Summer 1994

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Cover Page Footnote
International Law; Commercial Law; Law

This comments is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol19/iss3/5
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I. Introduction

Should the First Amendment attach to all speech that originates in the United States, or are constitutional protections for expression shed at the border? State of the art communications technology has heralded a new international age for media. Instant retransmission of picture, sound, and data has given rise to exponential growth of transnational exchanges of news, entertainment and advertising. With this explosion of international media comes the increased risk of cross-border defamation.\(^1\) The problem, for example, is that a constitutionally privileged statement in the United States may be a libel\(^2\) in Britain. The conflict is exacerbated when litigants select forums in order to evade or hide behind the First Amendment.

This substantial conflict between the Constitution and foreign defamation law presents a challenge for American courts: When faced with a case that would otherwise require the application or enforcement of foreign defamation law, should principles of international law give way to the First Amendment's insulation of the media from defamation liability? When U.S. courts would otherwise apply foreign law, or enforce foreign judgments, how should First Amendment concerns be addressed? Although the three modern decisions facing the question have resulted in the application of First Amendment protections, the standards by which each court ruled are not consistent, and in some instances, they are not even clear.

Defamation suits against the media pit individuals' interests in their reputations against values underlying freedom of expression. American constitutional standards resolve this tension strongly in favor of the latter.\(^3\) This policy preference for the press is uniquely Ameri-

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\(^1\) The terms "defamation" and "libel" are used somewhat interchangeably. For the record, "[d]efamation is made up of the twin torts libel and slander—the one being, in general, written, the other spoken." W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 111, at 771 (5th ed. 1984).

\(^2\) A prima facie case of libel requires the plaintiff to prove that the defendant "(1) published a statement that was (2) defamatory (3) of and concerning the plaintiff." Keeton et al., supra note 1, § 113, at 802.

\(^3\) See, e.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (stating that "where the scales [between press freedom and injury to an individual's reputation] are in
can and is embodied in the First Amendment and the Supreme Court's interpretations of the speech and press clauses. Whether this protection follows the U.S. media when it publishes abroad is unsettled. Although it is rarely analyzed, the extent to which extraterritorial defamations receive First Amendment protection is a reflection of a particular court's construction of the First Amendment.

While courts and commentators are virtually unanimous that the First Amendment protects expression that is necessary to democratic self-government, the level of protection for speech that is unrelated to the political process is quite unsettled. Some would argue that First Amendment protection should not extend further than that speech necessary for self-government. Others arguing for a more expansive system of freedom of expression, believe that the First Amendment is, or should be, a necessary component of human dignity, the core of constitutionally protected liberty, essential for self-fulfillment, and the guarantor of dissent as a crucial American cultural symbol. Courts that restrict the First Amendment to its self-government function are suspect of arguments that constitutional speech protections extend to defamations published abroad, where American self-government purposes could not possibly be implicated. Courts that embrace a "self-government plus" view of the First Amendment are more inclined to extend constitutional protections to U.S. publications in other nations.

Yet, the transnational defamation case law focuses on stock-phrased choice-of-law tests that are usually reduced to the indeterminacy of asking whether litigants "relied" on First Amendment protections. Discussions of the scope of First Amendment protection and its nexus with the choice of a standard for decision is cursory or wholly absent. Whether or not this omission is intended, it is a flaw. For no uncertain balance, we believe the Constitution requires us to tip the balance in favor of protecting true speech.


5 Meiklejohn, supra note 4; Bork, supra note 4.


7 Baker, supra note 4.

8 Emerson, supra note 4.

9 Shiffrin, supra note 4.

10 Throughout this Comment the term "self-government only" is used to refer in the aggregate to all theories that advocate restricting First Amendment protection only to expression concerning self-government functions. The term "self-government plus" is used to refer in the aggregate to theories that advocate protecting expression beyond that necessary for self-government.
matter the test chosen, the decision to apply the First Amendment to an extraterritorial defamation case will ultimately hinge on a judge's personal philosophy of the First Amendment.

Part II of this Comment will compare defamation law of the United States to that of England. United States law evolved from English law. The emergence of First Amendment protections in the United States without corresponding developments in England, however, currently allows public figure plaintiffs to recover claims in English courts that would be barred in the United States. Part III will discuss the extraterritorial application of the First Amendment to defamation cases in the choice-of-law and enforcement of judgment contexts. Part IV will analyze three cases in which courts considered the extraterritorial application of the First Amendment in defamation cases. Part V will demonstrate that First Amendment theories are divided between those that advance self-government as the exclusive purpose of free expression and those that advance some form of "self-government plus." Part VI will demonstrate how a court's acceptance or rejection of "self-government plus" colors its results in extraterritorial defamation cases and will conclude that reliance on a "self-government only" theory, and consequent refusal to extend the First Amendment beyond U.S. borders, is incorrect.

II. A Comparison of English & American Defamation Law

The problem of applying foreign defamation law to the U.S. media is brought into focus by comparing English law to U.S. law. It is particularly relevant to examine English law for two reasons. First, American defamation law originally derived from English common law. Second, England and jurisdictions that follow English common law have become the forum of choice for suits against U.S. media.\(^1\)

A. English Law

Under current English common law, a prima facie libel claim requires the plaintiff to show: (1) that the challenged statement was defamatory, that is, that it caused injury to his reputation; (2) that he is identifiable to others from the context of the statement;\(^2\) and (3) that defendant published the statement.\(^3\) Where a statement is libelous per se,\(^4\) plaintiff need not prove actual injury; injury to reputation will

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\(^2\) A defendant may be liable even though he had no reason to believe that the statement referred to the plaintiff. Eric Barendt, *Freedom of Speech* 181-84 (1985).

\(^3\) See Colin Duncan & Brian Neill, *Defamation* ¶ 5.01 (1978); see also, Knupffer v. London Express Newspaper, Ltd., [1944] 1 All E.R. 495 (H.L.) ("The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff.").

\(^4\) A statement is a libel per se if it is susceptible of no meaning other than the defamatory meaning. In such a case the statement is defamatory as a matter of law, the issue of
be presumed and damages will be awarded. Plaintiff need not show any fault on the part of the defendant unless rebutting a qualified privilege or seeking punitive damages. Truth, or "justification" is a complete defense, but an unsuccessful justification defense may aggravate damages because English law recognizes that a defendant may be punished for reaffirming the truth of the defamation. The public or private status of a plaintiff is irrelevant; so too is the nature of public interest in the challenged expression. The common law of England is followed by most other common law jurisdictions.

B. U.S. Law

Eighteenth century English law provided the rules of decision in the courts of the American colonies. After independence, the common law of the colonies became the law of the states. The defamation action remained substantially unchanged in America until the twentieth century, when some states began to recognize speech protections for the press under state constitutions and under interpretations of the federal Constitution. It was not, however, until 1964 that the Supreme Court held the First Amendment applicable to the tort of defamation.

In New York Times v. Sullivan the Supreme Court first addressed the fundamental conflict between the common law of defamation and the values of the First Amendment. The plaintiff, a Montgomery, Alabama commissioner with oversight responsibility for the police department, filed a libel action against the New York Times for publishing an advertisement that criticized the behavior of the Montgomery police.

defamatory content does not go to the jury, and injury is presumed. Keeton et al., supra note 1, § 112, at 795-96.

Two types of statements require the plaintiff to prove defamatory meaning. A libel per quod is a statement that is benign on its face, but when considered in context defames the plaintiff. In this case the plaintiff must prove the innuendo, i.e., the circumstances that render the statement defamatory. A statement may also be susceptible of two meanings, one benign, the other defamatory. In that case, the plaintiff must show that the speaker intended the defamatory meaning. Id. at 796.

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15 Barendt, supra note 12, at 178. Because of the difficulty of establishing quantifiable damages for the injury to reputation caused by defamation, the availability of presumed damages often means the difference between a hollow victory and one in which the plaintiff actually recovers. Keeton et al., supra note 1, § 116A, at 842-43.


17 Duncan & Neill, supra note 13, ch. 12.


19 Id.

20 E.g., Desai v. Hersh, 719 F. Supp. 670, 674 (N.D. Ill. 1989) (noting that Indian law has its roots in English law); DeRoburt v. Gannett Co., 83 F.R.D. 574, 580 (D. Haw. 1979) (noting that the Pacific island-nation of Nauru follows English law).


in civil rights protest activities. Under the common law of Alabama, plaintiff won a $500,000 damage award that was upheld by the Alabama Supreme Court. The U.S. Supreme Court, in an opinion written by Justice Brennan, reversed, holding the Alabama law to be unconstitutional.

In reaching its decision, the Court held that the First Amendment mandates certain minimum protections in all cases where the plaintiff is a public official seeking to recover under state law in a defamation action arising from statements concerning his official conduct. First, the plaintiff must prove that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Second, actual malice must be proved with "convincing clarity." Third, the scope of appellate review in challenges to the constitutionality of state defamation law is broadened to include findings of fact as well as conclusions and application of law.

These new constitutional standards amounted to a sweeping rejection of the common law of most American states, and were premised on the importance of the role of a free press in American democracy. By imposing heightened burdens on public officials who bring defama-

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23 Id. at 256-59. Some of the advertisement's allegedly defamatory contents were as follows:

In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

... Again and again the southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times ... [a]nd now they have charged him with perjury. ... Id. at 257-58.

24 Id. at 262-64.

25 We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. Id. at 264.

26 Id. at 279-80.

27 Id.

28 Id. at 285-86. The convincing clarity standard had been interpreted to require a greater degree of proof than the preponderance of the evidence standard traditionally applied in civil actions, but less than the reasonable doubt standard applied in criminal actions. Bose Corp. v. Consumer Union of United States, Inc., 466 U.S. 485, 517 (1984) (Rehnquist, J., dissenting).

29 New York Times, 376 U.S. at 285. "The rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Id. (quoting Pennekamp v. Florida, 328 U.S. 351, 355 (1945)).

30 Id. at 269-70.
tion claims against their critics, the law facilitates the government-monitoring function of the press. A contrary rule would prevent criticism of public officials unless the speaker was sure to a legal certainty that her statement was true. The New York Times protections intend to prevent the chilling of the press on matters relating to the performance of public officials because such information is necessary for democratic self-government. Strengthened press freedoms ensure a well-informed society because "the right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."

While acknowledging that expression of some false defamations will go unpunished, the Court contended 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 survive]."

