

Checking the “Trigger-Happy” Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence

DEREK G. BARELLA*

For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

—Justice Oliver Wendell Holmes¹

INTRODUCTION

A nation’s jurisdiction to prescribe is defined as its ability “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.”² There are a number of bases upon which a state can claim prescriptive jurisdiction. Generally, territoriality and nationality are the two most universally accepted bases of jurisdiction.³ The territoriality principle represents the state’s right to regulate activity that takes place wholly or substantially within its borders.⁴ The nationality principle is the state’s right to regulate the conduct, interests, status, or relations of its nationals, whether that conduct occurs inside or outside of the state’s territorial limits.⁵ Extraterritorial jurisdiction,

* J.D. Candidate, 1994, Indiana University School of Law—Bloomington; B.S., 1991, Ball State University. Special thanks to my wife, Heather, for her constant encouragement and support.

1. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (citation omitted), *overruled by* *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

2. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1986) [hereinafter RESTATEMENT].

3. *Id.* § 402 introductory note. “Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.” *Id.* § 402 cmt. b. Thus, in the event conflicts should arise, international law mandates that nationality must yield to territoriality. Panel Discussion, *Jurisdictional Conflicts Arising from Extraterritorial Enforcement: The Broader Context of the Conflict*, 54 ANTITRUST L.J. 787, app. B at 831 (1985) (William C. Beckett, author of appendix).

In addition to territoriality and nationality, in limited cases, prescriptive jurisdiction has been based on other foundations. Universal jurisdiction is warranted in those cases in which the subject of the act to be regulated is not otherwise subject to any state’s jurisdiction, or in which the act in question is a violation of a jus cogens norm of international law. For example, a state has universal jurisdiction to prescribe punishment for offenses such as piracy, slave trade, or genocide. RESTATEMENT, *supra* note 2, § 404. Additionally, a state’s prescriptive jurisdiction has been recognized when based on a passive personality interest. That is, states may regulate conduct outside of their borders and engaged in by non-nationals for the purpose of protecting the safety of their nationals or national security. *Id.* § 402(3).

4. RESTATEMENT, *supra* note 2, § 402(1)(a).

5. *Id.* § 402(2).

by definition, is a state's exercise of its regulatory authority over activities taking place or persons located outside of the territorial boundaries of the state.⁶ Thus, when a state extends its jurisdiction over persons or activities in a foreign land based on nationality, or another non-territorial basis of jurisdiction, the state is acting extraterritorially.⁷ Since the foreign state hosting the activity or persons sought to be regulated has jurisdiction based on territoriality, there exists an imminent potential for conflict of laws. As the world economy becomes more interdependent and the capitalization of foreign markets becomes more frequent, the potential for extraterritorial application of laws, and the corresponding potential for conflicts among laws, will increase.

The United States has long been on the cutting edge of states pressing to extend coverage of domestic laws beyond territorial limits. Extraterritorial application of United States law has occurred most often, and has caused the most controversy, in the fields of antitrust and securities law.⁸ In recent

6. "Extraterritorial jurisdiction" is defined as "[j]uridical power which extends beyond the physical limits of a particular state or country." BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

7. International law does not impose an express restriction on extraterritorial jurisdiction. General principals of international law, however, serve to limit such jurisdiction. For instance, international law recognizes: 1) the duty to refrain from interfering with the sovereignty of another state, which necessarily includes the duty to refrain from performing acts of sovereignty within the territory of another state, and 2) the duty to refrain from interfering with the exercise of another state's jurisdiction. Gary Z. Nothstein & Jeffrey P. Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 CORNELL INT'L L.J. 1, 13 (1976); see also Michael A. Warner, Jr., Comment, *Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law*, 11 NW. J. INT'L L. & BUS. 371, 372 (1990) (noting that the modern approach is to supplement rigid territoriality concepts with notions of reasonableness and fairness).

8. Extraterritorial application of federal antitrust and securities laws has long been a source of friction between the United States and foreign governments. Even traditional allies such as Great Britain have been outspoken in their disapproval of "American Imperialism." David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185, 188 (1984). Foreign states have gone so far as to engage in retaliation against the United States. Such retaliation usually has taken one of three forms:

1) One of the milder forms of retaliation has simply been diplomatic protest. This protest has at times risen to the level of public admonitions, and in some cases has resulted in a foreign government appearing before United States courts to plead restraint in the application of American antitrust laws. *Id.* at 187.

2) In some cases, threats, sanctions, and other forms of economic coercion have been applied against American corporations abroad in response to transnational application of United States laws:

In the economic sphere, other countries are expressing resistance to U.S. companies' participation in projects thought likely to be subject to U.S. extraterritorial controls. Some foreign manufacturers are shifting to non-U.S. sources of supply for long-term industrial projects or export-oriented manufacturing. This is affecting U.S. companies' participation in joint ventures as well as their sales abroad. . . . The political and economic implications are so significant that they could become a bigger threat to American economic interests than the present concerns about tariffs, quotas, and exchange rates.

Kenneth W. Dam, *Economic and Political Aspects of Extraterritoriality*, Address Before the Comm. on International Aspects of Antitrust Law of the International Section of the American Bar Association, (April 16, 1985), in CURRENT POLICY NO. 697, Mar. 5, 1985, at 2.

3) Finally, some foreign states have adopted legislation designed to thwart the extraterritorial application of United States laws. Typically this type of legislation takes one of three forms. "Blocking" statutes prohibit cooperation with American legal proceedings, particularly with respect to discovery orders. "Drawback" or "clawback" statutes expressly deny national recognition of certain foreign

years, however, the issue has arisen again as to whether United States labor and employment laws can be, and should be, applied extraterritorially.⁹ This Note will evaluate the prudence of extending the coverage of United States employment laws overseas, focusing particularly on the National Labor Relations Act ("NLRA" or "Act"). Part I reviews the historical presumption against extraterritoriality that has been applied to employment laws. Using this historical discussion as a backdrop, Part II examines recent congressional developments that have revived the issue of transnational application of United States employment laws. More specifically, Part II considers the amendments to the Age Discrimination in Employment Act and to Title VII of the Civil Rights Act of 1964—amendments that made those two acts applicable to United States companies employing Americans abroad.¹⁰ Part II also looks at the Workplace Democracy Act of 1992 ("WDA"),¹¹ which was introduced in the House of Representatives on September 25, 1992. The WDA was referred to the House Education and Labor Committee on the date of its proposal, and was not reported out of committee. The WDA had as its primary purpose the securing of collective bargaining rights for public employees. In addition, the WDA called for the amendment of the National Labor Relations Act in order to apply its provisions extraterritorially. Part III discusses why this proposed extension of the NLRA to American employers located abroad would cause practical administrative difficulties for the National Labor Relations Board ("NLRB" or "Board") and diplomatic difficulties for the United States Government. Finally, Part IV proposes a new test for courts to employ when considering the extraterritorial application of federal employment laws.

