⁰ the Court held that California could apply its law to a suit arising from an in-state injury, even though that law permitted unlimited recovery against the state of Nevada while Nevada law limited recovery to \$25,000.¹⁹¹ Although the case dealt largely with sovereign immunity, the Court, in reaching its decision, described our constitutional system as one of "cooperative federalism"¹⁹² and stated,

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. *Each of these decisions is equally entitled to our respect.*¹⁹³

In these cases, as in *Hague*, the Court permitted a forum state with a significant interest in the controversy to apply its law, and, as a result, the interests of nonforum states were subordinated. Yet, there was in each case the assumption that each state's subservience was only partial, for each state's law would be applied and interests furthered some of the time, at least when that state served as a forum. But it has never been suggested that the subordination of one state's interests to another's could be complete.¹⁹⁴ Jurisdictional limitations generally will

¹⁸⁷ *Id.*

¹⁸⁸ *Carroll v. Lanza*, 349 U.S. 408, 412 (1955).

¹⁸⁹ *Id.* at 414.

¹⁹⁰ 440 U.S. 410 (1979).

¹⁹¹ *Id.* at 421-27.

¹⁹² *Id.* at 424 n.24.

¹⁹³ *Id.* at 426 (emphasis added). See also *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 279 (1980) (plurality opinion) (recognizing "[t]he principle that the Full Faith and Credit Clause does not require a State to subordinate its own compensation policies to those of another State . . .").

¹⁹⁴ For example, there was no suggestion in *Pacific Employers* that, had it been feasible, all citizens of Massachusetts could sue in California to obtain the benefits of that state's workers compensation laws regardless of where they were injured. There was no indication in *Nevada v. Hall* that any Nevada resident could go into California and obtain the benefits of its law in litigation regardless of where they were injured.

preclude the possibility that all of a state's citizens may avoid its laws by suing elsewhere.¹⁹⁵ And when jurisdiction has existed and forum law has been applied in favor of nonresidents, the Court has required distinctive contacts with the forum state, such as employment or the occurrence of an injury there, that could not exist in all actions by nonresidents.

One reason for requiring these distinctive contacts is self-evident. If any citizen could avoid the limitations of her state's law and obtain the benefits of another, the legitimate policies of her state, as reflected by its laws, could be completely overridden. This would destroy the sovereign rights of that state as much as, if not more than, federal intrusion would. In the choice of law, then, the full faith and credit clause should serve, as it does in the enforcement of judgments,¹⁹⁶ to ensure the protection of individual state's rights, not only from federal preemption, but also from total subordination to the laws of other states.¹⁹⁷

In the multistate defamation context, this goal will be thwarted by a constitutional choice of law rule that permits application of the law of any state of "injury" to the entirety of a plaintiff's claim. Defamation law primarily redresses damage to reputation,¹⁹⁸ but such an injury, unlike injuries that give rise to other torts, is not localized. As Justice Rehnquist noted in *Keeton*, "The reputation of the libel victim may suffer harm even in a state in which he has hitherto been anonymous."¹⁹⁹ Because the injury is not localized, reliance on its presence to justify application of forum defamation law potentially leaves other states with no power to apply their defamation laws to the multistate media operating within their borders. After *Keeton*, neither jurisdictional limitations nor requirements of distinctive contacts would ensure application of the state's laws to such entities at least some of the time. Any plaintiff could avoid those laws by suing in another state of circulation. Consequently, states with relatively speech-enhancing defama-

And there was no indication in *Hague* that all residents of Wisconsin insured by All-state could sue in Minnesota to obtain the benefits of its stacking rule.

¹⁹⁵ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (in personam jurisdiction improper absent sufficient contacts between defendant and forum); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (same).

¹⁹⁶ Cf. *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 42 (1949) ("It is when a clash of policies between two states emerges that the need of the [Full Faith and Credit] Clause is the greatest. It and the statute which implements it are indeed designed to resolve such controversies.").

¹⁹⁷ See generally Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 *MERCER L. REV.* 709 (1983).

¹⁹⁸ See Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 *U. PA. L. REV.* 1, 18-19 (1983).

¹⁹⁹ *Keeton*, 104 S. Ct. at 1479 (footnote omitted).

tion laws would be placed in a state of vassalage to states with relatively speech-inhibiting defamation laws.

In nondefamation cases the prerequisite of some distinctive state contacts minimizes the likelihood of such total subordination. Jurisdictional and choice of law limitations will preclude most Wisconsin plaintiffs who are insured by Allstate from obtaining the benefits of Minnesota law.²⁰⁰ Thus Wisconsin can further the policies reflected by its no-stacking rule much of the time. Similarly, if Wisconsin chooses through liability-limiting laws to protect Wisconsin manufacturers that do interstate business, it can effectively do so some of the time because jurisdictional and choice of law limitations will preclude most Wisconsin plaintiffs from bringing suit in, and obtaining the benefits of the laws of, other states. But ironically, because a publisher's business is speech, which can theoretically cause injury in every state, Wisconsin publishers engaged in this traditionally protected activity are potentially subject, in all cases where they cause injury, to the laws of any state in which they do business.

This critical point can be clearly illustrated. The people of Indiana surely have the sovereign right to foster the freedom and success of their media by requiring that private plaintiffs prove actual malice. Concomitantly, they have the right to subordinate their own interests in obtaining compensation for defamatory falsehoods. Their right to further these policies surely extends to all publications in the state. Yet, if in a small Indiana town near the Kentucky border the local newspaper arguably defames a local resident, would a lawyer doubtful of her ability to establish the defendant's malice hesitate to bring suit in Kentucky, where the newspaper also circulates? If the suit did go to a Kentucky court, and that court, following Kentucky's *lex fori* approach, applied the state's simple negligence rule to the entire case, Indiana's policies and interests would be defeated. And this subordination will be absolute. If Kentucky can and will apply its law, every case in which Indiana's malice requirement will change the outcome will be brought in Kentucky. Furthermore, this subordination will not be mutual. Kentucky's compensation policies will never be subordinated to Indiana's speech-enhancement policies—no sensible Kentucky plaintiff will forego more favorable Kentucky law to sue in Indiana if application of the Indiana malice rule would adversely affect her case. Consequently,

²⁰⁰ However slight the contacts required by *Hague*, the plurality did note that Allstate's doing business in Minnesota gave Minnesota an interest in regulating its obligations "insofar as they affected both a Minnesota resident and court-appointed representative . . . and a longstanding member of Minnesota's work force." 449 U.S. at 318.

Indiana will be powerless to further its policy decision to protect this Indiana newspaper.

The same holds true for all media that circulate their products in Indiana and one or more other states that have speech-inhibiting defamation laws. In every case a plaintiff will be able to obtain the benefit of another state's more favorable law. If, as the Court stated in *Nevada v. Hall*, the sovereignty of each state is equally entitled to respect, it therefore should be constitutionally impermissible for a state to apply its law to the entirety of a multistate defamation case simply because there is in-state circulation, some injury to the plaintiff's reputation in the state, and some deception of the state's citizens.

Two additional federalism-based concerns also mandate rejection of a permissive choice of law approach in this context. First, the combination of this choice of law approach with *Keeton's* jurisdictional holding and the forum-shopping propensities of defamation plaintiffs may effectively federalize multistate defamation laws.²⁰¹ To illustrate, suppose a state that is hostile to the press enacts defamation laws that grant publishers only those constitutional protections mandated by the Supreme Court. If that state's courts could and did apply those laws in all defamation cases against the national media that are brought before them, all plaintiffs suing the national media for defamation would bring their claims in that state's courts, unless the differences in the laws of another state are inconsequential. This would result, in effect, in the nationalization of defamation law as applied to multistate media, for in virtually all cases that state's law would control. And because that state's law would incorporate only those constitutional limits articulated by the Court, its application would be tantamount to federalization of defamation law.