In Gertz v. Robert Welch, the Court rejected a rule that would have extended New York Times to all statements of public concern, regardless of the public or private status of the plaintiff. Because state interest in protecting injuries to reputations of private individuals is stronger than state interest in protecting public figures, it is constitutionally permissible for states to impose any rule of fault short of strict liability for private plaintiffs' defamation recovery. The interest in insulating the press with New York Times protections is not based solely on the public interest in the defamatory statement, but on the access to the media enjoyed by public figures. Such access is not, however, available to private figures. Hence, the Court reasoned, a lower standard of liability

\[31\] Id. at 270.

\[32\] "The effect would to be shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources." Id. at 266 (internal citations omitted).

\[33\] The [First Amendment] . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. Id. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957) and Stromberg v. California, 283 U.S. 359, 369 (1931), respectively) (internal citations omitted).


\[35\] Id. at 271-72 (internal citations omitted). In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court held that New York Times protections extended to suits brought by public figures, as well as public officials. In so holding it expanded the universe of defamation claims that would impose heightened burdens on plaintiffs.

\[36\] Gertz, 418 U.S. at 343.

\[37\] In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), a plurality of the Court would have extended New York Times principles to any defamation action based on speech of public concern. This would have replaced the inquiry into plaintiff's status with an analysis of the nature of the contested statement. It is difficult to conjure up a statement that would have been reported in mass media that would not be of public concern.

\[38\] Gertz, 418 U.S. at 343.
was constitutionally permissible. Nonetheless, the award of presumed and punitive damages still requires a showing of actual malice so long as the defamation was of public concern.\textsuperscript{39}

In \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}\textsuperscript{40} the Court further extended \textit{Gertz}'s limitations of \textit{New York Times}. A four member plurality held that where a private plaintiff's defamation suit is based on a matter of purely private concern, general and punitive damages may be awarded on a fault standard less than actual malice.\textsuperscript{41}

Most recently, \textit{New York Times} protections were expanded and clarified in \textit{Philadelphia Newspapers, Inc. v. Hepps}.\textsuperscript{42} In a six to three decision written by Justice O'Connor, the Court held that where a defamation plaintiff, public or private, bases a claim on a statement of public concern, and the defendant is a media entity, the plaintiff bears the burden of proving the falsity of the statement.\textsuperscript{43} This holding displaced, once and for all, the long standing common law rule that a defamation is presumed false. Justice O'Connor summarized the constitutionalization of defamation law:

When the speech is of public concern but the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern, but the plaintiff is a private figure, as in \textit{Gertz}, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.\textsuperscript{44}

\section*{III. Extraterritorial Application of the First Amendment}

Because of constitutional limitations on defamation liability in the United States, current American law is substantially antagonistic to foreign law. This conflict is solidified in transnational defamation cases where a plaintiff seeks to apply the law of a foreign nation (usually England or some other common law nation) and the defendant presses to apply U.S. law. There are two contexts in which this clash can occur. In the choice-of-law context, a defamation action is brought in a U.S. court and foreign publication forces a choice between the law of a foreign nation and of a U.S. jurisdiction. In the enforcement of foreign judgments context, a foreign court has already rendered a judgment under foreign law, and the successful plaintiff sues to enforce that judgment against the defendant's U.S. assets in a U.S. court.

\textsuperscript{39} \textit{Id.} at 348-49.
\textsuperscript{40} 472 U.S. 749 (1985).
\textsuperscript{41} \textit{Id.} at 759-61.
\textsuperscript{42} 475 U.S. 767 (1986).
\textsuperscript{43} \textit{Id.} at 776-77.
\textsuperscript{44} \textit{Id.} at 775.
A. Choice of Law

Choice-of-law issues present complicated problems in defamation cases. Choice-of-law rules vary in different U.S. jurisdictions and depend on the nature of the cause of action. The traditional, and somewhat antiquated, rule for tort actions is lex loci delicti, which means that the rule to be applied will be the rule of the place of the wrong.

The difficulty with applying lex loci in defamation cases is that there is no way to determine mechanically the place of the wrong. Assuming the wrong to be "publication," should publication be considered the jurisdiction where defendant wrote and printed the defamation? Or should it be considered the jurisdiction where the defamation is distributed, causing injury to plaintiff's reputation? What rule should be applied if the defamation was distributed in multiple jurisdictions? While lex loci may provide some certainty in physical injury cases, the complexity of the wrong in defamation cases make the rule unworkable.

Most contemporary courts have replaced lex loci with more flexible tests. The "most significant relationship" analysis will parse each element of the claim and determine which state or nation has the most significant relationship to each element. In a defamation case, for example, the plaintiff's home state will have the greatest relationship to the element of identification because it is the place where the greatest number of persons are likely to know the plaintiff and thus think less of him as a result of the defendant's statements. Under this test, the rule of the plaintiff's home state concerning identification would be applied. The defendant's home state may, however, have the most significant relationship to the element of fault if the defendant's activities took place at home. Accordingly, a court applying a "most significant relationship" analysis could apply plaintiff's home state rule of identification and defendant's home state rule of fault in the same case.

A variation on the "most significant relationship" analysis is the "interests analysis." The subtle difference is that the interests of the

46 Id.
48 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Section 6 provides:
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
(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,
states and parties are compared to determine which rule should apply.\textsuperscript{49} Technically, the comparison should yield the rule of the jurisdiction with the most significant relationship to each issue in a case.

Another standard is the "place of greatest harm" rule.\textsuperscript{50} This rule provides that where a defamatory statement has been communicated in more than one state, the law of the state where the plaintiff has suffered the greatest harm should apply.\textsuperscript{51} This rule can be applied in conjunction with a "most significant relationship" or "interests analysis."\textsuperscript{52} Because the plaintiff usually suffers her greatest harm in her home community, this rule almost always results in application of the law of the plaintiff's home state.

These rules have been applied in defamation cases when the choice is between the laws of two U.S. states. Because the First Amendment applies in all U.S. jurisdictions, applying any of these rules in the domestic context will not raise the issue of whether \textit{New York Times} is to be applied. However, when the conflict is between the law of a U.S. jurisdiction and the law of a foreign nation, the rules do not sufficiently address the key constitutional question—whether to apply \textit{New York Times} protections.

\textbf{1. DeRoburt v. Gannett}

A U.S. court first considered extraterritorial application of the First Amendment in \textit{DeRoburt v. Gannett}.\textsuperscript{53} Plaintiff, the president of the island-nation of Nauru, brought a libel suit against the American publisher of the \textit{Pacific Daily News} (PD).\textsuperscript{54} DeRoburt's claim arose from a \textit{PD} article that reported that he had personally loaned Nauruan funds to the Marshall Islands in violation of Nauran law.\textsuperscript{55}

At issue was whether the district court should apply Nauran law. Because Nauran law is virtually identical to English law,\textsuperscript{56} DeRoburt's public status would be irrelevant, and he would not have to prove fault, meet \textit{New York Times}'s heightened evidentiary burden, nor prove falsity. Furthermore, as the challenged statement alleged a criminal act,
it would constitute a libel per se and entitle DeRoburt to damages without proof of injury.\footnote{DeRoburt, 83 F.R.D. at 575. See supra note 14.}

The court's choice-of-law analysis began with a discussion of \textit{Klaxon v. Stentor Electric Mfg. Co.}\footnote{\textit{313 U.S. 487} (1941).} Under \textit{Klaxon}, a federal court sitting in diversity is to apply the choice-of-law rule of the forum state.\footnote{DeRoburt, 83 F.R.D. at 576.} The court noted that Hawaii has no established choice-of-law rule for defamation actions. Consequently, the district court was to apply the rule "it deem[ed] most likely to be adopted by the Hawaii Supreme Court in the future."\footnote{\textit{Id.} (citations omitted).}

Recognizing the difficulties inherent in ascertaining the place of the wrong, and embracing modern trends, the court rejected lex loci.\footnote{\textit{Id.} at 577-78 n.16. Each party contended that lex loci supported its position. Defendants argued that Guam law, which includes First Amendment protections, should apply because Guam was the place where publication, the last act necessary to cause liability, occurred. Plaintiffs, on the other hand, argued that "publication," in the defamation context, is a term of art that refers to communication to a third party. Publication therefore occurred in Nauru and its law should apply under lex loci. \textit{Id.} at 577.} Concerned that formulaic application of lex loci would obviate analysis of the underlying interests of the parties and states involved, the court developed an approach that combined an "interests" analysis reinforced with a "place of greatest harm" analysis.\footnote{\textit{Id.} at 577-81.} Relying on the \textit{Restatement (Second) of Conflict of Laws (Restatement)}, the court reasoned that the policy of the forum state\footnote{\textit{Restatement (Second) of Conflict of Laws} § 6(2)(c) (1971).} and the justified expectations of the parties\footnote{\textit{Id.} § 6(2)(d).} required the application of Nauran law in conjunction with the protections of the U.S. Constitution.

The policy of the forum state, that critics of public officials receive broad protection in their commentary, is inviolable:

\begin{quote}
The importance of this policy cannot be overstated. It is a principle fundamental to our system of constitutional democracy 'that debate on public issues should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government officials.' To insure the vigorous candid and unfearing disclosure of information concerning public officials, the Supreme Court held [in \textit{New York Times}] that the alleged defamer of a public official enjoys the constitutional protection of the 'actual malice' standard [which ultimately extends some protection to false statements].\footnote{DeRoburt, 83 F.R.D. at 579 (quoting \textit{New York Times}, 376 U.S. at 270).}
\end{quote}

Next, the court emphasized the impact of the expectations of the parties and its effect on their conduct. \textit{PD} published "with the expectation that [its] freedom of expression [would] be protected in the United States courts,"\footnote{\textit{Id.} at 580.} and consequently it was unrestrained in its criticism of...
a public official. Because "the public policy of the United States requires the application of the First Amendment to libel cases brought in this country," the court concluded that the parties could justifiably expect the application of *New York Times*, but not necessarily the law of Hawaii or Guam.

The court relied further on the *Restatement* and prior Ninth Circuit law to conclude that a "state of greatest harm" analysis would provide an additional measure by which to examine the interests of the parties. Because DeRoburt was a resident of Nauru and was most susceptible to injury to reputation there, Nauru was the place of greatest harm. Accordingly, the law to be applied was the law of Nauru, to the extent that it did not conflict with the First Amendment. That is, Nauran law was to be applied with the fault, falsity and evidentiary standards of *New York Times*. Effectively, *PD* benefitted by the court's rule, which is similar to that of a generic U.S. jurisdiction.

The court's holding appears to be that when choice-of-law analysis requires the application of a foreign state's defamation law, and the defendant published with the justifiable expectation of First Amendment protection, the First Amendment will be read into the law of the foreign state, affording the defendant as much First Amendment protection as he would receive if the law of a U.S. state were applied. Because it is the policy of every U.S. jurisdiction that broad *New York Times* protections be afforded to critics of public officials and public figures, the *DeRoburt* rule would apply the First Amendment protections virtually any time that a U.S. publisher is sued for defamation in a U.S. court. The question that is left open is: Under what circumstances could a U.S. speaker publish *without* justifiable expectation of First Amendment protection.