I. THE EXTRATERRITORIAL APPLICATION OF EMPLOYMENT LAWS

A. *The American Banana Dam Against Extraterritoriality*

The United States Supreme Court first considered the extraterritorial application of a federal statute in *American Banana Co. v. United Fruit Co.*¹²

judgments. And finally, "secrecy" laws impose duties of confidentiality upon foreign nationals. Secrecy laws thereby end up frustrating the extraterritorial application of United States laws in much the same manner as blocking laws. RESTATEMENT, *supra* note 2, § 442 reporters' notes 1 & 4; Gerber, *supra* at 187; James M. Zimmerman, *Extraterritorial Application of Federal Labor Laws: Congress's Flawed Extension of the ADEA*, 21 CORNELL INT'L L.J. 103, 120-23 (1988); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1311 (1985).

9. This revival has been a direct result of the congressional amendment of two widely publicized employment laws, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964. Both amendments were passed in order to explicitly extend the coverage of those acts to encompass American employees working for United States based companies outside of the United States. See discussion *infra* parts II.A, II.B.

10. This Note uses the terms "abroad" and "overseas" to refer to foreign states generally. Thus, those terms are meant to include Canada, Mexico, and other foreign nations that are not necessarily "overseas."

11. H.R. 6041, 102d Cong., 2d Sess. (1992).

12. *American Banana*, 213 U.S. 347 (1909), *overruled by* *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). The fact that the Court was not acquainted with cases arguing

At issue in *American Banana* was the Sherman Anti-Trust Act and, in particular, the United Fruit Company's alleged unlawful monopoly of the Costa Rican banana market.¹³ The Court, through Justice Holmes, issued a virtual per se rule against extraterritorial application of federal statutes.¹⁴ Justice Holmes' opinion was largely a creature of its time, a time in which non-territorial bases of jurisdiction were not as widely accepted as they are today. In this light, it is important to note that Justice Holmes' opinion focused on whether Congress had the authority to regulate activities abroad at all, rather than concentrating on whether Congress actually intended the Sherman Act to be applied extraterritorially. Justice Holmes stated that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."¹⁵ Therefore, "in case of doubt . . . [a]ll legislation is *prima facie* territorial."¹⁶ Again, this conclusion was warranted by the then-prevailing view that territoriality was the predominant base of jurisdiction. For a state to regulate conduct outside of its boundaries, it would run the risk of interfering with the sovereignty of another nation, thereby violating international law.¹⁷

B. *The Cracks in the Dam*

American Banana acted as an effective dam to extraterritoriality for the next two decades.¹⁸ In the 1930's, however, the absolutist view of territoriality began to soften, and states, particularly the United States, began to realize the need to continue to exercise some control over their citizens, even while those citizens were located outside the state's boundaries.¹⁹ Consequently, cracks in the dam began to appear.²⁰ The two largest cracks were representative of a more widely accepted recognition of non-territorial bases of prescriptive

the extraterritorial application of United States laws is evident from the majority opinion:

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

Id. at 355.

13. *Id.* at 354-55.

14. *Id.* at 357.

15. *Id.* at 356 (citation omitted).

16. *Id.* at 357 (emphasis in original) (citation omitted) (quoting *Ex parte Blain*, 1879 Ch. 522, 528 (Eng., C.A.)).

17. *Id.* at 356.

18. Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 604 (1990).

19. Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1276 (1990) [hereinafter *Constructing the State Extraterritorially*].

20. Turley, *supra* note 18, at 604-08. One commentator has described the "loud[] and unnecessary[]" role of *American Banana* as "an albatross which the Court has struggled to remove almost ever since [its creation]." David P. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34, 57.

jurisdiction and an expanded view as to what constituted prescriptive jurisdiction under the territorial principle itself.²¹

Blackmer v. United States,²² illustrates the first crack in the dam. In *Blackmer*, the Court declined overruling the presumption against extraterritoriality pronounced in *American Banana*. Nonetheless, the Court softened the rule by expressly recognizing nationality as a valid basis for exerting jurisdiction.²³ In so doing, the Court stated "the question of [a statute's] application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power."²⁴ The Court found Congress' authority to legislate extraterritorially, at least with respect to American citizens, to be clearly authorized under international law.²⁵ Given that Congress had such authority, the Court identified the real issue as being whether Congress indeed intended for the particular law in question to extend transnationally.²⁶ The presumption was changed from a virtually irrebuttable one that focused on the authority of Congress, to a rebuttable one that focused on the intent of Congress.

The rationale given by the Court for the presumption is two-fold. The first rationale stems from conflicts principles that were first announced by Chief Justice Marshall in 1804.²⁷ "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations."²⁸ Under this canon of construction, the courts, whenever possible, will construe an act of Congress in such a way as to avoid potential international conflicts.

The second rationale was formally stated by the Court in *Foley Bros. v. Filardo*.²⁹ The Court reasoned that Congress, when legislating, is primarily concerned with domestic matters.³⁰ This second rationale has been especially influential upon the courts when considering the transnational application of labor and employment laws. It has been stated that "[i]t is more likely for a statute with an international focus, such as the Trading with the Enemy Act, to be interpreted as having extraterritorial reach than it is for a statute with a domestic focus, such as the National Labor Relations Act, to be so interpreted."³¹

21. Turley, *supra* note 18, at 604-05 & n.42.

22. *Blackmer*, 284 U.S. 421 (1932).

23. *Id.* at 436.

24. *Id.* at 437.

25. *Id.* at 437 n.2 ("The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy.") (citing several international scholarly works) (quoting 1 OPPENHEIM, INTERNATIONAL LAW § 145, at 281 (4th ed.)).

26. *Id.* at 437.

27. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

28. *Id.* at 118.

29. *Foley Bros.*, 336 U.S. 281 (1949).