Similar consequences may ensue even without this hypothetical state. A private plaintiff, faced in one state with a pertinent defendant's privilege, or a difficult burden of proof, would be well-advised to bring her claim in another state that imposes no such hurdles. That state may impose other nonconstitutionally-required rules that protect speech but are not consequential to the plaintiff's case. Therefore, even if no single state exists whose entire law is reduced to the federal minimum, plaintiffs will bring actions only in the states whose laws are at the federal minimum on the issues pertinent to their claims. In short, a principle

²⁰¹ To some degree the Court's decisions in the defamation area already appear to have federalized state defamation law. See Smolla, *supra* note 198, at 51 ("As the Supreme Court narrows the scope of its public-figure doctrine, it threatens to contract the scope of common law privileges below the level to which they would have naturally evolved had the law of defamation not become constitutionalized.").

permitting application of state of circulation law potentially subjects the national media, in any given case, to the law of whichever states have the most speech-inhibiting laws on the significant issues in that case. Often, this will be the minimum protection of speech permitted by the Supreme Court. Such a scheme not only threatens the autonomy of individual states, but effectively imposes a federal law of defamation on all the states. Any attempt a state makes to depart from the federal minimum may be effectively thwarted. Attempted experimental and pluralistic treatment of the national media would be silenced. While the federal government surely has some power to regulate the national media as interstate commerce,²⁰² such a result clearly is inconsistent with the Supreme Court's aversion to judicial promulgation of federal law in areas over which states have traditionally asserted authority.²⁰³

The second federalism-based concern that requires rejection of a permissive choice of defamation law doctrine lies in its threat, to borrow the words of Justice Stevens in *Hague*, to "the federal interest in national unity."²⁰⁴ Publishers may hesitate before distributing their product in a state if its relatively speech-inhibiting defamation laws may be applied to everything they print. A permissive choice of law doctrine therefore would discourage interstate communication. But national unity depends upon each state's ability to keep abreast—through multistate media—of the events, ideas, and trends in other states. The "robust debate" encouraged by the Supreme Court in its defamation cases²⁰⁵ must be a national one. To discourage publishers from national distribution is to foster parochialism and isolationism; it is inimical to the federal interest in national unity.²⁰⁶

²⁰² See *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933).

²⁰³ Indeed, "absent some congressional authorization to formulate substantive rules of decision," the Court has limited its authority to promulgate federal law to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes . . . and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."); cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460, 473-75 (1957) (concurring and dissenting opinions discussing the concept of "protective jurisdiction" under which congressional authority to promulgate substantive law would imply authority to enact a jurisdictional statute providing a federal forum for enforcement of state created rights).

²⁰⁴ *Hague*, 449 U.S. at 323 (Stevens, J., concurring).

²⁰⁵ See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

²⁰⁶ Cf. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806, 814, 824 (1971) (suggesting that principles derived from commerce clause decisions favor choice of law decisions that best facilitate multistate transactions); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Con-*

For these reasons—respect for state sovereignty, prevention of effective federalization of defamation law, and avoidance of parochialism—then, a state of circulation with no interests beyond deterrence and compensation for minor in-state reputational injury should not be able to apply its defamation law to the entirety of a multistate defamation action.

C. *First Amendment Constraints*

The preceding arguments focus on federalism concerns and the full faith and credit clause. First amendment considerations also support restrictions on a state's ability to apply its defamation law to multistate defamation actions.

1. Application of First Amendment Analysis to Choice of Law Decisions.

State action in the form of choice of law decisions ordinarily must comply with a minimal standard of rationality, an infrequently stressed constraint of the fourteenth amendment's due process clause.²⁰⁷ When state action impinges on first amendment freedoms, however, its validity is subject to heightened scrutiny.²⁰⁸ Thus, if the application of defamation laws impinges on these freedoms, the decision to apply them through a choice of law determination should be subject to these heightened standards.

Notwithstanding occasional statements that "[t]here is 'no constitutional value in false statements of fact,'"²⁰⁹ the Court has unquestionably recognized that defamation laws do impinge first amendment freedoms.²¹⁰ Although heightened scrutiny is therefore required, the Court

stitution, 45 COLUM. L. REV. 1, 14 (1945) (arguing full faith and credit clause was intended to adapt our legal systems to the needs of a national commerce).

²⁰⁷ See Sedler, *supra* note 163, at 77-80, 83, 85; see also Kirgis, *The Rules of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 95-97 (1976) (stating that substantive due process imposes choice of law limitations). The Court's language in *Hague* clearly indicates the pertinence of this standard. One aspect of its choice of law test is whether the choice of law is "arbitrary." See *Hague*, 449 U.S. at 308. Justice Stevens, in his concurring opinion, also raised this as a potential issue and questioned whether a decision to apply forum law could ever be described as wholly irrational. See *id.* at 326 (Stevens, J., concurring).

²⁰⁸ See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786, 795 (1978); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); see also Sedler, *supra* note 163, at 77.

²⁰⁹ *Keeton*, 104 S. Ct. at 1479 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

²¹⁰ In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court noted that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to sur-

has not articulated the precise standard appropriate for review of defamation laws.²¹¹ Relatively clear guidelines can be gleaned, however, from the standards applied in related areas and from the Court's approach in the defamation decisions.

NAACP v. Button,²¹² for example, noted that governmental restrictions on speech must provide "breathing space,"²¹³ a theme that animates the Court's rulings in the defamation area. In *Button* the Court noted that its decisions consistently have required that regulations impinging on speech further a "compelling state interest"²¹⁴ and that they be precise and narrowly drawn.²¹⁵

A more recent decision, *Brown v. Hartlage*,²¹⁶ states similarly that any governmental restriction upon false political statements must "be demonstrably supported not only by a legitimate state interest, but a compelling one, and . . . the restriction [must] operate without unnecc-

vive." *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Accordingly, the Court held that states may not award damages for libel in actions brought by public officials absent proof of actual malice. *See New York Times*, 376 U.S. at 283. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court applied the *New York Times* standard to a criminal libel action brought for criticism of judicial conduct, noting that "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood." *Id.* at 73. And in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court prohibited private plaintiffs from recovery of presumed or punitive damages except in the case of actual malice, *see id.*, at 349, the Court noted that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* The Court recognized that "tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Id.* at 342. Despite Justice Rehnquist's dicta in *Keeton*, these cases show that the Court has consistently protected defamatory speech, at least when made without malice, and has recognized that defamation laws do impinge on protected speech. Heightened scrutiny should therefore be required, for "[w]hatever is added to the field of libel is taken from the field of free debate." *New York Times*, 376 U.S. at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)). Not only can successful libel actions be financially devastating to media outlets, resulting in a clear chilling of protected speech, but the legal fees incurred in defamation litigation can also have a substantial chilling effect. *See generally*, Smolla, *supra* note 198, at 12-14.

²¹¹ Professor Stone has noted that the Court appears to apply different standards to judge restrictions on different types of "low-value" speech. Although he considers false statements of fact to have low first amendment value, he does not describe any standards applicable to defamatory speech. *See Stone, Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194-95 (1983).

²¹² 371 U.S. 415 (1963).

²¹³ *Id.* at 433.

²¹⁴ *See id.* at 438.

²¹⁵ *See id.* at 433, 438.

²¹⁶ 456 U.S. 45 (1982).

essarily circumscribing protected expression.”²¹⁷ In *Brown* the Court applied this test in determining that Kentucky could not hold a political candidate criminally responsible for violation of the Kentucky Corrupt Practices Act,²¹⁸ which bars candidate campaign promises to serve for reduced compensation.²¹⁹ The Court characterized the Act as directly restricting the offer of ideas by a political candidate and held that such a law triggers the stated test.²²⁰ One argument the Court addressed was that, because the candidate could not legally have fulfilled his promise, it was a demonstrable falsehood that Kentucky had an interest in preventing.²²¹ Although the Court noted that the state interest in protecting the political process from distortions is “somewhat different” from the interests furthered by defamation law, the Court held that sanctions were impermissible absent the showing required by *New York Times Co. v. Sullivan*²²²—knowing falsehood or reckless disregard for the truth.²²³

Like the Kentucky statute, defamation laws tend to restrict directly the offer of ideas. In *New York Times* the Court observed that “[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.”²²⁴ Logic thus suggests, as does the Court’s analogy to defamation cases in *Brown*, that the application of defamation laws by a state should be subject to the same standard. A state must have a compelling interest effectuated by a narrowly tailored law that does not unnecessarily circumscribe protected expression, at least when the defamation involves politically-oriented expression like that present in *Brown*.²²⁵

A strong argument can be made that this standard should also apply when the defamation involves nonpolitical expression. The first amendment’s protection is not limited to political speech,²²⁶ and the

²¹⁷ *Id.* at 53-54.

²¹⁸ KY. REV. STAT. § 121.055 (1982).

²¹⁹ See *Brown*, 456 U.S. at 50.

²²⁰ See *id.* at 53-54.