2. Desai v. Hersh

*Desai v. Hersh* stands in subtle contrast to *DeRoburt*. Although the federal district court appeared to apply First Amendment protec-

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67 Id.
68 Id.
69 Id. (citing Hanley v. The Tribune Publishing, Co., 527 F.2d 68 (9th Cir. 1975)).
70 Id. It takes a few analytical gymnastics to understand how a court that rejects lex loci can then turn to the "place of greatest harm." Perhaps the distinction is that lex loci operates on the fiction that there is one place where plaintiff was injured. In contrast, "place of greatest harm" acknowledges that plaintiff may have been injured in multiple places, but addresses the fact that plaintiff has suffered more in one place than in others. Furthermore, the court employed "place of greatest harm" in conjunction with an interests analysis, avoiding the arbitrariness of lex loci.
71 Id. at 580-81.
72 For example, would the *DeRoburt* rule extend to a publisher that is incorporated and has its principal place of business in a U.S. state, but whose distribution is primarily outside the U.S.?
74 *Desai* expressly declines to follow *DeRoburt*. Id. at 675. By adopting a rule that appears to exempt defendant from liability, see *infra* notes 110-19 and accompanying text, it
tions to a suit arising from the defendant’s foreign publication, it imposed a limiting principle that substantially restricts the extraterritorial reach of the First Amendment. Plaintiff Moraji Desai, a prominent politician in India, brought a libel action against Seymour Hersh, the author of *The Price of Power: Kissinger in the Nixon White House.* Desai’s action was premised on Hersh’s allegation that Desai sold secrets to the CIA while serving as deputy Prime Minister under Indira Gandhi. Two of Desai’s counts alleged violations of Indian libel law. Like Nauru, India’s laws derive from the common law of England. Accordingly, Indian law does not privilege criticism of public officials and public figures.

Desai’s public figure status was conceded, thus the issue before the court was whether it would be constitutionally permissible to allow his claims under Indian law to go forward without imposing *New York Times* burdens. Recognizing that “the applicability of First Amendment protections to extraterritorial activities is uncertain,” the court sought to develop a rule. *DeRoburt,* the court noted, was the only case on point.

Desai argued that because PD’s activities in Nauru were random, and Hersh’s distribution into India deliberate, *DeRoburt* was distinguishable. *DeRoburt*’s injection of *New York Times* into Nauran law was premised on PD’s justifiable expectation that its activities would be subject to First Amendment protections, whereas Hersh, who was alleged to have exploited the Indian market purposefully, could not justifiably expect the Constitution to travel with him.

The court rejected plaintiff’s argument, reasoning that the two cases were factually indistinguishable. Nonetheless, it rejected the *DeRoburt* rule. Reasoning that the Hawaii court’s rule was overinclusive because it would result in application of *New York Times* protections in all cases, it set out on a tortuous path to explain its new rule, which achieves the same result as *DeRoburt*—First Amendment protections apply to a defamation claim in a U.S. court that arises from an extraterritorial publication.

It is the Desai court’s limiting principle that separates it from *DeRoburt.* Under Desai, if a defendant is protected by the First Amendment, it is the fortuity of his not having personally arranged the foreign publication that insures his protection. Although the outcome in Desai is similar to *DeRoburt,* the rule portends different outcomes where a writer does not act through a third party to secure foreign distribution. Under Desai, self-distributing newspaper defendants would not receive *New York Times* protections for their extraterritorial distribution. Under *DeRoburt,* First Amendment protection is secured to extraterritorial publications because it is the policy of U.S. courts to do so, not because of the technical details of the writer’s business relationship with his publishers. This distinction belies a fundamental difference in each court’s approach to the First Amendment.

75 *Desai,* 719 F. Supp. at 672.
76 *Id.* at 674.
77 *Id.* at 675.
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.* at 676.
82 The court explained, “However, given the extensive modifications resulting from the
effects precision by applying *New York Times* only when “the purpose of the First Amendment will be fostered.”

The court examined the rules advanced by each opposing litigant. Under the defendant’s proposed rule, First Amendment protection would extend in U.S. courts to all extraterritorial publications by all persons protected by the Constitution. The court noted that this rule was identical to the *DeRoburt* rule. The court understood the rationale of such a standard to be that a high obstacle to defamation claims would prevent self-censorship by the press. A converse rule would result in a “chilling” effect, where media would decline to publish stories critical of public officials and public figures for fear of not being able to clear the procedural hurdles of defeating a common law libel action. Plaintiff’s contrary rule was simply that the First Amendment does not apply to extraterritorial publications.

The court rejected the defendant’s rule. It reasoned that application of the First Amendment hinges on whether the challenged defamation is a matter of public concern in the United States, not on whether the court hearing the lawsuit is sitting in the United States. *DeRoburt* was criticized for failing to address the interests of foreign nations and for effectively protecting some publications in the absence of a First Amendment rationale to do so.

The court also rejected the plaintiff’s rule, reasoning that deference to the foreign law would, in some instances, chill the flow of information to the American public. Extraterritorial application of the First Amendment facilitates the flow of information in the United States when applied to random distribution of U.S. published works to Americans abroad. More importantly, the ease of foreign republication of U.S. works would mean that an author could be subject to liability solely on the basis of the unilateral conduct of a third party who publishes the author’s work in a foreign nation. Automatic application of First Amendment safeguards, under *DeRoburt*, the (First Amendment) exceptions swallow up the (foreign law) rule and the equivalent of American defamation law is applied.” *Id.* at 675.

Accordingly, its criticism of the defendant’s proposed standard is intertwined with its criticism of *DeRoburt*. That is, it evaluates Hersh’s argument on the strength of *DeRoburt*’s reasoning without considering that other rationales could support such an absolute standard.

In common law actions where the plaintiff need not prove falsity, fault or damages, the advantage is heavily tipped in favor of the plaintiff. Under such a scheme, if a publisher had any doubt about its ability to prove legal truth, it would refrain from publishing and much information would be withheld from the public. This is inconsistent with our democratic system of self-government.

“Publication” is a term of art in defamation law that refers to any communication to a
cation of foreign defamation law to a U.S. publication that is repub-
lished abroad, with or without the author's involvement, would chill
domestic expression concerning matters of public concern.\footnote{94}

The court emphasized that its goals in formulating a rule were to
ensure predictability and to "provide . . . guidance to speakers in order
to minimize the chilling effect which would result from the threat of
possible application of foreign defamation law."\footnote{95} To serve these
goals, the court examined two alternative rules. One possible
approach would be case-by-case balancing of the foreign law interests
against the "public concern value," or newsworthiness of the contested
speech.\footnote{96} The other would be to determine whether a defendant has
purposefully abandoned her First Amendment protections.\footnote{97} The
court analyzed DeRoburt and Desai's Indian law claims under this rule.
The approach was superficially appealing and would afford protection
to Hersh's book. Its subject—the conduct of foreign affairs by a U.S.
resident—is the paradigm of high "public concern value" and is enti-
tled to the highest level of First Amendment protection.\footnote{98}

Yet, the court's analysis of DeRoburt illustrated the dangers of ad
hoc balancing in this circumstance. PD's story concerning the misuse
of funds by a government official in a small pacific island-nation seems
to be of minimal public concern value in the United
\footnote{99} The court contended, however, that without the ability to predict the use to
which such information might be put, it is difficult to assess accurately
its public concern value. For example, the PD story might inform a
decision of whether to grant foreign aid to Nauru or the Marshall Is-

\footnote{94} The court underscored this point:

Application of . . . foreign defamation law at odds with the [F]irst
[A]mendment could have a tremendous chilling effect. Our world is shrinking
every day as a result of improvements in mass communications and travel. Publica-
tions may be disseminated worldwide in a matter of hours, with or without
the permission of the author or publisher. Indeed, applying plaintiff's sug-
gested rule could have catastrophic implications for the electronic media in
this age of international broadcasting from the United States. The advent of
international popularity of the satellite dish may result in expression originally
intended for domestic or limited extraterritorial publication being published
worldwide, or even extraterrestrially.

Effectively, under plaintiff's suggested rule of law, publishers would be re-
quired to conform to the most restrictive law of defamation, wherever in the
world that may be.

\footnote{id}{95} \footnote{id}{96} \footnote{id}{97} \footnote{id}{98} \footnote{id}{99}
lands, rendering it of public concern in the United States.\(^{100}\)

The court noted that its difficulty in ascertaining public concern value echoed the Supreme Court's own such difficulty.\(^{101}\) In Gertz, the Supreme Court rejected a public concern test as the standard for applying New York Times protections.\(^{102}\) In this circumstance, because of the likelihood that all speech concerning foreign public officials and public figures would pass the public concern test, the results would be identical to the DeRobert rule.\(^{103}\) While the law of a foreign country might be applied, it would be applied along with New York Times protections. Although this result might ensure predictability, it would render any inquiry into the foreign country's interest superfluous.\(^{104}\) In this case, Desai's Indian law claims overlaid with New York Times rules would be redundant to his Illinois law claims, and would be dismissed.\(^{105}\) The alternative result is equally unsatisfactory. If the balance did not tilt toward the First Amendment every time, the unpredictability of choice-of-law analysis would yield little guidance, and protected speech would be chilled.\(^{106}\) Accordingly, the court rejected balancing of public concern value as a means to decide whether to apply the First Amendment to extraterritorial defamations.\(^{107}\) Nonetheless, the court explained, public concern or subject matter tests are often employed after a plaintiff's public or private status has been determined.\(^{108}\) The rule it ultimately adopted, in fact, incorporates a subject matter test:

In instances where the plaintiff is a public official or figure and thus heightened [F]irst [A]mendment protections, including the 'actual malice' standard, apply to domestic publication, these same protections will apply to extraterritorial publication of the same speech where the speech is a matter of public concern and the publisher has not intentionally directly published the speech in the foreign country in a manner consistent with the intention to abandon [F]irst [A]mendment protections.\(^{109}\)

Thus, whether the challenged defamation is of public concern is a threshold inquiry. If the public concern test is passed, the court will

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\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) Gertz v. Robert Welch, Inc., 418 U.S. 340, 346 (1973). Justice Powell, writing for the majority, reasoned that ascertaining whether a statement was of public concern was far more uncertain than ascertaining whether a plaintiff was a public figure. Accordingly, a subject matter test (for public concern) would yield wildly inconsistent results and such uncertainty would itself cause a chilling effect. Id.

\(^{103}\) Desai, 719 F. Supp. at 678-79.

\(^{104}\) Id. at 678.

\(^{105}\) Id. at 679.

\(^{106}\) Id.

\(^{107}\) Id. at 678.


then look to whether a defendant purposefully abandoned First Amendment protections.

