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Process - Foreign Publishing Corporation Subject To Suit in Connecticut For Libel; In Personam Jurisdiction Over News Media Governed By First Amendment Considerations of Parties' Interests and Not By That Amendment's Application to "Minimum Contacts" Requirement of Due Process Clause. Buckley v. New York Post Corp. (2d Cir. 1967)

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PROCESS—FOREIGN PUBLISHING CORPORATION SUBJECT TO SUIT IN CONNECTICUT FOR LIBEL; IN PERSONAM JURISDICTION OVER NEWS MEDIA HELD GOVERNED BY FIRST AMENDMENT CONSIDERATIONS OF PARTIES' AND PUBLIC'S INTERESTS AND NOT BY THAT AMENDMENT'S APPLICATION TO "MINIMUM CONTACTS" REQUIREMENT OF DUE PROCESS CLAUSE. *Buckley v. New York Post Corp.* (2d Cir. 1967).

Alleging that the New York Post had published two newspaper editorials maliciously and with reckless disregard of the truth, the outspoken devotee of Conservatism, William F. Buckley, Jr., brought action for libel in the superior court of Connecticut—his state of domicile. Though the defendant, a Delaware corporation with its principal business location in New York City, was in no way physically situate in the forum state, substituted service of process was effected by mail in accordance with the Connecticut "long-arm" statute. Answers to interrogatories later revealed that, on the days the editorials had appeared, 2,021 copies of the Post's daily edition and 2,026 copies of its weekend edition had been distributed by various means to persons in Connecticut.[1]

Upon removal of the case to the federal district court, the Post entered a motion for dismissal on the ground that Connecticut jurisdiction was lacking, subdivisions (3) and (4)[2] of the "long-arm" statute notwithstanding. The district court adjudged subdivision (3) applicable, since it prescribes jurisdiction over a foreign corporation in an action arising from the use or consumption of its goods within the state. However, dismissal was granted on the theory that the subdivision's application to the defendant would violate rights

[1] The distribution was effected by wholesale agents, bus and mail shipments consigned to dealers, and mail subscriptions. The figures in the text do not include the "indeterminable" number of copies sold in New York with the expectation that they would be taken into Connecticut by commuters returning from work.

[2] CONN. GEN. STAT. ch. 599, § 33-411 (1961).

Service of process on foreign corporation. . . .

(c) Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: . . . (3) out of the production, manufacture or distribution of goods by such corporation with the reasonable expectation that such goods are to be used or consumed in this state and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed or sold or whether or not through the medium of independent contractors or dealers; or (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

secured by the due process clause of the fourteenth amendment. On appeal to the Second Circuit Court of Appeals, *held*, reversed: Were the case solely dependent upon subdivision (3), want of jurisdiction would indeed necessitate dismissal; subdivision (4), on the other hand, in permitting jurisdiction over a foreign corporation as a result of "tortious conduct" within Connecticut, could validly be applied without constitutional objection. *Buckley v. New York Post Co.*, 373 F.2d 175 (2d Cir. 1967).

In *Buckley-Post*, after construing the state "long-arm" statute applicable to the defendant,[3] the court proceeded to entertain the pri-

[3] In confronting this problem, the court was concerned with the judicial interpretation of the Connecticut "long-arm" statute, and the application of the statute in rapport with the single-publication rule.

In substituting subdivision (4) as the basis of jurisdiction, the court indicated that the wording, "used or consumed," in subdivision (3) was scarcely expressive of reading a newspaper. Although acknowledging that the *raison d'être* of subdivision (3) lay in products liability actions, the lower court had believed that it would be "too strained an interpretation" to differentiate between an instance where "a nail is concealed in an unopened can of peas" and another where "defamatory words lie dormant in an unread newspaper," since in either case no "cause of action arises until some further act occurs." The appellate court, however, could not extend the analogy. It was noted that, although the statutory wording could rationally be extended to include reading, it would never include viewing a television or listening to a radio. Consequently, it was held judicially inconsistent to interpret from the subdivision a grant of jurisdiction over publishers of newspapers or magazines, but not over broadcasting companies. 373 F.2d at 177-78.