²²¹ See *id.* at 60-61.

²²² 376 U.S. 254 (1964).

²²³ See *Brown*, 456 U.S. at 61.

²²⁴ *New York Times*, 376 U.S. at 277.

²²⁵ See also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (where restriction is directed toward “speech . . . intimately related to the process of governing,” compelling state interest and narrowly drawn restrictions are required).

²²⁶ See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (protecting commercial speech). The analogous history of commercial and defamatory speech makes application of the commercial speech standards arguably appropriate to nonpolitical speech in the defamation context. Until recently, neither commercial speech nor defamatory speech were thought to have any first amendment protection. Compare *Beauharnais v. Illinois*, 343 U.S. 250, 255-57 (1952) (libelous speech not protected) and *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)

Court has questioned the wisdom of judicial determinations as to "what information is relevant to self-government."²²⁷ And its requirement that public officials prove more fault than private defamation plaintiffs does not necessarily imply that a lower standard of scrutiny is applicable to state sanctions on defamations of the latter. The Court holds public officials and public figures to higher standards of proof in defamation

(commercial speech not protected) with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (commercial speech protected) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-50 (1974) (delineating first amendment restrictions on defamation laws).

Modern cases in both areas have emphasized that one reason for the current protection of both commercial and defamatory speech is to ensure that more clearly protected speech is not impinged upon. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (striking down ordinance prohibiting outdoor advertising displays); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980) (finding ban on promotional advertising unconstitutional because it unnecessarily suppressed more protected speech); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) ("[O]ur commercial speech cases . . . illustrate that the First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). This history of parallel reasoning suggests that common standards of review may be appropriate.

Even if the commercial speech standards are applied, however, a more discriminating analysis than was applied in *Hague* is still required to determine whether legitimate state interests are furthered. Commercial speech cases require that governmental restrictions on speech be based on a "substantial" state interest, that they directly advance that interest, and that they be no more extensive than is necessary to serve that interest. *Central Hudson Gas*, 447 U.S. at 566. Two additional prerequisites for commercial speech protection are that the speech concern lawful activity and that it not be misleading. *Id.* at 566. Because defamatory statements are by definition false, this last prerequisite should be inapplicable to the defamation context. Its application would defeat first amendment protection and would be inconsistent with cases limiting state restrictions on defamatory speech. The requirement is particularly suited to the commercial speech context alone because commercial speech is more easily verifiable by its disseminator and may be more durable. The Court stated that these attributes make toleration of inaccurate statements less necessary in the commercial speech context. See *Virginia State Bd.*, 425 U.S. at 771-72 n.24 (1976).

Indeed, because laws restricting noncommercial speech may chill free expression more than laws restricting commercial speech, the more stringent standards suggested in the text appear to be more appropriate in the defamation context than do the commercial speech standards. See *Virginia State Bd.*, 425 U.S. at 777 (Stewart, J., concurring) (speech-intrusive laws are less chilling to commercial speech). In addition a higher standard of scrutiny for laws imposing sanctions on defamatory speech would be consistent with other cases proscribing governmental restrictions on "low-value" speech. Compare *Near v. Minnesota*, 283 U.S. 697 (1931) (invalidating prior restraint of defamatory speech) with *Friedman v. Rogers*, 440 U.S. 1 (1979) (validating prohibitions of noninformative commercial speech).

²²⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

cases largely because they are likely to have better access to the media in order to counteract and redress the defamation.²²⁸ Thus the Court's allowance of relatively speech-inhibiting rules in private defamation actions²²⁹ does not mean that a different standard of scrutiny is required. Rather, relatively speech-inhibiting rules simply may be seen as more necessary to effectuate the state interest in redressing defamatory injury because of private plaintiffs' inability to obtain redress by other means. Upholding relatively speech-inhibiting rules in this context is therefore consistent with the standard. Thus the requirement that defamation rules be narrowly tailored to serve a compelling state interest, suggested in the context of political statements by *Button* and *Brown*, is logically applicable to sanctions on any form of defamation.²³⁰

While the Supreme Court has not specifically adopted this or any other test in its defamation decisions, such a standard is consistent with the language and approach of these decisions. They indicate that the Court judges the constitutionality of defamation laws by examining whether their application effectuates strong state interests without unnecessarily or unduly circumscribing protected speech. In *Gertz v. Robert Welch, Inc.*,²³¹ for example, the Court characterized the state interest in compensating private plaintiffs for actual damages as "legitimate"²³² and "strong and legitimate"²³³ and invalidated awards of presumed damages because they furthered no "substantial" state interest.²³⁴ It limited the availability of presumed and punitive damages on the ground that state remedies for defamation could reach "no farther than is necessary to protect the legitimate [compensation] interest involved."²³⁵ Similarly, *New York Times* stressed that laws allowing truth alone as a defense would deter criticism, suggesting that laws of this nature are not sufficiently narrowly tailored and unduly limit protected

²²⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

²²⁹ Compare *id.* at 347 (private plaintiffs can recover actual damages on showing of fault) with *New York Times*, 376 U.S. at 279-80 (public officials can recover only with showing of actual malice).

²³⁰ But cf. *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976) (plurality opinion) (Society's interest in protecting erotic materials "is of a wholly different and lesser magnitude than the interest in untrammelled political debate . . .").

²³¹ 418 U.S. 323 (1974).

²³² *Id.* at 341, 349.

²³³ *Id.* at 348.

²³⁴ *Id.* at 349. The Court's use of "substantial" instead of "compelling" is probably without significance. In *In re Griffiths*, 413 U.S. 717, 721-22 & n.9 (1973), decided one year before *Gertz*, the Court applied a similar standard in an equal protection case. There, the Court noted that the requisite state interest had been described as "overriding," "compelling," "important," or "substantial" but that no significance ought be attached to these semantic variations.

²³⁵ *Gertz*, 418 U.S. at 349.

expression.²³⁶

These cases indicate, then, that first amendment principles require close examination of the state interests offered to justify application of defamation rules and that their application must be narrowly tailored to further those interests. Defamation rules may be applied no more extensively than is necessary to protect those state interests deemed sufficiently strong to justify intrusion on speech. Applied to the multistate defamation context, these requirements may frequently prevent application of a state's speech-inhibiting law to a claim for nationwide damages.

Before discussing the application of this standard in more depth, however, a potential objection to its use in the conflict of laws setting warrants exploration. The objection is that potentially applicable state laws already incorporate the Supreme Court's limitations on defamation laws and that there is thus no need to scrutinize the permissibility of their application a second time in the interstate context. Stated differently, one might argue that the Court has already considered the potential threat to first amendment activity posed by these laws and that reconsideration of these concerns in the conflicts setting would constitute a "double counting" that the Court has declined to pursue.²³⁷

One response to this objection is based on the fact that if substantive defamation rules, valid because they further strong state interests, may be applied only when in fact they do so, a certain number of defamation awards entailing certain amounts of damages will follow. If these rules may also be applied when their application does not further strong state interests, however, the proclivities of forum shopping plaintiffs to avoid states with strong state interests but with relatively speech-enhancing defamation rules will result in substantially greater numbers and amounts of defamation awards against the interstate media. Increased liability, resulting in the demise or decreased vitality of some publications, will enhance the extant chill on protected speech.²³⁸

²³⁶ See *New York Times*, 376 U.S. at 279.

²³⁷ See *Calder v. Jones*, 104 S. Ct. 1482 (1984). In *Calder*, decided the same day as *Keeton*, the Court rejected an argument that the first amendment constrained a state's ability to assert personal jurisdiction over a defamation defendant, stating, "[T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce these concerns at the jurisdictional stage would be a form of double counting." *Id.* at 1488 (citation omitted).