The court explained the criteria by which a publisher would be judged to have purposefully abandoned the First Amendment. Intentional publication in a foreign country that is "substantial" will indicate abandonment of First Amendment protection.\textsuperscript{110} If such publication results from third party actions, only the third party will be deemed to have abandoned constitutional protections and the author herself will be immunized. This is the case even where the third party action is pursuant to a contract with the author.\textsuperscript{111} Rejecting agency principles that might be applied to third party republication neutralizes the chilling effect that would result from "fear of sale of the speech to a third party who would, unbeknownst to the author and domestic publisher, introduce the speech into a foreign country."\textsuperscript{112} The court explained that "avoiding this chilling effect justifies limiting potential liability under foreign defamation law to the actual person or entity responsible for the foreign publication, even where the foreign distribution was a certainty."\textsuperscript{113} This analysis is consistent with the \textit{New York Times} principle that where there is uncertainty about whether to protect speech or injury to reputation, the balance must tip in favor of the speaker.\textsuperscript{114} The plaintiff may, after all, pursue a remedy in the foreign court.\textsuperscript{115}

Applying this rule to Desai's claims, the court first ruled that Hersh's book was a matter of public concern.\textsuperscript{116} The court then explained that although Desai's complaint alleged publication in India, neither side had submitted evidence concerning Indian publication. The court stayed its ruling on Desai's motion for summary judgment in order to allow both sides to submit additional documentation.\textsuperscript{117} Thus the First Amendment would not apply at trial if Desai were to meet his evidentiary burden by showing that Hersh "intentionally republished"\textsuperscript{118} his book in India, thereby exploiting the Indian market.\textsuperscript{119}

\textbf{B. Enforcement of Foreign Judgments}

The other circumstance in which extraterritorial application of the First Amendment is raised is when a U.S. court is asked to enforce a defamation judgment rendered in a court of a foreign nation. When a U.S. court is asked to enforce a judgment rendered in another U.S. court, it is bound by the constitutional mandate that "Full Faith and

\begin{itemize}
  \item \textsuperscript{110} Id. at 680.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id. (emphasis added).
  \item \textsuperscript{115} \textit{Desai}, 719 F. Supp. at 680.
  \item \textsuperscript{116} Id. at 681.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id. at 679.
  \item \textsuperscript{119} Id.
\end{itemize}
Credit shall be given in each State to the . . . judicial Proceedings of every other State."\(^{120}\) When courts are asked to enforce a judgment rendered in a non-U.S. court, they are bound only by ambiguous doctrines of comity. Generally, a court should exercise its discretion to enforce foreign judgments out of deference and goodwill for the foreign nation, so long as the judgment was rendered in procedures consistent with due process.\(^{121}\)

Further guidance is provided by the Uniform Foreign Money-Judgments Recognition Act (UFMJA), which has been enacted in substantial part by many American jurisdictions. Section 3 of the Act provides that absent certain exceptions, "[t]he foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."\(^{122}\)

Section 4 provides for exceptions. Section 4(a) delineates the mandatory exceptions,\(^{123}\) including judgments rendered under procedures incompatible with due process,\(^{124}\) and where the original court lacked personal\(^{125}\) or subject matter jurisdiction.\(^{126}\) Section 4(b) allows discretionary nonenforcement in certain circumstances,\(^{127}\) including those where there has been untimely notice,\(^{128}\) fraud,\(^{129}\) a judgment rendered on a cause of action that violates the public policy

\(^{120}\) U.S. CONST. art. IV, § 1.
\(^{121}\) RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).
\(^{122}\) UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3 (1962).
\(^{123}\) Section 4(a) reads:
(a) A foreign judgment is not conclusive if
(1) The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
(2) the foreign court did not have personal jurisdiction over the defendant; or
(3) the foreign court did not have jurisdiction over the subject matter.

\(^{124}\) Id. § 4(a)(1).
\(^{125}\) Id. § 4(a)(2).
\(^{126}\) Id. § 4(a)(3).
\(^{127}\) Section 4(b) reads:
(b) A foreign judgment need not be recognized if
(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
(2) the judgment was obtained by fraud;
(3) the [cause of action] [claim for relief] on which the judgment was based is repugnant to the policy of this state;
(4) the judgment conflicts with another final and conclusive judgment;
(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

\(^{128}\) Id. § 4(b)(1).
\(^{129}\) Id. § 4(b)(2).
of the state,\textsuperscript{130} or on grounds of forum non conveniens.\textsuperscript{131}

The result is that the UFMJA provides for routine enforcement of foreign judgments, out of comity, so long as minimum standards are met. Unlike choice of law, enforcement is presumed, the burden of proving that a judgment should not be enforced rests on the party challenging the judgment, and analyses of competing interests are absent.\textsuperscript{132} In defamation cases, the issue is whether a judgment rendered in the absence of constitutional safeguards either comports with those minimal standards of comity or the Act.

In \textit{Bachchan v. India Abroad},\textsuperscript{133} the only reported case to consider the issue, extraterritorial reach of the First Amendment was tested by a plaintiff who sought to enforce an English libel judgment in a New York State court. The plaintiff, Ajitabh Bachchan, is the brother and manager of a widely known Indian movie star and was a friend of the late prime minister Rajiv Gandhi.\textsuperscript{134} The defendant, India Abroad, publishes a newspaper that is distributed to the expatriate Indian community in the United States. It is also published by the defendant's English subsidiary. Additionally, India Abroad operates a wire service that transmits stories to a news service in India.\textsuperscript{135}

\textit{Dagens Nyjeter (DN)}, a Swedish daily newspaper, reported that Bachchan had been instrumental in transferring illegal kickbacks from Bofars, a Swedish arms manufacturer, to members of the Indian government in return for India's award of an arms procurement contract to Bofars.\textsuperscript{136} India Abroad's wire service reported that \textit{DN} had published its story concerning Bachchan. The story was carried by two Indian newspapers, copies of which were distributed in England. The story was also reported in India Abroad's U.S. and U.K. publications.\textsuperscript{137} Four days later, India Abroad reported Bachchan's denial of any involvement in the Bofars scandal.\textsuperscript{138} Approximately one year after publication, Bachchan commenced suit in the High Court of Justice in London against India Abroad and \textit{DN}. \textit{DN} settled for an unreported sum of money and issued an apology, saying that it had been misled by Indian government sources. India Abroad reported \textit{DN}'s apology, but did not issue an apology of its own.\textsuperscript{139} The English court awarded Bachchan £40,000 in damages for injuries stemming from the wire service report. Bachchan brought suit in New York State

\textsuperscript{130} Id. \textsection 4(b)(3).
\textsuperscript{131} Id. \textsection 4(b)(6).
\textsuperscript{132} Id. \textsection 3, 4.
\textsuperscript{134} Id. at 661.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 661-62.
New York's version of the UFMJA governs the recognition of foreign judgments. Both sides relied on the discretionary provision to support their arguments. India Abroad argued that because Bachchan's judgment was rendered under English law, without *New York Times* protections, the "cause of action on which the judgment [was] based is repugnant to the public policy of the state" and should not be enforced. Bachchan argued that section 5304(b)'s language supports enforcement. The New York Civil Practice Law and Rules refers to "causes of action" that are repugnant to public policy, not judgments. Libel is recognized both in England and in New York state. It could not, therefore, be argued that the *cause of action* on which his judgment was based was contrary to New York's public policy.

The court rejected both plaintiff's and defendant's interpretations of the discretionary provision and grounded its holding in the mandatory provisions of section 5304 of the New York Civil Practice Law and Rules. The mandatory prohibitions reach judgments that are rendered in the absence of constitutional safeguards, such as due process. Drawing an analogy to the proscription in section 5304(a) against enforcing judgments rendered in the absence of due process, the court reasoned that "it is doubtful whether this court has the discretion to enforce the judgment if the action in which it was rendered failed to comport with the constitutional standards for adjudicating libel claims."

The issue was, therefore, whether Bachchan's judgment had been rendered in a manner offensive to the First Amendment. The court first summarized English law. Any statement that hurts a plaintiff's reputation is defamatory. Plaintiff's only burden is to prove that a defamatory statement refers to him. Truth and damages are presumed. A defendant may plead the affirmative defense of justification, or truth, but if the defense fails, the jury may award additional damages for the further injury inflicted by the defendant's repetition of the libel.

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140 *Id.* at 662. An additional award of £40,000 for the publication of the English edition of *India Abroad* was not before the New York court.
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.* at 663. See *supra* notes 12-20 and accompanying text for a discussion of English defamation law.
149 *Bachchan*, 558 N.Y.S.2d at 663.
150 *Id.*
151 *Id.*
152 *Id.*
The court next summarized the holding of *Philadelphia Newspapers, Inc. v. Hepps*: Where a private figure plaintiff brings suit against a defendant based on a statement of public concern, the common law presumption of falsity cannot stand, and the burden of proof is placed on the plaintiff. Declining to rule that Bachchan was a public figure, the court reached its decision by holding that India Abroad’s story was of public concern. Because English law presumes falsity, the English judgment did not comport with *Hepps*’ requirement that plaintiff prove falsity where the challenged statement is of public concern. The English judgment was therefore constitutionally unenforceable.

The court also discussed a further state law ground on which Bachchan’s judgment was unenforceable. Under New York law, where a defamation relates to a matter of public concern, even a private figure plaintiff may recover only after establishing “by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and disseminating ordinarily followed by responsible parties.” That is, New York extends the *New York Times* actual malice and elevated evidentiary standards to suits by private figures where the contested speech is of public concern. The court thus held that enforcement of Bachchan’s English judgment would be offensive to both the U.S. Constitution and to New York State law.

**IV. Analysis of the Extraterritorial Defamation Cases**

Comparison of the tests employed by *DeRoburt, Desai, and Bachchan* reveals that there is no coherent approach to applying the First Amendment to extraterritorial publications. The *Desai* test asks first, whether the statement was of public concern, and second, whether the defendant purposefully abandoned his First Amendment protections. The first inquiry is answered by employing the Supreme Court’s analysis, as explicated in *Dun & Bradstreet v. Greenmoss Builders*,

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155 Id. at 663-64.
156 In deciding the case under a separate and independent ground, the court avoided the possibility of Supreme Court review of its First Amendment ruling. *See Michigan v. Long*, 463 U.S. 1032, 1037-42 (1983) (Supreme Court will not review constitutional rulings of state courts where the decision expressly rests on an adequate and independent state ground).
158 Ironically, this means that New York has adopted a subject matter test as a threshold to the actual malice standard. New York’s rule extending greater protection for the media than is guaranteed by the First Amendment is the very standard that was criticized by *Desai* and rejected by the Supreme Court in *Cirtz*. See supra notes 96-107 and accompanying text.
The second inquiry is answered by evaluating the extent to which the defendant exploited a foreign market.\textsuperscript{162}

Relying on the Restatement's interest analysis,\textsuperscript{163} DeRoburt appears to employ a two part test. The first inquiry determines whether the relevant policy of the forum state requires that First Amendment protections apply to the challenged defamation.\textsuperscript{164} The second asks whether the defendant justifiably expects that the First Amendment will apply to her publication.\textsuperscript{165}

The Desai court observed that DeRoburt's analysis is an illusory slam-dunk for the defendant.\textsuperscript{166} It is not only the policies of Guam and Hawaii that require "critics of public officials and public figures receive the protection afforded by the [F]irst [A]mendment";\textsuperscript{167} this constitutional standard is the relevant policy of every U.S. jurisdiction.\textsuperscript{168} Therefore, the first prong of DeRoburt compels no meaningful inquiry; the answer will always be that the forum state's policy requires First Amendment protection. As Desai illustrates, virtually every transnational defamatory publication will involve a matter of public concern\textsuperscript{169} and will pass DeRoburt's first prong.\textsuperscript{170}


In Dun & Bradstreet, the Court held that defamatory information contained in a credit report was not a matter of public concern and allowed the plaintiff to proceed without having to establish actual malice. \textit{Id.} at 783. Some of the factors the Court relied on were the fact that the speech was solely in the private interests of a narrow business audience, it was communicated to only five subscribers, each of whom was bound by contract to keep the report confidential, and the commercial value of the speech rendered it less likely to be chilled by incidental state regulation. \textit{Id.} at 762-63.