The court justified the application of subdivision (4) by noting that the ordinary denotation of the phrase, "tortious conduct in this state," could not exclude the distribution of two thousand copies of libel. Even though the "last event" approach, which situates the place of wrong where the defamation is communicated, has been stigmatized as an unsound basis for choice of law, its influence upon the Connecticut legislature was not considered vitiated to the extent that libel would be disregarded as tortious activity. 373 F.2d at 178-79.

This apt interpretation, giving efficacy in the instant facts to the Connecticut statute, was, however, asserted by the defendant to be nugatory. Invoking the rationale of Insull v. New York World-Telegram Corp., 172 F. Supp. 615, 632-34 (N.D. Ill.), *aff'd* 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960), the Post averred that the single-publication rule compelled the abandonment of the literal statutory meaning. In *Insull*, the cause of action for libel was held implicitly complete at the initial publication of the newspaper. Since the publication had occurred outside Illinois, the plaintiff's domicile and forum of the action, the subsequent distribution of the newspaper in that state by independent wholesalers was held inconsequential to the creation of the cause of action. Therefore, jurisdiction could not attach to the defendants because no tortious activity had taken place within Illinois.

Although advocated by the Post, a rationale analogous to *Insull* was not adopted in *Buckley-Post*. A recent Illinois decision, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 432, 176 N.E.2d 761 (1961), which broadly construed the Illinois "long-arm" statute, was cited by the court as casting doubt on *Insull's* present applicability. In *Gray*, the cause of action arose from the explosion of a water heater with a defective safety valve. The manufacturer of the valve contended that because the wrong had not originated in Illinois, arising instead from the acts performed in the state of production, jurisdiction could not attach to it. The argument was that, by using the term "tortious conduct" and not "tort," the Illinois legislature intended to separate the act or conduct from any consequences thereof, with only the former

mary issue whether due process would be denied the Post in holding it amenable to suit in Connecticut.

At common law, the corporate entity was judicially envisaged as existing only within the state of creation.[4] Accordingly, it was held that an action *in personam* could not be maintained outside the creating state's jurisdiction, for extraterritorially the corporation was not merely considered foreign, but nonexistent.[5] This strict conception was, however, quickly modified. Since the corporate form was becoming the primary conduit of business activity throughout the nation, courts began to realize that it should be amenable to suit in jurisdictions other than that of incorporation.[6] In addition to finding a valid basis of jurisdiction in express consent—either actual or imposed by statute as a prerequisite to engaging in business within the state[7]—courts developed three formulae to determine amenability to suit: implied consent to the jurisdiction, presence within the forum state, and "doing business" therein. Ultimately, the formulae merged, with "doing business" becoming the general test in jurisdictional problems.[8]

being within the purview of the "long-arm" statute. The *Gray* court rejected this contention, holding that its adoption would only tend to promote litigation over extraneous issues, such as the elements of a tort and their territorial aspects. The test in applying the statute was thought to "be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature." *Id.* at 763.

Prompted by *Gray* and the lack of Connecticut cases upholding the *Insull* doctrine, the *Buckley-Post* court failed to heed *Insull* in interpreting Connecticut law. Although the single-publication rule has not been adopted in Connecticut, the court agreed with earlier judicial predictions that its adoption was forthcoming. Nevertheless, it noted that only aberrant reasoning would permit the single-publication rule to spare a newspaper or magazine publisher from the reach of a "long-arm" statute. The purpose of the rule was not to deny the plaintiff the prerogative of suing in his domiciliary state when defamed by a party residing beyond its jurisdiction; rather, it was established "to protect the defendant—and the courts—from a multiplicity of suits, an almost endless tolling of the statute of limitations, and diversity in applicable substantive law." 373 F.2d at 179-80. However, it was held that this protection should not be afforded with indifference to the rights of the plaintiff, thereby permitting the single-publication rule to nullify libel circulating outside the situs of its original publication. A further authority serving to eviscerate the Post's contention was Mattox v. News Syndicate Co., 176 F.2d 897 (2d Cir.), *cert. denied*, 338 U.S. 858 (1949), a Second Circuit decision in which, albeit the initial publication had taken place in New York, the substantive law of plaintiff's domicile, Virginia, was deemed controlling. Apparently, had a tort not been recognized as occurring in Virginia, its substantive law would have been inapplicable under conflict-of-laws prinicples.