²³⁸ Professor Frederick Schauer, apparently the originator of the double counting objection, premises it primarily on the notion that limitations on substantive defamation laws are designed to provide a buffer zone of strategic protection against the erroneous penalization of protected speech. See Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 704-14 (1978). If this premise were the full explanation for the Court's limitations, any state's application of rules

In addition, freely applied forum-oriented conflicts rules will further curb the media because of the uncertainty they would introduce into publishing. For example, publishers' inability to predict the applicability of privileges recognized by states most closely connected with their stories would make it more difficult for them to structure their day-to-day operations in an efficient and effective manner.²³⁹

The constitutionality of these added threats to freedom of the press—absent from the intrastate context—have not come before the Court, and they should not be dismissed by noting conclusorily that the substantive law any state will apply presumably will be consistent with the Court's previously announced limitations on defamation law. The cases just discussed illustrate that identification of the permissible level of chill on speech has not been simply a matter of ad hoc bright line drawing that has been finalized from hence forward. Rather, it has been a function of a balancing of factors—primarily the strength of the state interest underlying the law in question against the threat to first amendment values.²⁴⁰ Absent a clear repudiation of this balancing ap-

that provide this buffer zone arguably would not be impermissible under the first amendment because the application would not increase the risk of erroneous penalization beyond that which the Court has deemed acceptable. The Court's limitations on substantive defamation laws, however, are premised on more than simply providing such a buffer zone. This is illustrated by the Court's refusal to permit the imposition of punitive damages for negligent defamation of private persons. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). This limitation, viewed in light of the fact that actual damages may be awarded in such contexts, does nothing to decrease the risk of erroneous sanctions on protected speech. This limitation, rather, serves a distinct function of limiting the level of permissible sanctions to that which furthers strong state interests, *see infra* text accompanying note 252, presumably to avoid unnecessarily chilling the effective continued activity of protected speech. Thus consideration of the enhanced liability chill discussed in the text is perfectly consistent with the Court's decisions. Indeed, in light of the dangers posed to the continued viability of the press by the size of recent defamation awards, this consideration is perhaps now more warranted than it was when *Gertz* was decided. *See, e.g., Of Reputation and Reporters*, *TIME*, March 19, 1984, at 64, 64 (noting the potential bankruptcy of newspapers because of defamation judgments). Consideration of this form of chill is also consistent with Professor Schauer's more general view that a "chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity." Schauer, *supra*, at 693.

²³⁹ *Cf. Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1974) (noting that, if Virginia and other states with minimal interests applied to interstate publications their criminal statutes prohibiting publication of advertisements that were legal in the advertiser's state, "[t]he burdens thereby imposed on publications would impair, perhaps severely, their proper functioning").

²⁴⁰ Even *Herbert v. Lando*, 441 U.S. 153 (1979), which rejected a constitutional privilege for editorial processes, is consistent with this approach. Although the Court there discounted the constitutional significance of more frequent liability, absent the privilege, for defamation not protected by its previous decisions, *see id.* at 172, it reached its conclusion by stressing the difficulties that the privilege would pose to the redress of damage to an individual's reputation, "as reflected in the laws of defamation

proach by the Court, speech-inhibiting defamation rules not previously before it deserve similar consideration.²⁴¹

A more fundamental response to the double counting objection is that the cases just discussed affirm a principle that is independent of any double counting concerns: the state—any state—may not inhibit speech without significant justification.²⁴² This principle expresses this nation's aversion to governmental meddling with free speech.²⁴³ The values underlying it and the virtue of consistency require its application in all contexts, absent a compelling reason to depart. None is apparent in the conflict of laws setting,²⁴⁴ and the double counting objection should therefore fail.

of all the states," *id.* at 169-70, and contrasted its view that the countervailing constitutional dangers were minimal, *see id.* at 171-74.

²⁴¹ One might argue that the double counting objection in *Calder v. Jones*, 104 S. Ct. 1481, 1488 (1984), repudiates the Court's allegiance to a balancing approach. *See supra* note 237. But jurisdictional rules, standing alone, should not affect the decision whether the defendant's conduct will be sanctioned. The fact that this question is left in part to the choice of law determination may explain why the Court in *Keeton* explicitly stated that the choice of law issue was a separate question. Because the consequences of widespread jurisdiction on a defendant's ultimate liability are at least theoretically almost nonexistent, the jurisdiction cases may be seen as instances in which the chill on speech is unaffected, at least in the senses previously deemed important by the Court. Thus double counting may well have been an appropriate characterization of the first amendment argument in these jurisdictional cases. Because of the existence of the forms of chill noted in the text, however, it would not be appropriate to invoke the objection in the choice of law context.

²⁴² In some contexts, of course, speech may be totally protected.

²⁴³ *See, e.g., New York Times*, 376 U.S. at 270 (recognizing "a profound national commitment to the principle that debate on public issues be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

²⁴⁴ The only arguable justification seems to be respect for state autonomy and sovereignty. As earlier portions of this article have shown, however, a permissive conflicts rule would in fact pose substantial dangers to these values.

Another reason for imposing heightened scrutiny on defamation choice of law rules is that a rule permitting application of the law of any state in which a publisher circulates materials is discriminatory against the press. In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court struck down as inconsistent with the first amendment Minnesota's use tax on the cost of paper and ink products consumed in publishing. Because the tax singled out the press for special treatment, the Court held it could not stand unless it was "necessary to achieve an overriding governmental interest," which it was not. *See id.* at 582, 591-92. Other types of national businesses are not, under current law, subject to the laws of all states in which they do business for any injury their products cause. Should a state apply its law to the out-of-state portion of a plaintiff's defamation injuries but refuse to apply its law to remedy out-of-state injuries caused by nonpress businesses operating in the state, it would be engaging in discrimination similar to that rejected by the Court in *Minneapolis Tribune*.

2. Application of Heightened Scrutiny and the Invalidity of Deterrence as a State Interest

First amendment principles thus mandate that a state may apply its defamation rules only in a manner narrowly tailored to further strong state interests. In the multistate defamation context a court's decision to apply forum law to the entirety of a plaintiff's nationwide defamation claim would not meet this test if the plaintiff had only negligible connections to the state. Although the forum state may, according to *Keeton*, have a valid interest in redressing injuries *within* the state if the plaintiff's reputation suffered harm there,²⁴⁵ application of its law to redress injuries suffered in other states where the harm is not legally cognizable may result in compensation highly disproportionate to this interest. The forum state law's speech-inhibiting reach would extend far beyond that necessary to further its underlying state interest, violating the first amendment requirement that it be narrowly tailored.

One might argue, however, that application of forum law in this context would further the second state interest mentioned in *Keeton*—detering deception of a state's citizens.²⁴⁶ While the requirement that a statute be narrowly tailored may mandate that this interest be asserted only in a manner proportionate to the harm done within the state, again precluding application of forum law to redress harm outside the state, a more extensive and arguably punitive application of liability-creating forum law would presumably amplify the law's deterrent effect. Thus, if this interest is strong and valid, application of forum law to the entirety of a claim by a state with only a small portion of the defendant's circulation might be consistent with first amendment considerations. However, additional first amendment principles indicate that this state interest is insufficient, at least for purposes of sanctioning nonmalicious defamation.

When the Supreme Court prohibited liability without fault and presumed or punitive damages absent malice in *Gertz*, it specifically purported to accommodate first amendment interests with the interests underlying state defamation laws,²⁴⁷ and it made clear that state interests in deterrence and punishment were insufficient to justify sanctions upon nonmalicious defamation. Rather, the primary, and perhaps the only, state interest that could justify the imposition of liability was compensation for actual harm. According to the Court, "The legitimate state interest underlying the law of libel is the compensation of individ-

²⁴⁵ See *Keeton*, 104 S. Ct. at 1479.

²⁴⁶ See *id.*

²⁴⁷ See *Gertz*, 418 U.S. at 348.

uals for the harm inflicted on them by defamatory falsehood."²⁴⁸ Recovery by private persons on a showing of fault was allowed by the Court "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation."²⁴⁹ And the Court implicitly discounted the legitimacy of other state interests when it limited the extent of permissible damage awards by declaring that "this countervailing state interest extends no further than compensation for actual injury."²⁵⁰ Moreover, in holding punitive damages impermissible absent malice, the Court explicitly rejected the legitimacy of any state interest in punishment or deterrence of negligent defamation.²⁵¹ The Court stated that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrence."²⁵²

Thus the Court's accommodation of interests in *Gertz* clearly indicates that deterrence and punishment are not valid state interests when asserted to justify sanctions against nonmalicious defamation. Perhaps valid with respect to other forms of tortious conduct, they are not sufficient to justify liability in the face of first amendment commands.²⁵³

The Court's treatment of the deterrence interest as a valid one in *Keeton* conflicts with its proclamations in *Gertz*. It is therefore not surprising that the authorities cited in *Keeton* in reference to that interest seem slightly off the mark. For instance, the case cited as illustrative of New Hampshire's interest in deterrence was a conversion case, not a defamation case.²⁵⁴ Because both conversion and defamation are tort actions, Justice Rehnquist simply transferred the deterrence interest im-

²⁴⁸ *Id.* at 341.