30. Turley, *supra* note 18, at 607.

31. George A. Zaphiriou, *Basis of the Conflict of Laws: Fairness and Effectiveness*, 10 GEO. MASON U. L. REV. 301, 322-23 (1988) (citations omitted); see also RESTATEMENT, *supra* note 2, § 403

The second crack in the dam was an expanded view of the territorial principle. Often termed the "effects doctrine," or "objective territoriality," this view recognized the authority of a state to regulate conduct outside of its territorial boundaries that has or is intended to have substantial territorial effects.³² Judge Learned Hand, writing for the Second Circuit in *United States v. Aluminum Co. of America*,³³ adopted this doctrine in recognizing the extraterritoriality of the Sherman Act in 1945.³⁴ Judge Hand stated that if conduct abroad had "intended and actual" or "foreseeable and substantial" effects within the state, then prescriptive jurisdiction was established.³⁵ Initially, the effects doctrine was widely criticized by other states. "Some countries viewed the effects doctrine as akin to 'imperialism' and chose not to recognize the doctrine."³⁶ United States courts continued to apply the doctrine in antitrust cases, however, until 1976 when the Ninth Circuit slightly modified the doctrine in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*³⁷ The *Timberlane* opinion augmented the effects doctrine by establishing a balancing test that weighs the interests of the United States against the interests of other nations that might be affected by the extraterritorial application of a United States law.³⁸ This balancing approach in turn has been widely criticized,³⁹ but has nonetheless been accepted by a number of circuit courts, and the American Legal Institute.⁴⁰ Today the effects doctrine, in one form or another, is begrudgingly accepted by most of the international community.⁴¹

C. The Modern Presumption Against Extraterritoriality

The modern analysis of statutes has diverged down one of the two cracks depending upon the nature of the statute in question.⁴² Antitrust and

reporters' note 2.

32. RESTATEMENT, *supra* note 2, § 402 cmt. d.

33. *Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

34. *Id.* at 443-44.

35. *Id.*

36. Zimmerman, *supra* note 8, at 110 & n.39; see also RESTATEMENT, *supra* note 2, § 402 reporters' note 2; LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 829-30 (2d ed. 1987); Edward Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151, 153 (Winter 1980).

37. *Timberlane*, 549 F.2d 597 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

38. *Id.* at 609, 613; see Gordon, *supra* note 36, at 158.

39. See, e.g., Gerber, *supra* note 8, at 205-06.

40. RESTATEMENT, *supra* note 2, § 403.

41. *Id.* § 403 reporters' note 3; see also Monroe Leigh, *Export Administration Act—Extraterritorial Jurisdiction over Foreign Incorporated Subsidiary of U.S. Parent Company—Claim of U.S. Jurisdiction Rejected in Netherlands Court*, 77 AM. J. INT'L L. 636 (1983).

42. Professor Jonathan Turley has described the courts' bifurcated analysis of statutes by distinguishing between "market" and "nonmarket" statutes. Professor Turley contends that the courts more readily "grant extraterritorial relief under 'market statutes,' like the antitrust and securities laws that are primarily intended to protect market interests—even though [the courts] acknowledge that the statutes are silent on whether such application was intended by Congress." On the other hand, labor and employment laws, which regulate less traditional markets, receive less favorable treatment because they

securities statutes have received wide extraterritorial application.⁴³ When considering these types of statutes, courts have focused on the expanded territoriality concept and have concluded that potential territorial effects warrant extraterritorial application.⁴⁴ Indeed, consideration of the extraterritoriality of antitrust or securities statutes under the effects doctrine or the modified effects doctrine, as espoused in *Timberlane*, has often boiled down to a simple interest balancing test.⁴⁵ Moreover, courts have generously weighted the United States' interest in maintaining the purity of its trade and securities markets. Thus, foreign interests have submitted to American ones in the courts' balancing, and consequently federal antitrust and securities laws have been applied expansively across the globe.⁴⁶

Employment laws generally have not been examined under the enhanced territoriality concept,⁴⁷ but instead have been considered to be extraterritorial in application only if they could be based on the nationality principle.⁴⁸ Therefore, the focus in employment cases has not been on the policy considerations underlying transnational application of the law in question but instead has been on whether Congress has evidenced the requisite intent to

are essentially "nonmarket statutes." Turley, *supra* note 18, at 601. The term "nonmarket" "is meant to reflect a conceptual bias in extraterritorial cases that favor antitrust and securities laws because of their express statutory purpose of preserving competitive markets." *Id.* at n.16.

Professor Turley's article goes on to list three possible distinctions between "market" and "nonmarket" statutes that might be the underlying cause of their disparate treatment. The distinctions discussed are: 1) an effects distinction, 2) an intrusiveness distinction, and 3) an interests distinction. *Id.* at 638-55.

43. *Id.* at 608-17.

44. *See supra* notes 32-41 and accompanying text.

45. Zimmerman, *supra* note 8, at 110.

46. Turley, *supra* note 18, at 608-17.

47. The balancing of interests theory was utilized for a short time by the NLRB when considering application of the NLRA to cases with international contacts. The Supreme Court expressly rejected that balancing approach in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963): [T]o follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.

Id. at 19; *see also* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 308 (1982); Nothstein & Ayres, *supra* note 7, at 31.

In Part II.C., this Note will question whether the courts have actually rejected the effects doctrine with respect to employment laws, and in particular with respect to their consideration of the transnational scope of the National Labor Relations Act.

48. *But see* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (Summer 1987); Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS. 39 (Summer 1987). Professors Brilmayer and Juenger contend that "judicial recourse to an unexpressed legislative intent in determining the reach of domestic law amounts to mere windowdressing." *Id.* at 39. Questions of extraterritoriality arise because Congress failed to address that issue when enacting the particular statute to begin with. Professor Juenger draws out the proposition further by stating that "[i]t is doubtless correct to say that when courts profess to honor the wishes of Congress, they in fact follow their own normative views concerning the desirable scope of American regulatory legislation." *Id.* at 40.

apply the law extraterritorially.⁴⁹ In other words, while the authority of Congress to enact transnational employment laws has been widely recognized, the courts have required proof of the affirmative intent of Congress to extend the law in question overseas. Such intent has rarely been found.⁵⁰

The test for effective rebuttal of the presumption in employment law cases further has been split into two prongs.⁵¹ If the statute is one that, if applied extraterritorially, is likely to interfere with international diplomacy and relations, the statute will be deemed territorial unless a "clear statement" of contrary congressional intent can be found.⁵² If applying the statute extraterritorially would not give rise to imminent foreign relations conflicts, however, the standard is weaker. In these non-confrontational cases, the intent of Congress to apply a law abroad can be found in either the statutory language or its history.⁵³

When analyzing each particular employment statute for extraterritorial reach, the courts have not always been clear about which tier of the presumption they were applying. Whichever tier was being used, however, the courts have consistently denied extraterritorial application to almost every employment law they have considered.⁵⁴ Those laws that have been held to possess "territorial application only" include: the Labor Management Relations Act,⁵⁵ the National Labor Relations Act,⁵⁶ Title VII of the Civil Rights Act of 1964,⁵⁷ the Age Discrimination in Employment Act,⁵⁸ the Eight Hour

49. Michael L. Goldberg, *Labor Relations and Labor Standards for Employees of United States Enterprises Working in Foreign Areas*, 48 N.D. L. REV. 23, 26 (1971); Turley, *supra* note 18, at 617-18.