4 Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

5 EHRENZWEIG, CONFLICT OF LAWS § 33, at 111 (1962).

6 Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 578 (1958).

7 EHRENZWEIG, *supra* note 5, at 111.

8 Kurland, *supra* note 6, at 578; *see* D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

These formulae, moreover, became necessary in order to gain jurisdiction over the corporate "person" in compliance with principle exposited in *Pennoyer v. Neff*.[9] With the ratification of the fourteenth amendment, the Supreme Court ruled that in state courts, whereas personal service was not imperative in actions *in rem*, actions *in personam* required service of process on a defendant physically present within the forum state. The oft-quoted pronouncement read:

> [W]here the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service . . . upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.[10]

But in *Buckley-Post* it was noted that "[t]he past fifty years have seen such widespread adoption of statutes asserting personal jurisdiction over non-residents and so many decisions upholding their constitutionality as to constitute a veritable *bouleversement* of [this] magisterial pronouncement . . . ."[11] This "reversal" has permittted plaintiffs, in cases similar to *Buckley-Post*, to bring suit in their own fora through constructive or substituted service of process, thus sounding a requiem for the bias which had formerly favored defendants in the area of *in personam* jurisdiction.[12]

A landmark decision contributing to this demise was *International Shoe Co. v. Washington*,[13] in which the Supreme Court replaced the "doing business" test with the following criterion: If a defendant were not present within the territory of the forum, the only mandate of due process in an action *in personam* would be that he have certain "minimum contacts" with it, "such that the maintenance of the suit [would] not offend 'traditional notions of fair play and sub-

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[9] 95 U.S. 714 (1878).
[10] *Id.* at 727.
[11] 373 F.2d at 180-81.
[12] *Id.* at 181. *See* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128 (1966). *See also* D. Currie, *supra* note 8, at 553-54; Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.
[13] 326 U.S. 310 (1945).

stantial justice.' "[14] A later Supreme Court holding, *McGee v. International Life Ins. Co.*,[15] in implementing *International Shoe*, well illustrated the liberality of the "minimum contacts" criterion. Although, in *McGee*, the defendant's only "contacts" with the forum state had been the sending of an insurance policy to one of its residents and the receiving of paid premiums via return mail, the court determined that the "minimum contacts" had been demonstrated; the due process requirement, therefore, was deemed satisfied.

The *Buckley-Post* court, though readily acknowledging that certain language in *McGee* underscored considerations peculiar to insurance, reasoned that a general principle could be drawn from its opinion which would permit states to assert jurisdiction over nonresidents without impinging on rights guaranteed by the fourteenth amendment.[16] It was noted that inequities, discordant with the principle of due process, would only appear in situations where the defendant was subject to the jurisdiction of a forum with which he was not relevantly connected.[17] Since a wholly isolated event giving rise to a tort can comprise this connection,[18] the court perceived "no constitutional problem in Connecticut's summoning the New York Post to answer in its courts for a tort—*other than defamation*—alleged to have been

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[14] *Id.* at 316. The new criterion did not completely eliminate the older test, however, as courts continued to ascertain jurisdiction over a foreign corporation by inquiring whether it was "doing business" within the forum state. Annot., 25 A.L.R.2d 1202, 1203 (1952).

[15] 355 U.S. 220 (1957).

[16] The court expressed the opinion that, once the traditional notion that the plaintiff must follow the defendant was forsaken, this general principle would not appear violative of basic concepts of fair play. Contrary views would be bottomed on an inarticulate premise, subject to question by the legislature, that plaintiffs are more susceptible to bringing unjust actions than defendants are to avoiding just ones. "Indeed, when the operative facts have occurred where the plaintiff sues, the convenience of both parties would often be served by a trial there, and the chief benefit to the defendant of a rule requiring the plaintiff to seek him out is the impediment this creates to the bringing of any suit at all." 373 F.2d at 181; *cf.* McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957).