²⁴⁹ *Id.* at 348-49.

²⁵⁰ *Id.* at 349.

²⁵¹ *See id.*

²⁵² *Id.* at 350 (emphasis added).

²⁵³ *See id.* at 349-50. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Court suggested that deterrence is a recognized interest underlying defamation laws. *See id.* at 172. However, the plaintiff in *Herbert* conceded that he would have to show malice to recover. *See id.* at 156. The Court appeared to limit its recognition of an interest in deterrence to the context of defamation made with actual malice, a qualification not inconsistent with the implications of *Gertz*. *See, e.g., Herbert*, 441 U.S. at 172 ("Those who publish defamatory falsehoods with the requisite culpability . . . are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material If such proof results in liability for damages which in turn discourages the publication of erroneous information *known to be false or probably false*, that is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.") (emphasis added).

²⁵⁴ *See* *Leeper v. Leeper*, 114 N.H. 294, 298, 319 A.2d 626, 629 (1974), *cited in Keeton*, 104 S. Ct. at 1479.

plicit in conversion to the defamation context, apparently without consideration of the significantly different effects each tort has on first amendment freedoms.²⁵⁵ In addition, the New Hampshire criminal defamation statute cited as expressing New Hampshire's interest in deterrence applies only to statements known to be false, statements for which *Gertz* suggested deterrence and punishment may be valid.²⁵⁶

Keeton's recognition of the legitimacy of a state's interest in deterring negligent defamation is inconsistent not only with *Gertz* but also with other strands of first amendment doctrine. First, a distinctively punitive motive seems to be present when a court awards damages—through application of forum law—that may be highly disproportionate to the forum state's interest in compensating in-state injuries, especially when the injuries redressed are not legally cognizable in other states. Such awards appear not only inconsistent with *Gertz's* prohibition of punitive damages in the absence of malice, but they breach the limits that the Court has imposed on a state's power to punish defamation through criminal libel laws. In the criminal libel area the Court has traditionally identified the deterrence of violence as the principal public interest underlying defamation laws. Even assuming this interest retains vitality—a doubtful assumption—state efforts to further this interest are nevertheless limited.

The last Supreme Court decision to uphold the application of a criminal libel statute was *Beauharnais v. Illinois*,²⁵⁷ a five-to-four decision handed down in 1952 in which the Court upheld a conviction for the distribution of inflammatory racist literature.²⁵⁸ Writing for the majority, Justice Frankfurter focused on the social strife and violence that Illinois historically had experienced because of defamatory statements similar to the one at issue in the case.²⁵⁹ In light of this history, he stressed the state interest in deterring violence and upheld the conviction.²⁶⁰ Twelve years later, in *Garrison v. Louisiana*,²⁶¹ the Court

²⁵⁵ See *Keeton*, 104 S. Ct. at 1479.

²⁵⁶ See *id.* at 1479 & n.6 (quoting N.H. REV. STAT. ANN. § 644:11 (1974)).

²⁵⁷ 343 U.S. 250 (1952).

²⁵⁸ See *id.* at 252.

²⁵⁹ See *id.* at 258-61.

²⁶⁰ In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. "There are limits to the exercise of these liberties [of speech and of the press]. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events famil-

unanimously overturned a conviction under the Louisiana criminal libel statute, holding that the statute must incorporate the then-recently announced standards of *New York Times*. In the course of its opinion, the Court stressed that the traditional purpose of criminal libel laws has been "to avert the possibility that the utterance would provoke an enraged victim to a breach of peace."²⁶² Strongly questioning the continuing validity of this justification for modern criminal libel laws, the Court concluded that a criminal libel statute could not stand unless it required a showing that the defamation was calculated to and would create a clear and present danger of a breach of the peace,²⁶³ and it forbade imposition of criminal liability for nonmalicious defamations of public officials.²⁶⁴

There is no indication in these cases that *Keeton's* suggested state interest in discouraging deception of a state's citizens, standing alone, is a legitimate public justification for the sanctioning of defamation. Rather, the permissibility of public sanctions turned on the probability that the statements would cause more tangible violent harm. And the probability that violence will be triggered by a defamatory statement in a state with which the plaintiff has no significant connection is virtually nil. Thus, to permit any state in which a defendant circulates a publication to impose sanctions on defamation so as to further a state interest in deterrence would be inconsistent with the Court's established doctrine on criminal defamation laws.

Recognition of any legitimate state interest in deterrence of deception is also at least philosophically inconsistent with the doctrine of prior restraint. The landmark decision prohibiting prior restraint, *Near*

iar to all. These and other transgressions of those limits the States appropriately may punish. . . .

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply imbedded in our society than the rantings of modern Know-Nothings . . . [But] it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem

Id. at 261-62 (footnotes omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

Professors Nowak, Rotunda, and Young have stated, "Although *Beauharnais v. Illinois* has never been explicitly rejected, it is unlikely to represent present law in light of *New York Times v. Sullivan*" J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 944 (2d ed. 1983) (footnote omitted).

²⁶¹ 379 U.S. 64 (1964).

²⁶² *Garrison*, 379 U.S. at 68.

²⁶³ See *id.* at 70.

²⁶⁴ See *id.* at 77-79.

v. Minnesota,²⁶⁵ forbade prior restraint of precisely the type of speech with which this Article concerns itself—defamatory speech. Voiding an injunction against the distribution of a “malicious, scandalous and defamatory newspaper,”²⁶⁶ Chief Justice Hughes, writing for the Court, stressed that “[t]he statute [under which the injunction was issued] is not aimed at the redress of individual or private wrongs.”²⁶⁷ Rather, “[t]he object of the statute is . . . suppression of the offending newspaper or periodical.”²⁶⁸

Deterrence is prevention, and prevention is, in effect, prior restraint. Although less direct in form than an injunction, the concept is the same. Scandal sheets of the sort *Near* protected from suppression provided information not provided by more established publications tied to politicians or the business world.²⁶⁹ Massive defamation awards premised on a deterrence interest may suppress small publications that serve a similar role just as much as the injunction voided in *Near* did. As a practical matter *Near* rejected the state’s efforts to “discourage the deception of its citizens” through deterrence of defamation before the fact. With few exceptions,²⁷⁰ judicial aversion to prepublication governmental intrusion in speech has been unwavering.²⁷¹ The notion that the government has an interest in protecting citizens from speech, even deceptive speech, is anathema to a democratic society. The role and interest of the government has therefore traditionally been limited to providing compensation only after defamatory statements have caused injury.

Thus, espousing a state interest in deterring deception is inconsistent with several strands of first amendment precedent. Its pertinence

²⁶⁵ 283 U.S. 697 (1931).

²⁶⁶ *Id.* at 706.

²⁶⁷ *Id.* at 709.

²⁶⁸ *Id.* at 711.

²⁶⁹ See Murphy, *Near v. Minnesota in the Context of Historical Developments*, 66 MINN. L. REV. 95, 135-36 (1981).

²⁷⁰ In *Near*, Chief Justice Hughes noted three “exceptional cases” where prior restraints might be permitted: (1) statements interfering with a war effort, (2) obscenity, and (3) statements inciting violence. See *Near*, 283 U.S. at 716. The interest in deterring violence noted in connection with criminal defamation statutes is not inconsistent with *Near* in light of the third exception.

Friedman v. Rogers, 440 U.S. 1 (1979), exemplifies an additional exception in permitting restrictions on purely noninformative commercial speech such as trade names. See *id.* at 12 (noting that trade names convey no information until they acquire meaning over time).

²⁷¹ See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a Florida statute that guaranteed political candidates equal space to reply to criticism); *New York Times v. United States*, 403 U.S. 713 (1971) (denying injunction against publication of the Pentagon Papers); see also *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936) (First and fourteenth amendments preclude state and federal governments “from adopting *any form* of previous restraint upon printed publications, or their circulation . . .”) (emphasis added).

and strength in the conflicts setting is therefore suspect. This interest, particularly in light of the constitutional concerns noted earlier, does not justify a court's application of forum law to the entirety of a plaintiff's nationwide defamation claim when that plaintiff has only minimal connections to the forum state. At most, its force should be deemed proportionate to the in-state harm caused by the defamation, serving to validate a state's compensating the plaintiff for the harm incurred within the state.