\textsuperscript{162} Desai, 719 F. Supp. at 679-81.

\textsuperscript{163} DeRoburt v. Gannett Co., 83 F.R.D. 574, 579 n.20 (D. Haw. 1979) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971)).

\textsuperscript{164} \textit{Id.} at 579.

\textsuperscript{165} \textit{Id.} at 580.

\textsuperscript{166} "The DeRoburt rule would be over-inclusive, providing predictability at the expense of a competing interest without furthering [F]irst [A]mendment interests." Desai, 719 F. Supp. at 676.

\textsuperscript{167} DeRoburt, 83 F.R.D. at 579.

\textsuperscript{168} See supra notes 66-68 and accompanying text. DeRoburt premised its conclusion that \textit{New York Times} protections are the relevant policies of Guam and Hawaii because such protections are constitutional mandates. DeRoburt, 83 F.R.D. at 580. First Amendment protection for critics of public officials and public figures would therefore be part of the relevant policy of all U.S. jurisdictions.

\textsuperscript{169} [W]hat might appear to be purely a matter of the internal affairs of a foreign nation, may be newsworthy and of public concern in the United States. As an example, under the facts in DeRoburt, the internal affairs of Nauru might be a matter of public concern regarding a decision by the United States to grant foreign aid to Nauru. Indeed almost [sic] any account of the affairs of foreign countries can, through the use of a reason or imagination, touch upon the affairs of the United States.

\textsuperscript{170} Accordingly, the distinction between Desai's public concern inquiry and DeRoburt's public figure inquiry is significant. Statements of public concern that do not involve public figures or public officials would still pass Desai's first prong. Under DeRoburt, such statements
The second *DeRoburt* prong is linked to the preordained inquiry into the policy of the forum state and is an equally foregone conclusion. The Court reasoned that because the policy of U.S. forums is to protect expression about public officials and figures, defamation defendants hailed into court in U.S. jurisdictions justifiably expect First Amendment protection. Accordingly, as all extraterritorial defamations will satisfy the first prong, they will also pass the second, and receive protection under *New York Times*.

It is the second prong of each test that illustrates the dramatic distinction between *Desai* and *DeRoburt*. *Desai*’s “purposeful abandonment” language appears to resemble *DeRoburt*’s “justifiable expectations” language. Each court purports to analyze defendants’ reliance interest, effectively asking whether a defendant acted in reliance that First Amendment protections would attach to the challenged speech. For *DeRoburt*, the reliance inquiry is satisfied by the location of the litigation in a U.S. court. For *Desai*, the defendant’s reliance is established by its restriction of publication to the United States and its territories. The difference results in two distinct rules. Under *DeRoburt*, First Amendment protection will apply whenever an extraterritorial defamation case is litigated in U.S. courts. Under *Desai*, the First Amendment will only apply in a case where the defendant has not “exploited” the foreign market.

Faced with analogous issues in the enforcement of judgments context, *Bachchan* simply inquired whether the foreign law sought to be enforced would pass muster under *New York Times*. Without the pretense of an interest analysis, *Bachchan* achieves the same result in the enforcement context that *DeRoburt* does in the choice-of-law context:

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*would only satisfy the inquiry if it were the law of the forum state to extend some or all First Amendment protections to all statements of public concern. See Chapadeau v. Utica Observer-Dispatch, 341 N.E.2d 569 (1975) (Under New York law, actual malice and preponderance of the evidence standards are applied to all defamation actions brought by private persons against the press where the statement is of public concern.).

171 “*This* court believes that the public policy of the United States requires the application of the First Amendment to libel cases brought in the courts of this country; defendants in this case therefore justifiably expect constitutional protection of their free expression.” *DeRoburt*, 83 F.R.D. at 580.

172 Thus, *DeRoburt* measures the defendant’s reliance by examining the plaintiff’s behavior in selecting a forum for the litigation.

173 The fallacy of divining a “purposeful” abandonment of the First Amendment by extraterritorial publication lies in the simple fact that a publisher can not know that it is abandoning anything unless some act of positive law indicates that such publication is equivalent to abandonment of protection. Thus Desai’s characterization of Hersh’s possible Indian publication as “purposeful abandonment” is post-hoc fiction. As precedent, it is a judicial choice of a narrow construction of the First Amendment’s scope.

174 See *supra* notes 110-15 and accompanying text for a discussion of the criteria by which the Desai court would determine whether a foreign market had been exploited.

175 “The procedures of the English Court will be compared to those which according to the decisions of the United States Supreme Court are constitutionally mandated for suits by private persons complaining of press publications of public concern.” *Bachchan* v. India Abroad, 585 N.Y.S.2d 661, 663 (N.Y. Sup. Ct. 1992).
In extraterritorial defamation cases, U.S. courts will not apply nor enforce the law of a foreign nation without additionally applying First Amendment protections to the law or judgment sought to be applied or enforced. This is contrasted to the Desai approach, which will only apply the First Amendment to a publication's public concern impact inside the United States.

An explanation for these contradictory rules may be that the distinction between applying foreign law and enforcing a foreign judgment warrants differing analyses. Underlying Desai's "purposeful abandonment" test is an inquiry into the interest of the foreign state. This concern is absent in both Bachchan and DeRoburt, whose rules would never apply nor give effect to foreign law that is less protective than the constitutional minimum. If, as Desai charges, DeRoburt is an anomalous choice-of-law decision, three considerations potentially explain the difference between Desai and Bachchan.

First, there is arguably no need to consider the interest of the foreign nation in the enforcement context. Enforcement occurs after a plaintiff has chosen a forum that applied foreign defamation law without New York Times protections. Accordingly, the interest of the foreign nation, which would be protected in a choice-of-law context, has already been adequately protected by the court that rendered the original judgment. If this rationale is sound, Bachchan was correct in applying New York Times without considering the foreign interest, and Desai was also correct in limiting New York Times by considering the plaintiff's exploitation of the foreign market. The flaw in this argument is that the foreign court's consideration of the foreign interest is hollow protection if its judgment is ultimately unenforceable in a U.S. court. The interests of the foreign jurisdiction are no less offended if its judgment is refused effect as if its law is ignored.

Second, a more severe enforcement test prevents abusive selection of foreign forums by plaintiffs seeking to circumvent the First Amendment. If the Bachchan rule were not applied, and foreign defamation judgments were enforced in the pro forma manner of other foreign judgments, the First Amendment could be circumvented with

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176 See supra notes 65-72 and accompanying text for a discussion of DeRoburt on this point, and notes 145-58 and accompanying text for a discussion of Bachchan.
177 See supra notes 101-09 and accompanying text for a discussion of Desai.
178 If this is the case, perhaps both Desai and Bachchan were correctly decided and DeRoburt is incorrect. Conversely, the distinction between choice of law and enforcement may not offer sufficient explanation, and either the Desai or the DeRoburt-Bachchan approach is correct and the other erroneous.
179 "In an extraterritorial context, due regard must be given to foreign nations' interests in compensating its own citizens for harm to their reputations from defamatory falsehoods." Desai v. Hersh, 719 F. Supp. 670, 676 (N.D. Ill. 1989).
180 See supra notes 67-68 and accompanying text for discussion of DeRoburt on this point and notes 145-48 and accompanying text for discussion of Bachchan.
181 Desai, 719 F. Supp. at 675-76.
182 See supra notes 122-33 and accompanying text.
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alarming regularity. Because most major U.S. publications are routinely distributed to foreign nations, those publications are generally subject to suit in those jurisdictions. Consequently, public figures and officials, whose defamation claims could not survive a motion to dismiss under the law of any U.S. jurisdiction would be able to win judgments in foreign nations and enforce those judgments in the United States, effectively skirting New York Times. In the absence of Bachchan, foreign law can operate to undercut constitutionally guaranteed press freedoms.

Third, encouraging foreign plaintiffs to litigate in U.S. courts may actually be a principled rationale supporting the plaintiff-hostile Bachchan rule: When such cases are adjudicated in U.S. courts, there is less likelihood that the First Amendment will be overlooked or misapplied by a foreign court. The Desai test explicitly contemplates whether the First Amendment is applicable, therefore precluding the possibility that foreign law will be applied without consideration of First Amendment interests. Furthermore, U.S. courts are more experienced in applying the complicated New York Times doctrinal scheme. Thus

184 The ultimate threat is that U.S. public figures will select foreign forums for their defamation claims against U.S. media. Because the law of England and other common law jurisdictions offers no special protection to press criticism of public figures and officials, and presumes defamatory statements to be false and therefore actionable, U.S. plaintiffs would be entitled to recover under foreign law for injuries to reputation stemming from the foreign distribution of otherwise protected U.S. publications.

For example, the Village Voice published an article that alleged that ex-President Bush had participated in illegal arms sales to Iran to finance the guerilla war against the government of Nicaragua in violation of federal law. Frank Snepp, GOP Had Secret Channels to Iran, VILLAGE VOICE, July 23, 1991, at 30. Under New York Times, the Voice is immune from liability under the law of any U.S. jurisdiction unless Bush can prove by a preponderance of the evidence that the assertion is false, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), and that the Voice published with actual malice, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Effectively, this bars any potential suit, for the likelihood of proving falsity is slim, and actual malice even more remote.

The absence of the Bachchan rule would allow the ex-president to circumvent the First Amendment by merely bringing suit in England on the basis of the Voice's minimal but purposeful distribution overseas. Falsity will be presumed, the Voice would probably avoid the risk of further liability for trying to prove the truth of such masterfully concealed facts, and actual malice would be irrelevant to liability. All that Bush would have to do to win an English judgment is show that the Voice published the article. The allegation that he committed a crime would constitute libel per se occasioning the award of presumed and punitive damages. See supra notes 12-16 and accompanying text.


Bachchan is the first reported case to address the issue. Prior to Bachchan, it is likely that at least a few defendants used U.S. courts to collect routinely on foreign defamation judgments rendered in the absence of First Amendment protections. See, e.g., Roy Green slade, supra note 11.