50. *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1262-63 (D.N.J. 1983) ("Generally, this country's labor laws have been construed to preclude extraterritorial application."); Goldberg, *supra* note 49, at 36; Turley, *supra* note 18, at 627; Zimmerman, *supra* note 8, at 106; Warner, *supra* note 7, at 387.

51. Jacqueline E. Bailey, Note, *Title VII Protections Do Not Extend to Americans Working Overseas: EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991), 5 TRANSNAT'L LAW. 417, 423 (1992); Janelle M. Diller, Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1476 (1985); Conly J. Schulte, Case Note, *Americans Employed Abroad by United States Firms Are Denied Protection Under Title VII: EEOC v. Arabian American Oil Co.*, 25 CREIGHTON L. REV. 351, 361 (1991).

52. *See supra* note 51.

53. *See supra* note 51.

54. *See supra* note 51.

55. Labor-Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1988)); *see infra* part II.C.

56. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)); *see infra* part II.C.

57. Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)); *see infra* part II.B.

58. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1988)); *see infra* part II.A.

Law,⁵⁹ the Federal Employers' Liability Act,⁶⁰ and the Railway Labor Act.⁶¹

Virtually the only employment law to receive favorable extraterritorial application is the Fair Labor Standards Act ("FLSA").⁶² The Court in *Vermilya-Brown Co. v. Connell*⁶³ held that congressional intent to apply the FLSA to a military base in Bermuda could be inferred from the language in the statute governing "possessions" of the United States.⁶⁴ The Court reasoned that the leased property on which the base was located qualified as a possession of the United States.⁶⁵

In *Foley Bros. v. Filardo*,⁶⁶ decided only three months after *Vermilya-Brown*, the Court refused to find the Federal Eight Hour Law applicable to a contract between the United States and a private contractor for construction

59. Eight Hour Law, ch. 174, 37 Stat. 137 (1912), *repealed by* Pub. L. No. 87-581, 6 Stat. 360 (1962); *see infra* notes 67-71 and accompanying text.

60. Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1988)). In *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29 (1925), an American citizen was employed by the defendant railroad and suffered fatal injuries while working on a passenger train located in Canada, 30 miles north of the United States border. The decedent's administrator brought suit under the Federal Employers' Liability Act ("FELA"). FELA declares that common carriers by railroad, while engaging in interstate or foreign commerce, shall be liable for damages caused to employees resulting from the carrier's negligence. The Court held that there was no evidence that Congress intended FELA to apply extraterritorially. The plaintiff's only recourse was to seek relief under Canadian law. *Id.* at 31.

Despite the fact that the Court noted a lack of congressional intent to apply FELA extraterritorially, *Chisholm* was not exactly governed by the modern presumption approach. At the time *Chisholm* was decided, *American Banana* was still the prevailing view, and in fact the *Chisholm* Court cited *American Banana* approvingly. *Id.* at 32. Thus, at the time of this decision, territoriality was still seen as the greatly preferred, and indeed was still cited by many as the only, basis for exerting prescriptive jurisdiction. This theory, not a lack of congressional intent, was most likely the primary justification for the Court's holding in *Chisholm*.

61. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-163 (1988)). In *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685 (1951), the District of Columbia Court of Appeals affirmed a decision of the National Mediation Board holding that the Railway Labor Act ("RLA") was intended to be strictly territorial in scope. In that case the Air Line Dispatchers Association, a labor organization, had filed an application with the National Mediation Board for an investigation of an alleged representation dispute among the flight dispatchers of Pan American-Grace Airways, Inc. The Board, noting that the company and the dispatchers in question operated solely outside the United States, dismissed the application on the ground that the RLA did not apply to the dispute. *Id.* at 687. The affirmation by the court in this case was made easy, as the terms and history of the RLA clearly point to the fact that its provisions were meant to apply to carriers engaged in interstate and foreign transportation only "so far as such transportation . . . takes place within the United States." *Id.* at 690 (quoting 49 U.S.C.A. §§ 1(1)(c), 1(2)).

The court then considered the 1936 amendments to the RLA that extended the RLA to air carriers "engaged in interstate or foreign commerce." *Id.* (quoting 45 U.S.C.A. § 181). The court concluded by reference to another section in the RLA, and to the legislative history of the amendments, that the amendments were only intended to cover air carriers to the extent rail carriers were covered under the original RLA. *Id.* Thus, the court concluded that in all respects, the RLA was strictly territorial in its scope.

62. Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-209 (1988)).

63. *Vermilya-Brown*, 335 U.S. 377 (1948).

64. *Id.* at 390.

65. *Id.*

66. *Foley Bros.*, 336 U.S. 281 (1949).

work to be performed in a foreign country.⁶⁷ The Court reached this conclusion despite the fact that the relevant provisions of the Eight Hour Law were "indistinguishable in effect" from the FLSA provisions that the Court had just considered in *Vermilya-Brown*.⁶⁸ Justice Frankfurter, concurring in the *Foley Bros.* judgment, noted the inconsistent results in the two cases: "Because the decision in *Vermilya-Brown Co. v. Connell*, . . . was one of statutory interpretation, I would feel bound by it were it not still open because rendered at this Term. If I felt bound by it, I would be obliged to dissent in this case."⁶⁹ Justice Frankfurter, who had joined the dissenting Justice Jackson in *Vermilya-Brown*,⁷⁰ went on to restate the arguments mandating strictly territorial application of both the FLSA and the Eight Hour Law.⁷¹

Congress amended the FLSA in 1957 to reverse the Court's decision in *Vermilya-Brown*.⁷² The purpose of the amendments was "to exclude from any possible coverage of the Fair Labor Standards Act work performed by employees in a workplace within a foreign country."⁷³ Congress gave a number of reasons for intentionally limiting the reach of the FLSA. In particular, Congress cited the fact that the payment of United States minimum wages in certain foreign countries was disturbing the local economies "by drawing workers away from vital tasks and by conceivably making recruitment of workers to these desirable jobs on the overseas bases a subject of local political interest."⁷⁴ Further, in order to comply with local laws, defense contractors had been forced to violate the FLSA in their foreign operations. The Department of Defense, in order to facilitate operations, had underwritten the contractors against any FLSA liability and now the Department stood to pay millions of dollars in retroactive liability.⁷⁵ Finally, Congress recognized "[t]he desirability of allowing the Government to continue its present procedures of establishing employment standards through negotiation and agreement with the governments of the areas involved."⁷⁶

67. *Id.* at 284-85.

68. *Id.* at 292 (Frankfurter, J., concurring); see also Zimmerman, *supra* note 8, at 114.

69. *Foley Bros.*, 336 U.S. at 291 (Frankfurter, J., concurring) (citation omitted).

70. *Vermilya-Brown*, 335 U.S. at 409 (Jackson, J., dissenting).