Compensation for injury, then, is the only strong state interest that justifies a state's choice of defamation law decision that impinges on first amendment freedoms. The first amendment demands that such a decision be narrowly tailored to further that interest. The substantiality of a state's interest in providing such compensation, therefore, should be the touchstone when assessing the permissibility under the first amendment of forum law application in the conflicts setting. Among other things, the next Part focuses on the requisite strength of this interest.

IV. DEVELOPING A MODEL FOR THE CHOICE OF LAW IN MULTISTATE DEFAMATION CASES

A. *The Choice of Substantive Defamation Law*

The foregoing federalism and first amendment principles independently mandate that a state whose only connection with a multistate defamation action is the defamatory publication's circulation within the state's borders ought not apply its law to the entirety of the plaintiff's claim. The application of forum law in such cases potentially nullifies the sovereignty of sister states with relatively speech-enhancing laws, makes more likely the practical federalization of multistate defamation law, and discourages interstate publication. In addition, application of forum law in these circumstances unjustifiably infringes on first amendment freedoms.

Yet, the question of what law may be applied in the multistate defamation context remains. Requiring a court to divide up the claim and apply the law of each state of circulation only to the extent necessary to compensate for the harm done in that state is unsatisfactory. But this is not the only permissible solution. Federalism objections arise from the possibility that the combination of forum-shopping plaintiffs and forum-law-applying courts may totally abrogate the interests of nonforum states with relatively speech-enhancing laws. First amendment objections arise primarily from the possibility that states may apply speech-inhibiting laws without a strong interest in doing so. Both sets of objections can be met by prohibiting courts from applying to the

entirety of a multistate defamation claim any state's law that is more speech-inhibiting than the law of other states of circulation, unless that state has a significant interest, relative to the interests of other states, in compensating the plaintiff. This requirement would focus more on the actual effects of the multistate defamation experienced by the plaintiff rather than on intangible damage to her reputation within the states of circulation.

For example, if a plaintiff lives and conducts most of her activities in a single state, other states' application of this "home state" law would satisfy both federalism and first amendment concerns. Application of home state law would discourage forum-shopping and respect sovereign interests. If the home state had relatively speech-enhancing laws, the interests underlying those laws would be furthered when its residents brought claims. And application of home state law would not deter local publications from distributing outside the home state, so interstate publication is not discouraged.

Nor does application of home state law to the entire case infringe on first amendment values. Even if the home state's laws are relatively speech-inhibiting, that state has a strong interest in compensating resident plaintiffs. This interest extends beyond redressing the plaintiff's in-state loss of reputation. Suffering and humiliation that result from the defamation plaintiff's loss of esteem elsewhere will be felt most strongly by her in her home state.²⁷² The plaintiff's pecuniary loss, diminished economic productivity and reduced civic activity will be felt primarily there. And, if the effects of her loss of reputation are so devastating that she becomes a public charge or incurs substantial debts for medical treatment, the resulting burden and debts will most greatly affect the home state. Thus, even though an injury to a defamation plaintiff's reputation may be felt nationwide, the home state will bear the brunt of that injury. Conversely, nationwide vindication through the plaintiff's success in litigation, resulting in her beneficial interchange with nonresidents, will enhance her ability to contribute through economic and civic activity to her home state. Because of the resulting substantiality of the home state's interest, the application of its law to the entire claim would meet the heightened scrutiny mandated by the first amendment.²⁷³

²⁷² Professor Smolla has argued that, notwithstanding the traditional notion that defamation laws redress injury to reputation, which theoretically may exist everywhere, "it seems clear that the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one's community standing." Smolla, *supra* note 198, at 18-19.

²⁷³ In addition there is little likelihood of discrimination against the press through application of home state law. Other businesses are generally subject to the laws of

Of course, many defamation plaintiffs conduct substantial activities in more than one state, and thus the defamation may have significant effects similar to those just described in several states. Here, application of any of these states' laws would satisfy all constitutional concerns because it is only the application of the law of any states of circulation with only minor compensatory interests that offends constitutional principles. These concerns will not be infringed by the potential application of the law of more than one state if distinctive contacts are required that prevent the total abrogation of other states' policies and assure that their interest in compensation is sufficiently strong to satisfy first amendment concerns. If plaintiffs are limited to the laws of the states with relatively significant interests in compensation, constitutional concerns will be satisfied.

Care should be taken in establishing a threshold of significance, however, to assure the sovereignty of states with respect to their border town publications. The threshold should not be so low to enable all probable plaintiffs with claims against border town publications to benefit from the laws of contiguous states. Such a low threshold potentially nullifies the sovereign right of a speech-enhancing state to further its interests in enhancing the health of such publications. Thus mere acquaintance with persons of another state, which virtually all such plaintiffs would have, should not satisfy the requisite threshold even though the defamation may affect relationships with persons there. Rather, a significant degree of activity in the border state that might be affected by the defamation should be the minimal requirement for application of that state's law. This will assure that a state with speech-enhancing laws will maintain a degree of co-equal sovereignty, for its laws will be applied some of the time because not all plaintiffs will meet such a threshold. As for plaintiffs who do meet the threshold, the sovereignty of the state of publication may occasionally be required to accommodate the sovereign interests of other states in defamation cases, just as in other actions.

These considerations suggest a floor for choice of law decisions. With respect to any single issue, courts should not apply to the entire claim any state's law that is more speech-inhibiting than that of a state with a relatively significant interest in compensating the plaintiff. These principles, however, would not prevent a court from applying laws that are more speech-enhancing than those of a state with a significant compensation interest.

states where they cause localized injury. By "localizing" the defamation injury to a place where it has a significant effect, the media will be similarly treated.

For example, if the forum state's law recognizes a privilege not recognized by the plaintiff's home state law, the forum could, by *depepage*, apply its law to that issue without infringing on constitutional values. The forum's choice would be justified by its strong interest in promoting freedom of speech within its borders. More importantly, however, recognition of the privilege would not undermine the home state's sovereignty, for such undermining results from plaintiffs shopping for and obtaining the benefits of speech-inhibiting laws, not speech-enhancing laws; defamation plaintiffs do not shop for the latter. Rather, the home state's nonprivilege rule will still be applicable in suits brought in the home state, and application of the privilege may well encourage more plaintiffs to bring suit there, effectively enhancing the home state's ability to promote its policies. Finally, application of a rule that is more speech-enhancing than that which a court constitutionally could apply should not be considered an infringement on first amendment values.

Thus, an appropriate accommodation of full faith and credit, federalism, and first amendment concerns initially requires that, in choosing law applicable to an entire defamation claim, a forum apply the laws of a state that has a significant interest, relative to the interests of other states of circulation, in compensating the plaintiff.²⁷⁴ It may apply laws no more speech-inhibiting than the laws of that state. However, after identifying such a state, the forum may apply, through *decepage* for example, relatively speech-enhancing rules of other states without infringing constitutional values.

²⁷⁴ Federalism concerns require this test, regardless of the defendant's scienter. One might argue, if not convinced by these concerns, however, that first amendment limitations protect only nonmalicious defamation and that any state of circulation should be permitted to apply its law to the entirety of a claim for nationwide malicious defamation because, in this situation alone, the state retains an interest in punishment and deterrence.

This analysis would permit any state of circulation to apply its law to the entirety of the plaintiff's claim in those instances where plaintiffs are constitutionally required to prove malice as an element of their case—that is, defamation suits against public officials or public figures. But the choice of law issue becomes more complex if the plaintiff need not prove malice to recover but alleges its existence in hope, for example, of recovering punitive damages. By focusing on the fact that an ultimate finding of malice will determine the permissibility of applying more speech-inhibiting law, a court can carefully sort out its permissible choice of law options. However, the complexity of the analysis and the concerns of federalism suggest that the more prudent course would be for the court to choose to apply a uniform set of laws, such as that of the home state, whose application will not infringe on constitutional values, regardless of the scienter found.

B. *The Choice of Procedural Rules*

States that apply the substantive law of other states nonetheless occasionally apply their own procedural rules.²⁷⁵ How the constitutional principles discussed above affect the application of procedural rules remains to be explored.