Determinations unique to American law include the public figure status of the plaintiff, e.g., Bachchan v. India Abroad, 585 N.Y.S.2d 661, 663-64 (N.Y. Sup. Ct. 1992), as well as
foreign defamation plaintiffs are faced with a choice that keeps \textit{New York Times} protections in tact beyond the borders: litigate abroad and bear a substantial risk of nonenforcement, or litigate in the United States\textsuperscript{187} subject to the First Amendment if it is applicable.\textsuperscript{188}

The foregoing arguments suggest that the disparity between the \textit{Bachchan} and \textit{Desai} rules is ultimately justified by a preference for U.S. adjudication of foreign law defamation suits against U.S. defendants to ensure that the First Amendment is neither circumvented nor misapplied. While this rationale sounds correct in the abstract, it makes little sense in practice. In \textit{Bachchan}, the High Court of Justice applied English law,\textsuperscript{189} and ruled that India Abroad was liable to Bachchan.\textsuperscript{190} When Bachchan brought his judgment to New York for enforcement, the court did not even inquire into whether the facts of the case warranted First Amendment protections. In New York, the applicability of \textit{New York Times} was a foregone conclusion.\textsuperscript{191}

In \textit{Desai} the court held that Indian law, without \textit{New York Times} protection, would be applied upon the proper showing that Hersh had intentionally exploited the Indian market.\textsuperscript{192} Had Bachchan brought suit in a U.S. court that followed \textit{Desai}, \textit{New York Times} would have applied only if India Abroad had not “purposefully abandoned” its First Amendment protections by exploiting the Indian market.\textsuperscript{193} Yet, this is exactly what India Abroad did. Its liability in the English suit was predicated on its sale of the Bachchan story to an Indian news agency. This is clearly intentional exploitation of the Indian market as contemplated by \textit{Desai}.\textsuperscript{194} Under the \textit{Desai} rule, Bachchan would have succeeded in litigating and enforcing under Indian law if he had brought his case in the United States rather than in England.

\begin{itemize}
  \item whether speech is of public concern, \textit{e.g.}, \textit{Desai v. Hersh}, 719 F. Supp. 670, 677-78 (N.D. Ill. 1989).
  \item Enforcement of U.S. judgments is generally automatic if rendered in the jurisdiction where the suit is brought; if the judgment of one U.S. state is to be enforced in another U.S. state, the Full Faith and Credit clause and Uniform Enforcement of Judgments Act ensures procedures far more summary than enforcement of judgments rendered in foreign courts. U.S. \textsc{Const.} art. \textsc{IV}, § 1.
  \item Of course a third possibility is that foreign plaintiffs will not oppose defendant’s request for the application of U.S. law in foreign suits. Presumably application of U.S. law or hybrid foreign law with \textit{New York Times} protections would pass the \textit{Bachchan} test. This would still present the danger of misapplication of First Amendment law by inexperienced foreign courts.
  \item It actually applied Indian law, which is derived from and identical to English law.
  \item \textit{Bachchan}, 585 N.Y.S.2d at 662.
  \item Id.
  \item Id. The international scandal discussed in India Abroad’s story is of public concern and would satisfy the \textit{Desai} test’s first inquiry. Id. at 677-78 (“almost [sic] any account of the affairs of foreign countries can . . . touch upon the affairs of the United States.”).
  \item India Abroad’s publication in India is analogous to the example the \textit{Desai} court cited to illustrate “purposeful abandonment” of First Amendment protections. “Where publication in the foreign country is intentional, and the foreign market exploited, it may be fair to say that the publisher has purposefully abandoned the protections of the [F]irst [A]mendment.” Id. at 679.
\end{itemize}
India Abroad’s uncontroverted exploitation of the Indian market was irrelevant to the New York court’s application of New York Times to Bachchan’s claim.\textsuperscript{195} Desai, therefore, fared better than Bachchan under differing enforcement and choice-of-law analyses. Desai was rewarded for bringing his suit in a U.S. court against a defendant whose actions were analogous and perhaps less culpable than Bachchan’s.\textsuperscript{196} Thus, with an interrelated Desai-Bachchan scheme governing extraterritorial defamation cases, plaintiffs are more likely to enjoy the protection of foreign law when they litigate in the U.S. courts than when they litigate in foreign courts.

The First Amendment is not served by a disparate choice-of-law/enforcement scheme. It is fiction to suggest that Desai circumvented the First Amendment in any less egregious manner than did India Abroad. Both defendants were U.S. speakers who published statements that were actionable under foreign law but were privileged under the U.S. Constitution. India Abroad did not have to pay damages from its U.S. assets to satisfy its adjudicated liability under foreign law, while Hersh may have to.

Bachchan imposes an absolute rule: U.S. speakers cannot be held liable for money damages in the United States for publications that constitute actionable defamation in foreign nations unless New York Times protections are applied in the foreign determination of liability.\textsuperscript{197} The Desai rule is more favorable to foreign law: New York Times protections will be applied only after examining the level of the foreign state’s interest in applying its own law as measured by the defendant’s exploitation of the foreign market. In reductionist terms the two rules can be collapsed into one rule that governs the same conduct: New York Times protections will apply to defamation suits arising from foreign publications by U.S. speakers only if the liability is established by a foreign court. That a plaintiff’s choice of a foreign forum is the crucial element in determining whether New York Times protections apply illustrates that the Desai and Bachchan approaches may be rationalized, but that they cannot be reconciled. The more coherent analysis is that ideological differences concerning the meaning of the First Amendment pits the Desai court on one side, and the Bachchan and DeRoburt courts on the other.

V. Values Underlying Freedom of Expression

The First Amendment limits government’s\textsuperscript{198} power to regulate


\textsuperscript{196} India Abroad publishes in India as a routine facet of its operation. If Hersh distributed his book in India, such distribution was of such slight importance that neither party was able to testify to Indian distribution at trial. Desai, 719 F. Supp. at 681.

\textsuperscript{197} See supra notes 145-58 and accompanying text.

\textsuperscript{198} Although the language of the First Amendment bars Congress from making laws abridging speech or press, it is long settled that the Fourteenth Amendment incorporates the
speech and the press.\textsuperscript{199} Read literally, it forbids government from imposing \textit{any law} that curtails free expression.\textsuperscript{200} It has never been so construed.\textsuperscript{201} Rather, when faced with countervailing interests of sufficient magnitude, the First Amendment has given way to certain regulations that curtail free expression. Government regulates speech all the time. In some instances, the regulation of speech is incidental,\textsuperscript{202} in others it is quite deliberate.\textsuperscript{203} In certain instances, the absence of serious First Amendment implications are beyond challenge. Few would contend that criminal laws punishing fraud offend the First Amendment. Yet anti-fraud laws that punish false or misleading statements of fact clearly abridge some freedom to engage in some speech.\textsuperscript{204} It is simple to conclude, therefore, that there are limitations on the First Amendment. It is far more difficult to identify any ordered principle that defines those limits. A preference for narrow constitutional rulings results in an opacity of Supreme Court opinions concerning the scope of the First Amendment protections.\textsuperscript{205}

\begin{flushleft}
First Amendment to limit the state's power as well. Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).
\end{flushleft}


\textsuperscript{200} "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

\textsuperscript{201} The most vigorous advocate on the Court for an absolutist view of the First Amendment was Justice Black. In \textit{Konigsberg v. State Bar of California}, Black wrote:

\begin{quote}
I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the balancing that was to be done in this field.
\end{quote}

\begin{quote}
The very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence.
\end{quote}


\textsuperscript{202} For example, a city ordinance that prohibits placing posters on private and municipal property is an incidental regulation on expression.

\textsuperscript{203} \textit{E.g.,} FCC v. Pacifica Found., 438 U.S. 726 (1978) (FCC may regulate broadcasting of speech that is indecent but not obscene.).

\textsuperscript{204} This same example will hold true in the case of blackmail and extortion.

\textsuperscript{205} There is a tension that impels courts to discuss often what speech is not protected when its decision actually extends protection. In \textit{New York Times v. United States} (the Pentagon Papers case), the Court rejected the federal government's request for an injunction against the publication of classified Pentagon documents pertaining to the Vietnam War, and reaffirmed a broad rule disfavoring prior restraints. New York Times v. United States, 403 U.S. 713 (1971). In a concurring opinion, however, Justice Brennan outlined where prior restraints might be permissible:

\begin{quote}
Our cases . . . have indicated that . . . the First Amendment's ban on prior restraints may be overridden . . . only when the Nation "is at war," during which times "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."
\end{quote}


The concern is that a narrowly drawn First Amendment ruling will fail to provide the certainty of protection necessary to avoid chilling protected speech. Accordingly, the rule of construction favoring narrow constitutional rulings often succumbs to First Amendment con-
that underlie the First Amendment and attempt to explain the universe of its protection are more coherently discussed by commentators.

As a starting point, it is helpful to examine certain values that courts and commentators have identified as underlying freedom of expression. In deciding whether to reject or uphold regulation of speech, courts can identify a relevant value that is offended and reject regulation. Alternatively, they can determine that the damage to the values implicated is overcome by the interests furthered by the regulation and uphold it. Because we begin from a presumption that speech is protected, the latter is often a more difficult proposition.

Some commentators have gone further, and have attempted to assert theories that group together one or more values to define, with differing degrees of totality, the scope of the First Amendment. It is argued that a unified approach offers consistent results. A compelling counter-argument is that incursions into speech freedoms are severe policy choices that are justified only when a court acknowledges the values compromised and explains why contrary interests should prevail. It is not consistency that is needed, but rather it is candid discussion of policy rationales that compel courts, when necessary, to curtail speech.

In The System of Freedom of Expression, Professor Emerson identified four core values that are relied on to rationalize constitutionally protected expression: (1) individual self-fulfillment, (2) attainment of truth, (3) participation in decision making by all members of society and (4) achievement of balance between stability and change, often referred to as the safety valve function.

The first value, individual self-fulfillment, recognizes that expression should be protected in order to develop a "realm of liberty for self-determined processes of self realization." Expression for its own sake is a necessary condition of human dignity and is therefore of sufficient value to be protected. It need not serve any social function external to the speaker to warrant constitutional protection.

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206 E.g. Baker, supra note 4; Bork, supra note 4; MEIKLEJOHN, supra note 4. There is a distinction to be made between theories that attempt to explain what courts have done and those that are aspirational and suggest what courts should do. The former are often at a loss to divine a unified purpose in First Amendment jurisprudence. The latter, however, frequently offer prescriptive guidelines that will guide First Amendment law within concrete boundaries.

207 Bork, supra note 4, at 27-28.

208 SHIFFRIN, supra note 4, at 44-45, 167-69.

209 EMERSON, supra note 4.

210 Id. at 5.

211 Baker, supra note 4, at 991.

212 EMERSON, supra note 4, at 3-6. This value is distinct from the three other values
The second value, attainment of truth, mirrors what is often referred to as the "marketplace of ideas" model of the First Amendment. This value supposes that if all expression is protected, all ideas will be available for consideration in decision making. In such an open arena, the "truth" will, by virtue of continual scrutiny, prevail over less "true" ideas. Truth may also be contained in fragments of ideas. By allowing all ideas the opportunity to be assessed, the true or correct components of ideas will be selected, the incorrect components discarded, and the truth will be assembled in the process.

The third value, participation in decision making, rests on the principle that the essence of citizenship in democratic society is participation in change. Therefore, all members of society must be as fully informed as possible about issues of public concern. This theory extends beyond the political realm, "[i]t embrace[s] the right to participate in building the whole culture, and include[s] freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge." To the extent that expression conveys information that in any way bears on a citizen's ability to make decisions in a responsible and informed manner, it must be protected.

discussed by Emerson in that it focuses on the speaker, not the listener or society in general. Nonetheless, the benefits for society are advanced by the value placed on the dignity of each citizen.