71. *Foley Bros.*, 336 U.S. at 292-94 (Frankfurter, J., concurring). In particular, Justice Frankfurter was concerned that the statute might interfere with contracts in existence between United States contractors and foreign laborers. Additionally, Justice Frankfurter's concurrence in *Foley Bros.* reprinted a letter of the Wage and Hour Administrator, the person principally responsible for enforcing the *Vermilya-Brown* decision. *Id.* at 292-300. The Administrator had written that "even if I should be able to reach sound conclusions as to the application of the [FLSA] in these areas, I cannot help but foresee fundamental administrative difficulties in attempting to apply the Act in 'possessions' over which the United States does not exercise full sovereign rights." *Id.* at 299. Finally, Justice Frankfurter noted that he would have preferred a clear statement of purpose from Congress before holding a statute to "regulate labor conditions which are the primary concern of a foreign country." *Id.* at 291 (quoting the majority opinion at 286). Justice Frankfurter stated that "[w]e should not, in the absence of an explicit declaration of policy, assume that Congress meant to impose our domestic standards of employment upon peoples who are not generally subject to the regulatory power of Congress." *Id.* at 292.

72. Pub. L. No. 85-231, 71 Stat. 514 (1957) (codified as amended at 29 U.S.C. § 213(f) (1988)).

73. S. REP. NO. 987, 85th Cong., 1st Sess. 2 (1957).

74. *Id.* at 3.

75. H.R. REP. NO. 808, 85th Cong., 1st Sess. 3 (1957).

76. *Id.*

The cases previously discussed evidence courts' reluctance to extend coverage of federal employment laws overseas. Their hesitancy is largely predicated on a desire to avoid stepping on internationally sovereign toes, and by a belief that Congress is primarily concerned with domestic affairs. Following the *Vermilya-Brown* decision, Congress, in its amendment of the FLSA, could be said to have voiced its approval of the courts' conservative stance in this area. However, instances in recent years suggest that such congressional approval could be waning. To be more specific, Congress has amended two employment laws, the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964 ("Title VII"), to expressly ensure their extraterritorial reach.⁷⁷ Some commentators suggest that amendment of a third labor statute, the National Labor Relations Act, might not, and some would argue, should not, be far behind.⁷⁸

II. REVIVAL OF AN ISSUE ONCE THOUGHT TO BE DEAD

Much of the debate surrounding the extraterritorial application of United States employment laws has come from the courts' consideration of the ADEA, Title VII, and the NLRA. Utilizing the presumption, the courts have refused to apply any of these statutes extraterritorially, and have thereby prompted Congress to act. In 1984, Congress amended the ADEA,⁷⁹ and, in 1991, it amended the Civil Rights Act.⁸⁰ In both cases, the amendments made explicit Congress' intent that the laws be applied extraterritorially.⁸¹ While some commentaries have suggested a similar amendment to the NLRA,⁸² Congress remained quiet on the issue until September 25, 1992. On that date, Representative Bernard Sanders (D-VT) introduced the Workplace Democracy Act of 1992.⁸³ The primary purpose of the WDA was to guarantee the right of public employees to organize and bargain collectively.⁸⁴ However, section Three, "Application of Act," stated:

The provisions of the National Labor Relations Act shall apply to United States companies and their subsidiaries operating in any country that is a signatory to a Free Trade Agreement. Workers of such companies and subsidiaries shall have the right to file unfair labor practice complaints

77. See *infra* notes 92-95, 113-15 and accompanying text.

78. See, e.g., Jeffrey K. Ross, *American Legal Restrictions on the Use of Union Economic Weapons Against Multinational Employers*, 10 CORNELL INT'L L.J. 59, 84 n.130 (1976).

79. Pub. L. No. 98-459, 98 Stat. 1792 (1984) (codified as amended at 29 U.S.C. § 630(f) (1988)).

80. Pub. L. No. 102-166, 105 Stat. 1071 (1991) ("With respect to employment in a foreign country, [the term 'employee'] includes an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f) (Supp. III 1991)).

81. Renee S. Orleans, Note, *Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad*, 16 MD. J. INT'L L. & TRADE 147, 159-60 (1992).

82. See Ross, *supra* note 78, at 84 n.130.

83. H.R. 6041, *supra* note 11.

84. *Id.* § 2(a).

against the United States parent company under this Act and under the laws of the signatory country.⁸⁵

The WDA was never reported out of the House Education and Labor Committee; however, amending the NLRA to expand its coverage to American citizens working overseas for United States companies or subsidiaries still remains possible.

A. *The Age Discrimination in Employment Act*

Prior to its amendment, the Age Discrimination in Employment Act was consistently denied extraterritorial application by the courts. In the leading case on the matter, *Cleary v. United States Lines, Inc.*,⁸⁶ the petitioner, Francis Cleary, had worked for his American employer, United States Lines, for thirty-three years. The last two-thirds of his employment had been spent in Europe, with the last twelve years of service in London. When United States Lines terminated Mr. Cleary, he was told that the dismissal was due to structural reorganization. Later, the company said it fired Mr. Cleary due to poor job performance. Mr. Cleary claimed that both of the stated reasons were pretextual, and that actually he was terminated because of his age. Consequently, he filed a discrimination claim under the ADEA.⁸⁷

The Third Circuit agreed with the district court's conclusion that the enforcement provisions of the amended FLSA were incorporated into the ADEA.⁸⁸ The court reasoned, since the FLSA by its terms did not apply outside of the territory of the United States, ergo the ADEA did not either.⁸⁹ In support of its holding, the district court also found significant the fact that the Equal Employment Opportunity Commission ("EEOC"), the administrative agency charged with carrying out the provisions of the ADEA, was neither equipped nor empowered to function abroad.⁹⁰ The Third Circuit agreed with the district court's analysis and affirmed the holding on appeal.⁹¹

85. *Id.* § 3.

86. *Cleary*, 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

87. *Cleary*, 728 F.2d at 608.

88. *Id.*

89. To be specific, the court noted:

Section 7 of the ADEA, 29 U.S.C. § 626, provides that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211 (b), 216 [except for subdivision (a) thereof] and 217 of this title." The provisions referenced are part of the FLSA. Section 16(d), 29 U.S.C. § 216(d), provides that "no employer shall be subject to any liability or punishment . . . on account of his failure to comply with any provision of such Acts (1) with respect to work . . . performed in a workplace to which the exception in section 13(f) of this title is applicable." Section 13(f), 29 U.S.C. § 213(f), in turn provides that the acts covered by it shall not apply "to any employee whose services during the workweek are performed in a workplace within a foreign country."

Id.

90. *Cleary*, 555 F. Supp. at 1259.

91. *Cleary*, 728 F.2d at 610.