Most procedural rules are not founded on policies directed towards freedom of speech or defamation actions; rather, they reflect a state's general policies toward the resolution of all disputes in its courts. Where procedural differences between the forum and a state with a significant compensation interest are not traceable to speech or defamation policies, no issues of constitutional dimension are apparent from the forum's application of its own procedure. This holds true even if the forum state's procedural rules are distinctly more favorable to the plaintiff than those of her home state. The home state's sovereign right to further its speech-enhancing policies will not be subject to total nullification because the home state's rules are not based on speech-enhancing policies but on concerns for the efficiency and integrity of the state's courts. Suits in other states do not implicate these policies. Although interstate publication theoretically could be discouraged if circulation in a state meant that that state's procedural rules will be applied, the additional risk will be slight when those rules are not designed to expose publishers to a greater chance of liability on the merits. The potential federalization of procedure in multistate defamation cases seems an equally remote risk. Nor will first amendment considerations be implicated—the principal first amendment concern is that a state may not apply speech-inhibiting rules absent a strong interest in so doing. If the forum's procedural rules are not directed towards speech or defamation, the constitutional implications will normally be slight.²⁷⁶

Some arguably procedural rules, however, are directed specifically at speech and defamation cases. Evidentiary privileges against disclosure of sources and special preferences for summary judgment in defamation cases are examples. When states with a relatively significant compensation interest have such rules and the forum does not, their application does raise constitutional concerns, particularly with regard to federalism and the full faith and credit clause. Whenever application of such rules may change a suit's outcome, all well-advised plaintiffs will bring suit in states with these favorable procedural rules, thus nul-

²⁷⁵ See *supra* notes 71 and 77 and accompanying text.

²⁷⁶ Cf. *Minneapolis Star and Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983) (the press may be subject to economic regulation that is applicable to all businesses).

lifying the other states' speech-enhancing sovereign interests. Although most forum application of procedural rules is unlikely to deter interstate circulation, the application of arguably procedural rules such as a "nonshield law" rule, which would deny the press a testimonial privilege with respect to confidential sources, may do so. And whenever application of such rules does make a difference, any federal minimums of procedural protection in defamation cases²⁷⁷ will effectively become the law of the land for multistate defamation. Thus, when a defendant-favoring procedural rule of a state with a significant compensation interest is predicated on speech-enhancing policies, full faith and credit and federalism principles demand that a forum without such a compensation interest forego application of its procedural rules.²⁷⁸

Perhaps the most difficult procedural issue in this context is whether a state's statute of limitations may be applied to an entire claim. Some statutes of limitation do not distinguish between defamation actions and other torts.²⁷⁹ But some states have adopted statutes of limitation that apply only to libel and slander actions and that are uniquely short.²⁸⁰ In a case in which the plaintiff's home state had adopted such a statute of limitations—limitations that appear to be intentionally speech-enhancing—the preceding principles would require a foreign forum to apply the statute.

With respect to more generalized statutes, the Supreme Court, declining in *Keeton v. Hustler Magazine, Inc.*²⁸¹ to rule on whether New Hampshire could apply its statute of limitations, noted "considerable academic criticism" of a forum state's application of its statute of limitations regardless of the significance of litigation contacts with the forum.²⁸² Professor Martin, for example, has argued cogently that under general constitutional choice of law principles, a forum should not be permitted to apply its statute of limitations if it is longer than that of another concerned state unless the forum may constitutionally apply its substantive law.²⁸³ Although the application of a shorter statute may further the forum state's general interests in reducing docket congestion

²⁷⁷ Cf. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that no privilege protects a reporter's confidential sources from grand jury investigation).

²⁷⁸ Of course, if a state consciously enacts a speech-inhibiting procedural rule, first amendment considerations may similarly require its surrender.

²⁷⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 260 § 4 (West 1983).

²⁸⁰ See, e.g., N.J. STAT. ANN. § 2A:14-3 (West 1952).

²⁸¹ 104 S. Ct. 1473 (1984).

²⁸² *Id.* at 1480 & n.10 (citing R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 9.2B, at 517 (2d ed. 1980); Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 496-497 (1919)); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 221 (1976).

²⁸³ See Martin, *supra* note 282, at 221-23.

and in rendering decisions based on reliable evidence, similar policies cannot justify the application of a longer statute of limitations when the claim is barred in all interested states.²⁸⁴

This argument is even more compelling in the defamation context. Even when the home state's statute of limitations is not directed at defamation actions, the application of a longer forum statute would completely abrogate the home state's sovereignty. Multistate media operating in the home state will always be subject to the other state's longer statute, thus totally frustrating those home state policies that favor defendants.²⁸⁵

Furthermore, a forum that refuses to recognize a home state's statute of limitations but applies its substantive law will be sanctioning the press through the laws of a state that has disclaimed any strong interest in their application. In effect, application of the forum's statute of limitations imposes speech-inhibiting laws that would not be applied by any state with a relatively significant compensatory interest. When the forum's interest in compensating the plaintiff fails to meet the threshold necessary for application of its own speech-inhibiting laws, application of its statute of limitations to the entire case therefore also would not withstand heightened first amendment scrutiny. Thus, a state without a significant compensation interest should not be permitted to apply its longer statute of limitations, even when the shorter statute of a state with a significant compensation interest is not specifically premised on speech-enhancing policies.

C. *Parceling Out the Claim*

To this point this Article has focused on what single state's law may be applied to the entirety of a multistate defamation claim. *Keeton* suggests, however, that a court might divide up the claim and apply forum law to only a portion. While discussing New Hampshire's interests, Justice Rehnquist stated, "[I]t is beyond dispute that New Hampshire has a significant interest in redressing injuries *that actually occur within the state*"²⁸⁶ and "New Hampshire may also extend its concern to the injury that an in-state libel causes *within New Hampshire* to a nonresident."²⁸⁷

While this narrow language may suggest concerns on the Court

²⁸⁴ See *id.*

²⁸⁵ This fact raises both full faith and credit concerns and concerns of discrimination against the press.

²⁸⁶ *Keeton*, 104 S. Ct. at 1479 (emphasis added).

²⁸⁷ *Id.* (emphasis added).

with the issues addressed by this Article, it also suggests that the Court would have no objection if New Hampshire were to apply its law to redress only that portion of the injury suffered in New Hampshire. A court inclined to do so consistently within the limits suggested by this Article presumably would provide jury instructions on New Hampshire law for the New Hampshire portion of the injury and instructions on the law of a state with a relatively significant compensation interest for the remaining portion of the injury. The jury would grant separate damage awards for each portion of the injury. A court could go further and have different jury instructions for each state of circulation, together with different damage awards, each fulfilling the policies of a given state to the extent that it has a legitimate interest in compensation. Or even more exciting and debilitating, the court could add instructions on the law of foreign countries in which the defaming publication was circulated.

The spectre of the chaos such approaches would generate arguably would justify a court's falling back on *Keeton's* language stressing judicial efficiency as a justification for its application of its law to the entire claim.²⁸⁸ As this Article has shown, however, application of New Hampshire law to the entire claim would significantly intrude on constitutional values, and interests in judicial efficiency have traditionally been deemed insufficient to override significant constitutional protections.²⁸⁹ Efficiency concerns might justify a state's foregoing certain intrastate policies, such as those furthered by application of its law to the intrastate portion of a plaintiff's injury, but they cannot override constitutionally protected sovereign interests of other states or justify infringement of first amendment freedoms.

If a forum wants to apply its relatively speech-inhibiting law to the in-state portion of the injury, however, the constitutional principles noted thus far do not clearly preclude it from doing so. Application of home state law to the remainder of the claim would respect the home state's sovereignty. Other federalism concerns are not greatly frustrated, and, assuming there is actual injury within the state, application of forum law to this portion of the injury appears consistent with first amendment principles.

Yet, splitting up the claim like this presents a problem that arguably rises to constitutional dimension. Because reputation is intangible, compensation for its injury defies precise measurement. As a result, application of forum law to the in-state portion of a multistate claim poses

²⁸⁸ See *supra* note 172 and accompanying text.

²⁸⁹ See generally Pielemeier, *supra* note 176, at 425-29.

the danger that juries will award disproportionate damages for that portion, thereby inappropriately infringing both the interests of other states and the first amendment.

For example, if a defendant has made a particularly inflammatory or unpopular defamatory statement that is legally cognizable only in a state to which the plaintiff has no significant connections, there is a danger that the jury, because of its disdain for the defendant and its belief that the plaintiff has suffered grievous injury for which she will not be compensated because it was suffered outside the state, will award damages far in excess of those necessary to compensate her for her in-state injury.²⁹⁰ Thus, if a court does apply forum law to the in-state portion of a multistate claim, the constitutional principles noted in this Article require that, at a minimum, it take pains to assure that the jury award for that portion bears a reasonable relationship to the proportionate amount of harm caused within the state.