[17] D. Currie, *supra* note 8, at 534.

[18] *See* Elkhart Engineering Corp. v. Dornier Werke, 343 F.2d 861 (5th Cir. 1956); Hutchinson v. Boyd & Sons Press Sales, Inc., 188 F. Supp. 876 (D. Minn. 1960); Owens v. Superior Court, 52 Cal. 2d 822, 830, 345 P.2d 921, 924 (1959); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); S. Howes Co. v. W.P. Milling Co., 277 P.2d 655 (Okla. 1954); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951). *Contra*, Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Although in many of the cases cited before *Putnam* the defendant or his agent had been within the forum state, the *Buckley-Post* court did not find this decisive. *See* St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966); D. Currie, *supra* note 8, at 549.

committed in Connecticut upon a Connecticut resident . . . ."[19] The court temporarily excluded defamation from this conclusion so that an analysis could be made of recent southern decisions, notably *New York Times Co. v. Connor*,[20] which have held that, because of first amendment considerations, a more substantial contact must be evidenced in libel actions than would be necessary in other tort cases. Oddly enough, the *Connor* court failed to state what would be a constitutionally sufficient contact. Written in the negative, the opinion merely indicated that a daily newspaper circulation of 395 copies and a Sunday total of 2,455, coupled with certain business solicitation and personnel visits in the forum state, had not met the "minimum contacts" test. In view of the fact that a *Connor* precedent, the 1964 decision of *Buckley v. New York Times Co.*,[21] was equally uninformative, the only normative principle which the *Buckley-Post* court could extract after a perusal of these opinions was that jurisdiction cannot be asserted consistently with due process when a small newspaper circulation in the forum state is outweighed by the foreign corporation's having to face a local, prejudiced jury.[22]

Although propounding a contrary thesis, the court eschewed a critique of the *Connor* holding.[23] Instead, a different approach was pursued. The development of substantive principles under the first amendment, it was noted, have recently tempered the risks to which

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19 373 F.2d at 181 (emphasis added).

20 365 F.2d 567 (5th Cir. 1966).

21 338 F.2d 470 (5th Cir. 1964).

22 New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966). The statement in *Connor* reads: "where the size of . . . circulation does not balance the danger of . . . liability." But the *Buckley-Post* court noted that this statement did not mean liability as such, but meant the added danger of facing the local jury, incensed because of the newspaper's slanted coverage of local events.

In *Connor*, the Fifth Circuit was confronted with seemingly inconsistent precedents. The court had held in *Buckley*, a case with facts similar to those before it, that sufficient contact had not been shown, while in Elkhart Engineering Corp. v. Dornier Werke, 343 F.2d 861 (5th Cir. 1965), it had ruled that tortious damage caused by a single airplane crash had been within the fourteenth amendment requirement. The two were reconciled, nonetheless, by applying the first amendment principle. The *Connor* court noted that it had earlier approved of such a first amendment application in Walker v. Savell, 335 F.2d 536, 544 (5th Cir. 1964), "because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts."

23 The court, however, deemed the *Connor reasoning* dubious as applied to other factual situations. Like other entrepreneurs who inflict harm in providing services beneficial to the public, publishers must compensate those whom they have injured. Credence, therefore, could never be given to the decision if the plaintiff had been a highly respected educator or clergyman rather than "Bull" Connor, and, instead of the New York Times—a newspaper of ethical repute—the defendant had been a scandal magazine which had published libelous articles depicting the hypothetical plaintiff as a corruptor of children. 373 F.2d at 182.