After *Cleary*, Congress began to investigate the merits of extending the ADEA extraterritorially.⁹² In hearings on the matter, the goals of both the ADEA and Title VII of the Civil Rights Act of 1964 were discussed. Together, the two laws were designed to completely eliminate discrimination in the workplace.⁹³ Noting that Title VII applied extraterritorially, which was the prevailing view at the time, Clarence Thomas, then chairperson of the EEOC, argued along with others that the ADEA should be amended so that it too would protect Americans working abroad.⁹⁴ The position championed by Thomas and the EEOC prevailed and, in 1984, the Older Americans Act Amendments were passed, explicitly authorizing the extraterritorial application of the ADEA.⁹⁵ Congress carefully limited the amendments so as not to apply to foreign nationals or foreign-based companies. Further, the amendments provided that the ADEA would not be enforced in cases where compliance with its provisions would force a United States company or subsidiary to violate the laws of the host country.⁹⁶

Following the amendments, the courts struck one final blow to the issue of whether the ADEA protected Americans abroad. In *S.F. DeYoreo v. Bell Helicopter Textron, Inc.*⁹⁷ and *Pfeiffer v. Wm. Wrigley Jr. Co.*,⁹⁸ the Fifth and Seventh Circuits refused the respective plaintiffs relief under the ADEA for alleged discrimination that occurred overseas.⁹⁹ While the complaints were filed after the amendment of the ADEA, the alleged discrimination occurred prior to the amendment, and the courts refused to apply the Older Americans Act Amendments retroactively.¹⁰⁰ Judge Posner's opinion in *Pfeiffer* exemplifies the hesitancy exhibited by the courts when considering the transnational application of federal employment statutes. Despite the recent ADEA amendments, ninety percent of Judge Posner's opinion was used to carefully illuminate the concerns of the judiciary that have underlain the

92. *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 1 (1983).*

93. *Id.* at 2-3.

94. *Id. passim.*

95. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 1984 U.S.C.A.N. (98 Stat.) 1767, 1792-93 (codified at 29 U.S.C. §§ 623, 630, 631). The amendments add the following language to the ADEA definition of employee: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." Zimmerman, *supra* note 8, at 117 (citing Older Americans Act Amendments of 1984, *supra*).

96. Louise P. Zonar, Note, *Recent Amendments to the Age Discrimination in Employment Act, 19 GEO. WASH. J. INT'L L. & ECON. 165, 187 (1985)*. In effect, the amendments to the ADEA expressly reserve for American companies what is known as the foreign sovereign compulsion defense. The foreign compulsion defense has long been recognized by United States courts in cases where a defendant can show that in order to comply with the law of the country in which it was located, it was forced to engage in conduct that was violative of United States law. The historical problem with the defense has been that it has been accepted in some cases and rejected in others, with no clear guidelines being established to guide future conduct. For a good discussion of the defense, see generally Warner, *supra* note 7.

97. *DeYoreo*, 785 F.2d 1282 (5th Cir. 1986).

98. *Pfeiffer*, 755 F.2d 554 (7th Cir. 1985).

99. *DeYoreo*, 785 F.2d at 1283; *Pfeiffer*, 755 F.2d at 559.

100. *DeYoreo*, 785 F.2d at 1283; *Pfeiffer*, 755 F.2d at 559-60.

presumption against extraterritoriality.¹⁰¹ Finally, in the last paragraph of his opinion, Judge Posner recognized the 1984 amendments and then quickly dismissed them as nonretroactive.¹⁰²

B. Title VII of the Civil Rights Act of 1964

Meanwhile, contrary to the ADEA, Title VII of the Civil Rights Act of 1964 had been consistently interpreted by federal district courts as applying to Americans working abroad for United States companies.¹⁰³ However, in 1991, the Supreme Court considered the case of Mr. Ali Boueslan, an American citizen working for the Arabian American Oil Company ("Aramco"), a Delaware corporation, at its plant in Saudi Arabia.¹⁰⁴ Mr. Boueslan claimed he was fired on the bases of his race, religion, and national origin. Consequently, he sought relief under Title VII.¹⁰⁵ The Supreme Court, in an opinion by Chief Justice Rehnquist, held that Mr. Boueslan had no claim under Title VII because the statute contained no language to suggest that Congress intended it to be applied extraterritorially.¹⁰⁶ "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'"¹⁰⁷ The presumption of territoriality, the majority reasoned, "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."¹⁰⁸

Justice Marshall's dissent criticized the majority for both abandoning the two-tiered rebuttable presumption test and for establishing a clear statement rule for all employment laws.¹⁰⁹ "[T]he Court has until now recognized that [the clear statement test is] reserved for settings in which the extraterritorial application of a statute would 'implicat[e] sensitive issues of the authority of the Executive over relations with foreign nations.'"¹¹⁰ Justice Marshall cited the National Labor Relations Act as an example of such a law that, if applied extraterritorially, would very possibly implicate sensitive foreign relations issues.¹¹¹ Title VII, on the other hand, if applied strictly to American employees working abroad for United States employers, would cause no

101. *Pfeiffer*, 755 F.2d at 557 ("The fear of outright collisions between domestic and foreign law—collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries—lies behind the presumption against the extraterritorial application of federal statutes.").

102. *Id.* at 559-60; see also Turley, *supra* note 18, at 625.

103. Orleans, *supra* note 81, at 152 & n.53.

104. EEOC v. Arabian Am. Oil Co. (Aramco), 111 S. Ct. 1227 (1991).

105. *Id.* at 1230.

106. *Id.* at 1236.

107. *Id.* at 1230 (citations omitted) (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) and *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

108. *Id.*

109. *Id.* at 1237-46 (Marshall, J., dissenting).

110. *Id.* at 1239 (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979)).

111. *Id.*

friction with foreign relations.¹¹² Therefore, the dissent reasoned that Title VII should be subject to the “weak” tier of the presumption. The weak tier was satisfied, Justice Marshall concluded, because congressional intent to apply Title VII extraterritorially could clearly be ascertained from examining together both the statute’s language, legislative history, and administrative interpretations.¹¹³

Congress overturned the *Aramco* decision with the Civil Rights Act of 1991.¹¹⁴ The amendment language extending Title VII’s reach overseas was patterned almost directly after the Older Americans Act of 1984.¹¹⁵ It too is limited in its scope, expressly allowing the defense of foreign sovereign compulsion.¹¹⁶

C. *The National Labor Relations Act*

The extraterritorial application of the NLRA has been considered by the NLRB and the courts under several different factual settings. Though the language of the Act itself appears to grant wide jurisdictional authority to the NLRB,¹¹⁷ courts have consistently denied such jurisdiction in cases that have involved significant foreign elements.