V. AVOIDING THE CONSTITUTIONAL QUESTION—RESPECTING CONSTITUTIONAL CONCERNS THROUGH PROPER APPLICATION OF STATE CHOICE OF LAW THEORIES

The Supreme Court has never directly considered the constitutionality of choice of law decisions in the defamation context, nor have lower courts explicitly considered the issue. The viability of the arguments set forth in this Article thus remains to be tested. Independent of these arguments, however, thoughtful application of most extant choice of law theories would lead most courts to the resolutions suggested above.

For example, respect for the sovereignty of other states has always been built into the territorialist approach. By applying the law of the place of a particular significant event, as opposed to favoring forum law, territorialist courts assured that each state's sovereignty would be respected some of the time—whenever the significant event occurred within its borders. Indeed, territorialist courts at times stated that respect for the sovereignty of other states justified their approach.²⁹¹ To the extent territorialist courts arbitrarily select a particular significant

²⁹⁰ Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., concurring) ("The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that . . . feelings of hostility had at least as much to do with rendition of this half-million dollar verdict as did an appraisal of damages.").

²⁹¹ See, e.g., *Alabama Great S.R.R. v. Carroll*, 97 Ala. 126, 138-39, 11 So. 803, 808-09 (1892) ("The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions . . . shall impose a liability . . . and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired.").

event as controlling for choice of law purposes, consideration of the constitutional principles noted by this Article, which point towards application of the law of a state with a relatively significant compensatory interest, can make the choice of the particular event more principled. At the same time, such an approach will further the sovereignty-respecting principles to which territorialist decisions traditionally conform.

Several modern choice of law approaches explicitly incorporate the principles of respect for the sovereignty of other states and encouragement of interstate activity. The *Restatement (Second)*'s²⁹² identification of "the needs of the interstate and international systems" as a factor to be considered in choice of law²⁹³ is an example. Consideration of this factor, according to the accompanying comments, should lead courts to decisions that respect the needs and policies of other states and that facilitate commercial intercourse and harmonious relations with them.²⁹⁴ These goals are entirely consistent with the theme of this Article. In a similar vein, the *Restatement (Second)*'s directive that courts consider the interests of other states is designed to assure that courts seek "the best possible accommodation of [state] policies," an accommodation that will generally lead to application of the law of the state whose interests "are most deeply affected."²⁹⁵ Such considerations should likewise counsel courts to avoid potential nullification of sister state sovereignty, leading them to apply the law of a state that will feel the relatively significant effects of a defamation—a path this Article argues is constitutionally compelled. In addition, decisions that discourage forum shopping will further the *Restatement (Second)*'s goals of predictability and uniformity of result in choice of law decisions.²⁹⁶ While application of the *Restatement (Second)*'s general directive to apply the law of the plaintiff's domicile in defamation cases²⁹⁷ will usually be consistent with the concerns expressed by this Article, attention to those considerations explicitly noted by the *Restatement (Second)* should lead courts delving more deeply into the requisite analysis to reach results consistent with those this Article suggests.

Similarly, Dean Lefflar's articulation of the better rule approach requires consideration of "interstate and international order."²⁹⁸ He notes that consideration of this factor should lead courts to encourage state interaction and defer to the law of "primarily concerned" states,

²⁹² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

²⁹³ *Id.* § 6.

²⁹⁴ *Id.* § 6 comment d (1971).

²⁹⁵ *Id.* § 6 comment f.

²⁹⁶ *See id.*, comment i.

²⁹⁷ *See id.* § 150 comment e.

²⁹⁸ *See supra* text accompanying note 113.

even where the forum has an identifiable interest in applying its law.²⁹⁹ He also states that decisions discouraging forum shopping will further the goal of predictability of results.³⁰⁰ Although better rule courts, in recent cases, seem not to have given much credence to these principles,³⁰¹ their clear pertinence in multistate defamation cases suggests that courts should give them added weight.

Interest analysis also incorporates principles that, properly applied, should lead to results consistent with this Article. This Article has shown that any deterrence interest a state may have in application of its law should be accorded minimal, if any, weight in the defamation context.³⁰² And even if an interest analysis court initially found that the forum state's limited compensation interest justified application of forum law, Professor Currie would have it reconsider to see if a more moderate and restrained interpretation of its policies might avoid a conflict with other interested states.³⁰³ Such reconsideration should lead states to forego application of their law where the effects of the defamation on the plaintiff within the state, and concomitantly the probable benefit to the state affording the plaintiff recovery, are minimal or non-existent. At most, the state's interest, on reconsideration, should be limited to the extent of the in-state harm. A court supplementing interest analysis with comparative impairment principles³⁰⁴ should reach a similar result. Application of its relatively speech-inhibiting law whenever it has minimal connections with the litigation may not merely impair, but may effectively nullify, the interest of states with relatively speech-enhancing laws. While the forum's policies may be partially impaired, they will not be similarly nullified if its laws are applied to compensate those with respect to whom it has a substantial compensation interest. Thus, choice of law rules favoring application of the law of a state whose interests would be most impaired should favor nonforum law when the forum's connections with the litigation are minimal.

The one modern approach that cannot be reconciled with the concerns stressed by this Article is the *lex fori* approach. The potential

²⁹⁹ See Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 285-87 (1966).

³⁰⁰ See *id.* at 282-83.

³⁰¹ See *supra* notes 114-24 and accompanying text.

³⁰² Indeed, courts using a "weighing of interests" approach may on occasion find speech-enhancing interests of higher quality than either deterrence or compensation interests, leading them to apply a law less speech-inhibiting than that of a state with a significant compensatory interest. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (precluding compensation absent a showing of fault, thereby furthering speech-enhancing interests notwithstanding harm to the plaintiff).

³⁰³ See *supra* note 100 and accompanying text.

³⁰⁴ See *supra* notes 102-03 and accompanying text.

constitutional problems inherent in this approach, however, should give pause to courts that use it before they apply forum law in defamation cases in which the forum state has a relatively minor compensation interest.

Because most modern choice of law approaches incorporate principles that reflect the concerns stressed by this Article, courts should use the choice of law model developed here. Its suggested resolution follows not only from constitutional tenets but also from principled choice of law considerations. The model normally will require application of the law of a state that has a significant interest, relative to the interests of other states of circulation, in compensating the plaintiff. Furthermore, the concerns for efficiency and simplicity incorporated into some modern approaches should usually lead courts to apply that state's law to all aspects of the case. Neither the concerns stressed by this Article nor the choice of law principles that reflect them, however, would bar a court's occasional reliance on other choice of law factors to apply another state's more speech-enhancing law to a given issue.³⁰⁵ But application of more speech-inhibiting law would be inconsistent both with constitutional concerns and with conflict of law principles that extant approaches explicitly affirm.

CONCLUSION

The widespread susceptibility of defamation defendants to jurisdiction is likely to result in an increasing amount of litigation over choice of defamation law. This Article demonstrates that superficial reliance on precedent enunciating constitutional limitations on choice of law will not adequately protect important constitutional values in the context of defamation law. Rather, courts deciding choice of law issues must be particularly cognizant that largely unrestrained application of forum defamation law can pose particular dangers, not present in other settings, to values reflected by full faith and credit, federalism, and first

³⁰⁵ For example, a defendant may claim reliance on the protection of the shield law of a state where information was obtained with a promise of confidentiality. Even if this is not a state with a relatively significant compensation interest, the RESTATEMENT (SECOND) requires that courts consider the protection of justified expectations. *See supra* note 89. The better rule of law approach also considers predictability of results. *See supra* note 113 and accompanying text; Lefflar, *supra* note 299, at 282-284. These concerns may lead courts to apply that state's law. Similarly, a court weighing the interests or applying the better rule tie-breaking criteria may consider a speech-enhancing rule entitled to higher regard than a speech-intrusive rule. To apply such a rule would not infringe on constitutional concerns. *See supra* pages 422-23. To apply a more speech-inhibiting rule through application of these factors would, however, impinge upon these concerns.

amendment principles. Courts recognizing these dangers should take them into account not merely as a matter of constitutional compulsion, but also as a matter of sound common law decision making. If they do so, and thereby generally apply defamation law no more speech-inhibiting than that of a state with a relatively significant compensation interest, they will affirm values that have formed part of the basic structure of this nation.