publishers are exposed in libel actions. A significant case in this development, *New York Times v. Sullivan*,[24] outlined these principles. In an action to recover general damages for circulating an advertisement which had attacked a public official's conduct, the Supreme Court declared a state-authorized presumption of malice inconsistent with federal law. In such cases, the Court ruled, constitutional guarantees demand proof of "actual malice." Since "actual malice" was defined as "knowledge" of the publication's falsity or "reckless disregard" of its truthfulness, factual inaccuracies and defamatory content resulting from negligence in publishing were held insufficient to award general damages.[25] While *Sullivan* was limited to public officials, an extension, so as to include candidates for public office and *publicly controversial figures*, was subsequently suggested by the Second Circuit,[26] and successfully employed as a defense in another action.[27] In light of *Sullivan* and the later extension, the *Buckley-Post* court queried whether these substantive aspects would not "sufficiently protect communications media without superimposing a necessarily vague First Amendment standard upon the application of long-arm statutes and thereby possibly creating undue hardship for a plaintiff . . . ."[28] It was observed that, ironically, the *Connor* opinion answered this query affirmatively. After determining that jurisdiction could not constitutionally be imposed, the *Connor* court considered the merits of the case, and exonerated the defendant because the facts were admittedly governed by the doctrine enunciated in *Sullivan*.[29]

In conclusion, the *Buckley-Post* court conceded that procedural rules as well as substantive defenses may be necessary to protect foreign publishing corporations. Yet these rules, in eliminating onerous trials and appeals, would not find their basis in jurisdiction under the fourteenth amendment itself, but in the states' exercise of jurisdiction pursuant to the first amendment's objectives. Appropriate dismissals would therefore result from first amendment considerations made applicable to the states through the fourteenth amendment and not from failures to meet the "minimum contacts" require-

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[24] 376 U.S. 254 (1964).

[25] *Id.* at 280; *accord*, Garrison v. Louisiana, 379 U.S. 64 (1964). It is interesting to note that the plaintiff in the instant case used this "actual malice" terminology in his pleading.

[26] Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964).

[27] Pauling v. National Review, Inc., 49 Misc. 2d 975, 269 N.Y.S.2d 11 (1966).

[28] 373 F.2d at 182-83.

[29] New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966).

ment of the due process clause.[30] This approach would parallel that taken by the Supreme Court in cases dealing with the commerce clause. In *Davis v. Farmers Co-operative Co.*,[31] the Court reversed a Minnesota judgment against a director of a foreign railroad corporation in a suit arising from a transaction totally unrelated to the forum state. Compelling a party to defend in such a situation was termed an undue burden on interstate commerce and, consequently, "obnoxious" to the constitution, *irrespective of jurisdiction under the fourteenth amendment.* Scrupulously preserved in later Supreme Court opinions,[32] this distinction, if applied to libel actions involving the news media, would focus "attention on the facts allegedly creating hardship in each case . . . ,"[33] rather than impose a jurisdictional due process fiat mechanically applying to even the most diverse facts. In other words, in such libel actions courts could refuse to exercise jurisdiction when the facts revealed that a different forum was necessary. Thus, the first amendment would give the doctrine of *forum non conveniens* constitutional stature; and courts, pursuant to the dictates of this equitable doctrine, would consider the interests of the public and the parties involved in determining the proper forum. In view of the parties' interests in *Buckley-Post*, the court could discern no first amendment abridgment in subjecting the Post to Connecticut jurisdiction. Whereas the New York Times, in the *Connor* and *Buckley* cases, might well have ceased distribution in the southern states in lieu of facing repeated libel actions in those distant fora, it did not appear, in the principal case, that the Post would forego revenue from Connecticut sales and thus deprive Connecticut readers of its news and editorials, rather than defend a suit in that forum, a few miles from New York.[34]

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30 *See* New York Times Co. v. Connor, *supra* note 29, at 572.

31 262 U.S. 312 (1923).

32 *E.g.*, Michigan Central R.R. v. Mix, 278 U.S. 492 (1929); Hoffman v. Missouri *ex rel.* Foraker, 274 U.S. 21 (1927); Missouri *ex rel.* St. Louis, B. & M. Ry. v. Taylor, 266 U.S. 200 (1924); Atchison, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101 (1924); *see* Denver & Rio Grande Western R.R. v. Terte, 284 U.S. 284 (1932).

33 373 F.2d at 183. The distinction, the court stated, would be far more equitable than a stringent rule of jurisdiction which indiscriminately precludes a plaintiff from bringing suit in his own jurisdiction whether the publicaton occurred twenty-five miles or twenty-five hundred miles from the forum.