Because the cases dealing with the NLRA’s transnational reach involve diverse fact patterns, it is difficult to determine the precedential value of each case’s holding. The process is further complicated by the many different decision-makers that are involved, namely the Supreme Court, the lower federal courts, and the NLRB. Indeed, some commentators have suggested that the “true” issue of whether the NLRA extends extraterritorially has yet to be determined.¹¹⁸ To keep the cases straight and to ascertain what future

112. *Id.* at 1239-40.

113. *Id.* at 1246.

114. Pub. L. No. 102-66, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.); Jay W. Waks, *Workers’ Rights Now Extend Overseas*, NAT’L L.J., Dec. 23, 1991, at 16; Orleans, *supra* note 81, at 147 n.4.

115. Older Americans Act Amendments of 1984, Pub. L. No. 98-459. Congress did not engage in additional hearings in order to determine the merit of expanding Title VII’s protections. The cavalier amendment of Title VII’s territorial reach concerned Representative William Goodling (R-PA) who stated: “[A] far-reaching change in employment discrimination law is being undertaken with no pretense of substantive consideration in the legislative process. . . . [H]earings on an issue of this importance—extension of an American law to other countries and all the potential problems that may entail—would have been useful.” 137 CONG. REC. H3934 (daily ed. June 5, 1991) (Statement of Rep. Goodling).

116. § 109(b)(1)(B), 105 Stat. at 1077 (1991).

117. “Commerce” is defined in § 2(6) of the Act as:

[T]rade, traffic, commeree, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 U.S.C. § 152(6) (1988) (emphasis added).

118. Nothstein & Ayres, *supra* note 7, at 24 (“Contrary to the Board’s belief in *RCA*, neither *Benz* nor its prolific progeny address the issue of whether the Labor Management Relations Act applies or can be applied to American employees working on foreign soil for an American employer.”); Diller, *supra* note 51, at 1470-73 & nn. 32-50.

scenarios are governed by the existing case law, it is helpful to keep the following three variables in mind: 1) the nationality of the employer;¹¹⁹ 2) the situs of the underlying activity in controversy;¹²⁰ and 3) the nationality of the employees.¹²¹

The *Benz* line of cases is usually cited as authority that the NLRA is strictly territorial in scope.¹²² These maritime cases involved foreign-flag ships that were temporarily docked at American ports. Questions of NLRA application arose when American unions took action with regard to the ships' foreign crews. In *Benz*, an American union picketed a foreign ship in support of a strike by the ship's foreign crew members.¹²³ The Supreme Court held that the picketing was outside of the jurisdiction of the Labor Management Relations Act ("LMRA").¹²⁴ The Court noted that the only American connections with the controversy were the American labor union and the United States port. These contacts were deemed insufficient by the Court to mandate application of the LMRA,¹²⁵ which was created as "a bill of rights both for American workmen and their employers."¹²⁶

Six years later, the *Benz* holding was followed in two cases that were decided by the Court on the same day. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*,¹²⁷ the Court considered whether the NLRA was applicable in companion cases involving the organization of foreign crews on vessels owned by foreign subsidiaries of United States corporations.¹²⁸ The NLRB had held that the Act applied, and upon the petition of the National

119. It is important to note that employers are normally the defendants in actions brought under the NLRA. For the NLRA to apply, the employer in question must fall under the regulatory scope of the Act. No specific language in the Act indicates whether foreign employers are subject to the Act's provisions, so deferral to the general principles of extraterritorial jurisdiction is necessary. If the employer in question is not American, or the subsidiary of a American parent company, the United States cannot claim jurisdiction under the nationality principle. As mentioned earlier, the courts have not used the effects doctrine, or similar balancing tests, to extend employment laws transnationally. It appears that the only time the Act will govern the conduct of a foreign employer is when that employer's activity was conducted within the territorial boundaries of the United States. Therefore, in considering the extraterritorial scope of the NLRA, this Note is primarily concerned with the actions of American employers.

120. If the location of the activity at issue is within the territory of the United States, then there is no extraterritorial question. Thus, the cases concerning whether the NLRA extends abroad must contain activity that takes place, at least in part, outside of the territorial boundaries of the United States.

121. Generally, the cases agree that the NLRA was passed for the purpose of furthering the American economy by ensuring the rights of American employees. Therefore, as shown in the discussion that follows, disputes that appear to have no impact on American employees or the American economy, generally have been held to be outside the regulatory scope of the NLRA.

122. The *Benz* line of cases includes: *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), and *Ingres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963).

123. *Benz*, 353 U.S. at 139-42.

124. *Id.* at 146-47. The LMRA includes the NLRA, and future cases denying extraterritorial application of the NLRA have cited *Benz* as directly controlling authority.

125. *Id.* at 142.

126. *Id.* at 144 (emphasis in original) (quoting Chairman Hartley, coauthor of the Act, H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947)).

127. *McCulloch*, 372 U.S. 10 (1963).

128. *Id.* at 11-13.

Maritime Union, had ordered a representation election.¹²⁹ The district court affirmed the Board,¹³⁰ and the Second Circuit reversed.¹³¹ The Supreme Court granted certiorari to resolve the disagreement.¹³² The Court's opinion paid lip service to Congress' authority to enact a law to regulate facts such as those before it in *McCulloch*.¹³³ The Court then turned to the threshold question in the case—whether Congress had indeed enacted such a law by creating the NLRA.¹³⁴ Writing for the majority, Justice Clark stated:

The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains" We therefore conclude, as we did in *Benz*, that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." Since neither we nor the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election.¹³⁵

Similarly, in *Inces Steamship Co. v. International Maritime Workers Union*,¹³⁶ an American union was picketing a foreign ship docked in a United States port. The picketing was part of the union's attempt to organize the ship's foreign crew.¹³⁷ Citing *Benz* and *McCulloch*, the Court found the NLRB to be without jurisdiction to order a representation election.¹³⁸ In particular, the Court stated that with regard to the *Benz* line of cases, "[t]he Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce.'"¹³⁹

In *Benz*, *McCulloch*, and *Inces*, the issue was whether the NLRA applied to a situation involving foreign employees and a foreign boat, docked at a United States port. Even though the boats were docked at American ports, the Court in these cases considered the true situs of the claims to be the ships themselves. Thus, in the *Benz* line of cases, all three variables were foreign. As such, the Court had little difficulty deciding that the NLRA did not apply.

129. *United Fruit Co.*, 134 N.L.R.B. 287, *enforced subnom.* *Empresa Hondurena de Vapores, S.A. v. McLeod*, 200 F. Supp. 484 (S.D.N.Y. 1961), *rev'd*, 300 F.2d 222 (2d Cir. 1962), *vacated subnom.* *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

130. *McLeod*, 200 F. Supp. 484.

131. *McLeod*, 300 F.2d 222.

132. *McLeod v. Empresa Hondurena De Vapores, S.A.*, 370 U.S. 915 (1962) (*cert. granted*).