213 Baker, supra note 4, at 968.
214 Id. at 967.
215 Id.
216 EMERSON, supra note 4, at 6-7. The marketplace of ideas rationale was first articulated by John Stuart Mill. Allowing unfettered expression serves the search for truth because "[i]f opinion is right, [society is] deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception of the truth, produced by its collision with error." Mill, supra note 6, at 76.

The marketplace model owes its introduction into First Amendment jurisprudence to Justice Holmes. Assailing the majority's decision to uphold defendant's conviction under the Espionage Act for distributing leaflets critical of U.S. military intervention in the Russian Revolution, Holmes wrote: But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

As moving as Holmes' rhetoric may be, it is a questionable model for protecting expression. As Baker observes, the marketplace theory rests on two faulty assumptions. First, it assumes there is objective truth that is divorced from individual experience. The value of ideas probably owes more to individual perspective than it does objective "truth." What is "true" for one consumer in the marketplace of ideas may be antithetical to the interests of another. Baker, supra note 4, at 974.

Second, it assumes that ideas will win in the marketplace by virtue of their truthfulness. Such an assumption fails to consider the possibility that individuals select ideas because the message is frequently repeated in an appealing manner, favoring those who can purchase the most access to the marketplace and not because the idea is "true" or "correct." Id. at 975-81.

217 EMERSON, supra note 4, at 7.
218 Id. at 6-9. Compared to self-fulfillment, participation in change justifies similarly
The fourth value, the safety valve, begins with the premise that where decisions are made through democratic processes, there will inevitably be "winning" and "losing" ideas. Proponents of "losing" ideas will be more inclined to accept peacefully the imposition of opposition policies if they feel that they have had an opportunity to articulate their ideas and participate in the decision-making process. Maintaining an open process prevents violence and facilitates peaceful change.\(^{219}\)

Some additions to Emerson’s list are warranted. Professor Baker argues that the First Amendment should protect a wide domain of liberty.\(^{220}\) Broad protection for expression is a core component of liberty, but it is not the whole story.\(^{221}\) The First Amendment should protect a "broad realm of nonviolent, noncoercive activity."\(^{222}\) According to Baker, the First Amendment protection should reach beyond speech and protect some conduct as well.\(^{223}\)

Professor Blasi advances the “checking value” of the First Amendment.\(^{224}\) The power of organized government so dwarfs that of self-governing citizens, that traditional marketplace of ideas or self-government models are no longer salient.\(^{225}\) Instead, it is the role of a powerful media, insulated by the First Amendment, to take on the government when it abuses power so that citizens may exercise “a veto power to be employed when the decisions of officials pass certain bounds.”\(^{226}\)

Professor Bollinger has advanced tolerance as an additional First Amendment value.\(^{227}\) Rather than focus on the value of the speech to

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\(^{219}\) Id. at 9-11.

\(^{220}\) Baker, supra note 4.

\(^{221}\) Id. at 991.

\(^{222}\) Id. at 990.

\(^{223}\) Id. See infra note 244 for a discussion of the relationship of Baker’s theory to the self-fulfillment and self-government values.


\(^{225}\) Id. at 524-25.

\(^{226}\) Id. at 542. The checking value has aspects of a market failure model of the First Amendment. By vesting the corporate media with great power to inject ideas into the “marketplace,” the media act as a corrective force against government’s inordinate power to control the “marketplace” to serve its own institutional interests.

The result is argued to be a restoration of equilibrium between citizens and government, with the media putting its clout behind ideas that are consistent with citizens’ interests. That the media is not unified does not undermine Blasi’s thesis. It only ensures that a diversity of ideas will be injected into the “marketplace” by the mass media’s power.

A flaw in Blasi’s theory is the assumption that the interests of even a diverse mass media will mirror the interests of individuals. In reality, the media has its own institutional agenda. It is entirely conceivable that the media could elect (collectively or individually) not to take on government abuse when it is in their institutional interests but contrary to the interests of society.

be protected, Bollinger suggests that attention should be focused on both the symbolic attributes of the First Amendment and the danger of intolerant responses to offensive speech.\textsuperscript{228} An important function of free speech is its impact on "shap[ing] the intellectual character of society."\textsuperscript{229} Therefore broad protection for speech acts as a powerful example and catalyst toward fostering a tolerant society.\textsuperscript{230} Because "the free speech idea . . . is one of our foremost cultural symbols,"\textsuperscript{231} its symbolic power should be used for social benefit.

Professor Shiffrin argues that dissent should be recognized as a core First Amendment value.\textsuperscript{232} Rejecting the connection between the First Amendment and self-government, he nonetheless links freedom of expression to democracy. The image of electoral majority rule that drives the self-government and marketplace of ideas theories relies on erroneous conceptions of American democracy.\textsuperscript{233} Rather than a system that imposes the will of the majority on an unwilling minority, a more appropriate characterization of our democracy is its acceptance of the freedom to challenge established institutions, traditions, and values.\textsuperscript{234} Accordingly, the more appropriate metaphor for freedom of expression is the dissenter. The central role of the First Amendment should be "to protect the romantics—those who would break out of classical forms: the dissenters, the unorthodox, the outcasts."\textsuperscript{235} Courts assessing restrictions on speech should, therefore, weigh heavily the dissent value of the speech at issue and afford presumptive protection to dissent.\textsuperscript{236}

The foregoing discussion is by no means comprehensive, but highlights the dominant thought in answer to the question: Why protect expression? While analyzing every First Amendment decision through eight or more values is a bit unwieldy, there are unifying themes. In advancing his liberty model, Baker evaluated Emerson’s assessment of First Amendment values.\textsuperscript{237} Although each of the four theories pro-

\begin{itemize}
\item \textsuperscript{228} Id. at 7-12.
\item \textsuperscript{229} Id. at 104.
\item \textsuperscript{230} Id. at 6-11. Bollinger asserts that broad protection of expression “involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.” Id. at 10.
\item \textsuperscript{231} Id. at 7.
\item \textsuperscript{232} Shiffrin, supra note 4.
\item \textsuperscript{233} The notion of majority rule by an electorate informed by its selection of competing ideas is undercut by numerous features of American democracy. The Constitution itself belies this concept. If decisions are to be made by representatives that are conduits for majority wishes, what is the role of a constitution that limits government’s ability to effect the majority’s will? Is not judicial review itself contrary to majority rule? Id. at 65-68.
\item \textsuperscript{234} According to Shiffrin, American Romantic writers, particularly Walt Whitman and Ralph Waldo Emerson, articulated this core meaning of American democracy and free expression far more accurately than have courts and legal commentators. Shiffrin, supra note 4.
\item \textsuperscript{235} Id. at 5.
\item \textsuperscript{236} Id. at 108-09.
\item \textsuperscript{237} Baker, supra note 4, at 990.
\end{itemize}
ceed from different values and assumptions, Baker argued that they could ultimately be reduced to two values. The attainment of truth, safety valve, and participation in change values all serve the ends of democratic processes. The emphasis on "self" in the self-fulfillment value requires the definition of a distinct "realm of self-determined processes of self realization" that is separate from any role the First Amendment may play in democratic processes. Thus, the First Amendment is driven by two apparent values: self-fulfillment and participation in democratic change. A reductionist examination of Blasi, Bollinger, and Shiffrin's approaches leads to the conclusion that checking and tolerance fit fairly well in the participation in change value, while dissent serves both the participation and self-fulfillment values.

The point is not, however, to reduce First Amendment theory to sound bite-sized explanations. Baker's delineation of two tracks of First Amendment values underscores the basis of fundamental theoretical disagreement about the purpose of protecting expression in the first place. A list of values that rationalize protection of expression does not, alone, define the scope of the First Amendment, for it does not explain what is not protected. While a fair number of Supreme Court decisions have denied protection to certain expression, no clear principle can be extracted to explain what speech will, in all cases, fall outside the First Amendment's ambit.

The commentary is as fractured as is the case law. It is unilluminating to look to any theory or aggregation of values as a unifying explanation of the Supreme Court's jurisprudence. It is, however, useful to look to theory for analysis of the law's inadequacies and prescriptives for correction. Yet critiques of past decisions and development of abstract correctives offer little to explain how the law operates on the ground. About all that can be said with certainty is that the Court and most commentators agree that self government is an important underlying First Amendment value.

A theme that emerges from the commentary and that is highlighted by Baker is the tension between self-government and self-fulfillment values. The relationship between these values suggests three broad conceptions of the First Amendment that at least compartmentalize the competing theories. One conception is that the First Amendment primarily serves the separate values of self-government and

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238 Id. at 991.
239 Id.
240 The Court has explicitly recognized that speech on matters of public concern is at the heart of the protection. "It is speech on 'matters of public concern that is at the heart of the First Amendment's protection." Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-59 (1985) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)). Yet, the Court has also recognized that other speech is less central, but protected nonetheless. Dun & Bradstreet, 472 U.S. at 758.
241 Baker, supra note 4, at 991.
self-fulfillment. While it may be an exercise in generality, it is fair to characterize the approach of the Supreme Court as recognizing self-government and self-fulfillment. Although the weight of decisions emphasize self-government, there are some decisions that cannot be rationalized by self-government values and must rely on self-fulfillment or some variation of "self-government plus."

Another conception is that the First Amendment protects speech necessary to self-fulfillment only. This is somewhat contrary to the Court's view, but explains some of the commentary. From a results perspective, this approach is identical to full protection of both self-government and self-fulfillment speech. It is only the rationale that differs. Consistent with "self-fulfillment only," speech concerning self-government is protected in one of several ways. Self-government may be derivative of self-fulfillment, and thereby protected. Because the focus is on the speaker and not the social contract, it may be that what is protected is actually speech that supports the speaker's perception of her participation in self-government, regardless of any actual contribution to democratic processes. A "self-fulfillment only" theory might also regard self-government as irrelevant because it is a fallacious value.

Finally, the most restrictive conception is that the First amendment protects only speech that directly concerns self-government. Variations of this theory have been advanced by several commentators, most notably by political philosopher Alexander Meiklejohn and later by Judge Robert Bork. Because political sovereignty rests with the people, there must be freedom for "citizen-sovereigns" to criticize government. As with the self-government value, generally, the pur-


243 See City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993) (holding unconstitutional a city ordinance that prohibited newsmakers that distributed free advertising circulars but did not regulate other newsmakers); Sable Communications v. FCC, 492 U.S. 115 (1989) (holding unconstitutional a ban on "dial-a-porn" telephone services); Wooley v. Maynard, 430 U.S. 705 (1977) (holding unconstitutional a New Hampshire statute that prohibits alteration of license plates as applied to levy criminal sanctions against defendant who obscured state motto "Live Free or Die," because it offended his religious beliefs).

244 This is, in many respects, a variant on Baker's liberty theory. Baker's discussion of self-government is in terms of "participation in change." His focus is on individual participation. "To justify legal obligation, the community must respect individuals as equal, rational and autonomous moral beings." Baker, supra note 4, at 991. That is, participation effects self-fulfillment.