34 Further, the court could not overlook the two states' economic and intellectual affinity. The mere existence of their mutual border, it was held, should not prevent, by virtue of the first amendment, a libel action against the Post in a Connecticut court when the defendant is amenable to suit for libel in Buffalo or Skaneateles, New York. A contrary view would only substitute formalism for the realistic approach which ought to be taken before the first amendment bars a forum from exercising jurisdiction over a domiciliary of another state. 373 F.2d at 184.

Although somewhat cryptically explained, the *Buckley-Post* analysis of the roles of the first and fourteenth amendments, in the area of libel and the "long-arm" statute, appears to be sound. The court, by drawing from analogous cases concerned with the commerce clause and by synthesizing the *Sullivan* and *Connor* decisions, has indeed established a tenable doctrine. Should *Buckley-Post* be followed, courts would protect the news media, insure the continuance of news dissemination, and, at the same time, eliminate jurisdictional barriers precluding plaintiffs from suing in their own fora.

By focusing on the substantive defenses outlined in *Sullivan*, the court has retained the first amendment protections which are vitally needed by the communications media, while obviating a strict, ill-defined jurisdictional due process norm which, as seen in *Connor* and *Buckley*, might inequitably allow libel to circulate in a foreign state without redress. Thus it would seem that the first amendment's function has been correctly interpreted: This constitutional provision should not bar the maintenance of a libel suit by requiring a more substantial showing of "minimum contracts" to satisfy the due process clause of the fourteenth amendment; on the contrary, the protection of the freedom of the press ought to come into play after jurisdiction has been established. It would be inconsistent with the notion of "fair play and substantial justice" to prevent an action, when in litigation the substantive test of "actual malice" would balance the need for redressing libel against the constitutional safeguards surrounding the news media.

The *Buckley-Post* doctrine would not, however, completely eliminate jurisdictional protection. The elevation of the doctrine of *forum non conveniens* to constitutional stature would warrant an equitable decision in each case. If the application of a "long-arm" statute to a foreign publishing corporation would create a possible discontinuance of its newspaper's distribution in the forum state, and thus a possible abridgment of the first amendment, a different forum could be sought.

The idea of basing jurisdiction upon the interests involved in a libel suit, *i.e.*, upon basic notions of fairness, is not without support. Professor Ehrenzweig notes that California has determined jurisdiction over a foreign corporation in a warranty action by considering "whether there is afforded to both parties a greater amount of justice by allowing suit in [California] rather than elsewhere."[35] Indeed the

[35] Fielding v. Superior Court, 111 Cal. App. 2d 490, 496, 244 P.2d 968, 972, *cert. denied*, 344 U.S. 897 (1952), *quoted in* EHRENZWEIG, *supra* note 5, at 118.

McGee decision appears in accord.[36] Furthermore, Professor Ehrenzweig writes, an impetus has been given to the constitutional freedom of state legislatures and courts in subjecting foreign corporations to jurisdiction. As the earlier tests have been replaced by the *International Shoe* and *McGee* concepts of fairness, so too will these result in the acceptance of Learned Hand's simple formula:

> [T]he court must balance the conflicting interests involved: i.e., whether the gain to the plaintiff, in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. That question is certainly indistinguishable from the issue of "forum non conveniens."[37]

The *Buckley-Post* court has doubtless accepted that formula.

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[36] The *McGee* court noted that the defendant corporation would be inconvenienced by being amenable to suit in the forum state but held that this inconvenience would not amount to a denial of due process. McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957).

On the other hand, the Supreme Court, in Hanson v. Denckla, 357 U.S. 235 (1958), held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. But Justice Black, in his dissent, viewed the majority's opinion as stemming from the antiquated principles of *Pennoyer.* Citing *McGee,* he stated that "the old jurisdictional landmarks have been left far behind so that in many instances States may now properly exercise jurisdiction over nonresidents . . . ." *Id.* at 260.

[37] Kilpatrick v. Texas & P. Ry., 166 F.2d 788, 790-91 (2d Cir.), *cert. denied,* 335 U.S. 814 (1948), *quoted in* EHRENZWEIG, *supra* note 5, at 118.