245 This is essentially Shiffrin's argument. Because self-government, traditionally defined as electoral majority rule, is a fallacy, freedom of expression is linked to democracy by reconceptualizing democracy. Advancing the metaphor of the dissenter to shift the core of First Amendment inquiry to romantic tradition is surely a subset of self-fulfillment.

246 Alexander Meiklejohn, supra note 4.

247 Bork, supra note 4.

248 "The principle of freedom of speech is . . . a deduction from the basic American
pose of protecting speech is to facilitate electoral democratic processes.\textsuperscript{249} Meiklejohn in his initial writings went further and argued that protection should be denied for speech that does not bear on self-government. Meiklejohn urged a sharp division between public speech, which would be afforded full First Amendment protection,\textsuperscript{250} and "private" speech, which could be regulated to the extent allowed by due process.\textsuperscript{251} In subsequent writings Meiklejohn ultimately argued that "public" speech should include a wide range of subject matter, including literature, art, philosophy, and science, because decisions in these areas are ultimately expressed at the ballot.\textsuperscript{252}

Judge Bork is partially in accord with Meiklejohn's approach, but would protect only "speech that is explicitly political."\textsuperscript{253} Bork criticizes uncertainty and overinclusiveness in First Amendment jurisprudence\textsuperscript{254} and would instead ground the First Amendment in "neutral principles."\textsuperscript{255}

Bork extracts his "neutral" principles from the structure of the Constitution.\textsuperscript{256} The Constitution constructs a representative democracy that would be meaningless without freedom of speech on political issues.\textsuperscript{257} Because the structure of the Constitution demands protection for no more speech than is necessary to facilitate its governmental mandates, the First Amendment apparently protects nothing else.\textsuperscript{258} This limitation is also desirable because its very definitiveness renders the First Amendment "fit for enforcement by judges."\textsuperscript{259} Protection of expression concerning art, literature, and other "nonpolitical speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives."\textsuperscript{260} It is the "self-government only" conception alone that advances sharply defined limits to the Constitution's protection of expression. The first two con-

\begin{itemize}
\item \textsuperscript{249} Id. at 48.
\item \textsuperscript{250} Id. at 37.
\item \textsuperscript{251} Id. at 89. The problem with the Meiklejohn approach, as Shiffrin notes, is that even if one could determine what is and is not political speech, "[something is seriously amiss with] a first amendment theory that [provides] absolute protection for political speech... [while] excluding protection for Shakespeare, Aristotle, and Einstein." Shiffrin, supra note 4, at 48.
\item \textsuperscript{252} Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Cr. Rev. 245 (1961). This modification is suspect. As a means of bringing a broader range of speech under the First Amendment's umbrella it fails by conditioning protection of literature on its connection to political issues. If it intends the connection between speech and politics to be metaphoric and protect broadly, it becomes difficult to define speech that is not political.
\item \textsuperscript{253} Bork, supra note 4, at 29.
\item \textsuperscript{254} Id. at 20-21.
\item \textsuperscript{255} Id. at 23.
\item \textsuperscript{256} Id. at 21. Bork rejects the intent of the Framers of the Constitution as broad and incoherent and the absolute terms of the text as unworkable. Id. at 21-22.
\item \textsuperscript{257} Id. at 23.
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id. at 28.
\end{itemize}
ceptions may be considered as alternative formulations of the more flexible "self-government plus" approach.

The flashpoint that underscores every First Amendment decision is whether and how far beyond self-government speech protection ought to extend. Paradoxically, few courts reveal the theoretical assumptions underlying their First Amendment decisions. Yet such assumptions are crucially outcome-determinative, as virtually every case would reach a different result were the court's theoretical underpinnings altered. Decisions such as Desai and DeRoburt that are factually indistinguishable, yet differently decided, often turn on unstated theoretical differences. Accordingly, it is useful to examine these cases through the filter of competing First Amendment theories.

VI. Conclusion

The choice of self-government, self-fulfillment, or both as defining principle helps explain the results of the extraterritorial defamation cases. DeRoburt, Desai, and Bachchan all agree that self-government is an important, perhaps even the primary, First Amendment value. Desai, however, is deceptive in its use of the self-government value as a limiting principle. It is quite a leap from the premise that speech concerning self-government is protected to Desai's conclusion that speech that does not concern self-government is not protected. In fact, it is a logical fallacy. Desai first asserts that its rule will apply the First Amendment in extraterritorial defamation cases when "the purpose[s] of the [F]irst [A]mendment will be fostered." It recites precedent that supports the position that self-government is a widely accepted First Amendment value. It then concludes that protected political speech loses its protection once a defendant deliberately chooses to publish in a foreign country. Desai characterizes such foreign publication as "abandonment" of First Amendment protections but does not explain why intentional publication is equivalent to abandonment. In fact, the court suggests that this conclusion is obvious.

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261 No absolute theory explains all First Amendment results. A court that proceeds from "self-government only" assumptions will not necessarily afford protection for all speech that concerns self-government. Neither will a court that relies on self-fulfillment assumptions protect all speech that furthers self-fulfillment. Disparate philosophies will merely rationalize different results and will often be the hidden explanation for seemingly inconsistent decisions.
263 Id. at 676.
264 Id.
265 "[T]he Constitution 'contemplates a bias toward unfettered speech at the expense, perhaps, of compensation for harm to reputation, at least where a public figure and a topic of enormous public interest, going to the heart of political discourse, is concerned.' " Id. at 677 (quoting Buckley v. Littell, 539 F.2d. 882, 889 (2d Cir. 1976)) (emphasis added).
266 Desai, 719 F. Supp. at 679.
267 Id.
268 *When publication in the foreign country is intentional, and the foreign market ex-
That foreign publication by a U.S. author is tantamount to abandoning the First Amendment must surely come as a surprise to the large number of writers, publishers, and broadcasters who deliver their work overseas each day. The conclusion is, however, obvious if there is agreement that the First Amendment protects only speech that bears on self-government in the United States.\textsuperscript{269} If so, political speech that reaches non-U.S. readers has no effect on electoral processes in the United States. It is, however, erroneous to assert that the First Amendment operates this narrowly.\textsuperscript{270} If the Desai court had been driven by any type of "self-government plus" theory, the answer would not have been at all obvious. Desai plays bait and switch with the self-government value. It relies on a widely accepted premise—that self-government is an important First Amendment rationale—and then tells us that it is the only rationale. In so doing, it hides its adoption of a severely narrow definition of the scope of the First Amendment.\textsuperscript{271}

DeRoburt, too, is disingenuous in its discussion of First Amendment theory. It predicates its protection of PD's extraterritorial publication into the self-government value.\textsuperscript{272} Yet, its analysis begs the question. It may be the policy of Hawaii to protect criticism of public officials and public figures because it is a "principle fundamental to our system of constitutional democracy."\textsuperscript{273} It is not at all clear without further explanation, however, that protection of such criticism beyond U.S. borders has anything to do with our system of constitutional democracy.

Bachchan is similarly opaque concerning its view of the First Amendment's purpose. While it expresses an aversion to "chilling true
speech on matters of public concern,"274 it does not modify "public" by geographical limits. Of course, "public concern" rhetoric is closely associated with self-government values and the court's recitation of this language invokes the underlying theory.275 Yet, the court's protection of India Abroad's Indian publications does little to foster self-government.276 Although it is impossible to divine a rationalizing principle, it is fair to conclude that the Bachchan court's conception of the First Amendment exceeds "self-government only."

The "self-government only" approach is clearly not the law. At best it is a misguided attempt to inject artificial certainty into an area of constitutional interpretation that is justifiably complex. At worst, it is a cynical manipulation of constitutional theory that is calculated to restrict judicial review under the Bill of Rights. A survey of Supreme Court decisions underscores the conclusion that "self-government plus" is the correct approach. Although it is not at all clear what is encompassed within the "plus," protection for advertising,277 art, literature, and even pornography278 definitively establish the First Amendment's reach beyond speech that facilitates political decision making.

Because their holdings are consistent with "self-government plus," DeRoburt and Bachchan were decided correctly. Nonetheless, each court rationalized its decision on self-government rhetoric that was inapplicable to speech published outside the United States. While it would have been more satisfying for each court to explain its conception of the First Amendment, the results are nonetheless unassailable, even if the reasoning is flawed. Conversely, Desai falls outside First Amendment norms. Not only is it dishonest in manipulating the self-government value to rationalize the wrong result, it advanced, at least implicitly, a dangerously limiting conception of the First Amendment.

Whether to extend the First Amendment to extraterritorial publications underscores the idea that the First Amendment has limits that must, at times, be chosen. Most articulated "self-government plus" theories would seem to extend to extraterritorial speech. Protection


275 The link between self-government and speech of public concern is illustrated in Dun & Bradstreet:

It is speech on matters of public concern that is at the heart of the First Amendment's protection . . . [T]his special concern for speech on public issues is no mystery: The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.


276 Unless the court meant to facilitate self-government in India—a doubtful proposition. Even more remote is the possibility that the New York court was motivated by the needs of the American expatriate community living in India.


278 Miller v. California, 413 U.S. 15, 24 (1973) (First Amendment protection extends to all speech of serious literary, artistic, political and scientific value.); Roth v. United States 354 U.S. 476, 484-85 (1957) ("All ideas having even the slightest redeeming social importance . . . have the full protection of the [First Amendment] guarantees.").
seems to be embraced by the self-fulfillment rationale. An author's act of making a worldwide statement bears on the author and may or may not implicate self-government. More specifically, it is encompassed by the liberty theory equally as a self-fulfilling act that is neither violent nor coercive. It is also embraced by a focus on dissent value. An extraterritorial defamation serves as no less an outlet for dissent than does a domestic defamation.

When courts decide to apply or deny First Amendment protection, they are necessarily driven by a theoretical model of the First Amendment—whether they explain it or not. It is acceptable for a court to extend First Amendment protection without a detailed explanation about why it is doing so because this is consistent with the general constitutional presumption that expression is protected. While DeRoburt and Bachchan may be less satisfying analytically, they reached the correct result. On the other hand, when a court limits the First Amendment, its obligation to explain itself is heightened. It is not inconceivable that a “self-government plus” theory would exclude extraterritorial protection in some circumstances. If so, it should be fully explained. It is more logical, however, to construe even a flexible conception of “self-government plus” as presumptively protecting extraterritorial speech. Accordingly, courts should refuse to apply foreign defamation law without First Amendment safeguards and should refuse enforcement of foreign defamation judgments rendered in the absence of First Amendment protections.

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279 Baker, supra note 4. See supra notes 220-23 and accompanying text for an explanation of the liberty model.

280 See supra notes 232-36 and accompanying text for an explanation Shiffrin’s conception of the dissent value.

281 The aftermath of the Tiananmen Square rebellion and its violent suppression illustrates this point. A network of dissidents, both inside and outside of China, have relied on faxes and electronic mail to communicate about the political situation in China and organize measures in response. D.D. Guttenplan, Queens' China Connection; Expelled Dissident Runs Tactics Network, N.Y. NEWSDAY, June 6, 1989, at 4. This international, instantaneous electronic form of communication likely carries a number of defamations. It is also an important means of dissent for many who fall within the First Amendment’s protection.