133. *McCulloch*, 372 U.S. at 17, 22.

134. *Id.* at 19, 22.

135. *Id.* at 21-22 (citations omitted) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) and *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

136. *Inces Steamship*, 372 U.S. 24 (1963).

137. *Id.* at 25-26.

138. *Id.* at 27.

139. *Id.*

Despite the accommodating facts, the *Benz* line of cases have been cited for the general proposition that the NLRA does not extend extraterritorially.¹⁴⁰

In some later maritime cases, the international contacts involved were not as substantial as those in *Benz*, *Ingres*, and *McCulloch*, and the Court, therefore, needed to hone further its position on the extraterritoriality of the NLRA. In a 1970 case, *International Longshoremen's Ass'n Local 1416 v. Ariadne Shipping Co.*,¹⁴¹ an American union was picketing foreign-flag ships in United States ports in protest of substandard wages that were paid to non-union, but American, longshoremen.¹⁴² This time the Court, through Justice Brennan, affirmed Board jurisdiction under the NLRA.¹⁴³ Distinguishing the case from the *Benz* line of cases, Brennan noted:

The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' "internal discipline and order." Application of United States law . . . , accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. We therefore find that these longshore operations were in "commerce" within the meaning of § 2(6).¹⁴⁴

Three years after *Ariadne Shipping*, the Court was again confronted with a *Benz* like case in *Windward Shipping Ltd. v. American Radio Ass'n*.¹⁴⁵ Noting that the picketing was in protest of substandard wages paid to foreign seamen employed by foreign shipowners, the Court cited *Benz* and *McCulloch* and denied NLRB jurisdiction.¹⁴⁶ More importantly, the Court, through Justice Rehnquist, articulated what it saw to be the key factors which, when present, led to NLRA jurisdiction, but when absent, foreclosed application of the NLRA: "Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA [or NLRA] was designed to regulate. This case, therefore, falls under *Benz* rather

140. *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1259 n.2 (1983) *aff'd*, 728 F.2d 607 (3d Cir. 1984). It is also because of their accommodating facts that some commentators have argued that the *Benz* line of cases have been given too much precedential value and that the extraterritoriality of the NLRA is an open question. See *supra* note 118 and accompanying text.

141. *Ariadne Shipping*, 397 U.S. 195 (1970).

142. *Id.* at 196-99.

143. *Id.* at 200.

144. *Id.* In a case similar to *Ariadne*, *NLRB v. International Longshoremen's Ass'n ("ILA")*, 332 F.2d 992 (4th Cir. 1964), the fact pattern boiled down to unionized American workers refusing to unload a foreign ship while it was docked at a United States port. *Id.* Their refusal was predicated on a boycott of ships that were engaged in trade with Cuba. The Fourth Circuit denied Board jurisdiction because the controversy in question was not related to a "labor dispute." *Id.* at 995-96. Prior to making this ultimate determination, however, the Fourth Circuit ruled that the NLRA applied to the case. The court distinguished the facts before it from the *Benz* line of cases by pointing out that the real activity at issue was the politically motivated conduct of American employees. *Id.* Further, the court noted that the case did not involve "shipboard labor relations" but instead was about the conduct of the unloaders on a United States dock. *Id.* So, as in *Ariadne Shipping*, the core issue in this case was the application of the Act to American employees with respect to their actions taking place on United States shores.

145. *Windward Shipping*, 415 U.S. 104 (1974).

146. *Id.* at 112-15.

than under *Ariadne*.¹⁴⁷ In other words, the Court stated that it was looking for conduct, the direct effect of which would impact American employees or the American economy.¹⁴⁸

While many of the cases considering the extraterritorial application of the NLRA involved maritime operations, there have been a few cases before the Board that have involved more traditional employment settings.¹⁴⁹ *RCA OMS, Inc.*¹⁵⁰ and *GTE Automatic Electric, Inc.*¹⁵¹ may be examples of cases where the "true" extraterritorial application of the NLRA was considered. In these cases, American unions sought to represent American employees working for overseas subsidiaries of United States corporations. In *RCA*, the International Brotherhood of Electrical Workers, AFL-CIO ("IBE") sought to represent American employees of Operation and Maintenance Service, Inc., a subsidiary of RCA, a Delaware corporation. The employees that the union sought to organize worked at five sites in Greenland, a possession of Denmark governed as a Danish county. The employees in question were required to have United States government security clearance, were hired in and paid from the United States, and returned to the United States upon completion of their jobs.¹⁵² Despite these facts, the Board held that Greenland did not come within the jurisdiction of the NLRA.¹⁵³

Similarly, in *GTE*, the IBE sought to bargain for all of the telephone equipment installers employed by the company, including those employed by GTE Iran Inc., on a project that was being performed in Iran.¹⁵⁴ The Board, citing *RCA* and *Benz*, held "[i]t is clear that employees in Iran are not within the jurisdiction of the Act. Accordingly, we find that telephone equipment

147. *Id.* at 115.

148. See Ross, *supra* note 78, at 67.

The idea that the courts are looking for impact either on American workers or on the United States economy is further supported by cases like *United Fruit Co.*, 159 N.L.R.B. 135 (1966), and *National Maritime Union of America, AFL-CIO v. NLRB*, 267 F. Supp. 117 (S.D.N.Y. 1967). In both of these actions, the Board refused jurisdiction in disputes involving foreign employees working for a United States corporation in the Panama Canal zone. Because the Board exercised its discretion to refuse jurisdiction, the actual issue of whether or not the NLRA applied to these disputes was left undecided. In *Contact Services*, 202 N.L.R.B. 156 (1973), however, the Board considered facts substantively similar to those in *United Fruit* and *National Maritime Union*. In so doing, the Board held that the NLRA did apply but that it was refusing jurisdiction out of respect for foreign policy considerations that might be involved.

Though the United States often considers itself to have a substantial interest in the Panama Canal zone, labor practices in the zone would certainly have only a negligible effect, if indeed they have any effect at all, on the American economy. Therefore, the feelings articulated by the Court in *Windward Shipping* appear to have been present in these prior decisions in which the Board refused to exercise extraterritorial jurisdiction under the NLRA.

149. By reference to "more traditional employment settings" that might represent "true" questions of the extraterritorial application of the NLRA, this Note means to consider those cases where an American company, or subsidiary, employs American citizens outside of the territory of the United States.

150. *RCA*, 202 N.L.R.B. 228 (1973).

151. *GTE*, 226 N.L.R.B. 1222 (1976).

152. *RCA*, 202 N.L.R.B. at 228.

153. *Id.* The Board did not refuse to exercise jurisdiction, but rather held that it had no jurisdiction under the NLRA to consider the dispute presented in *RCA*. *Id.*

154. *GTE*, 226 N.L.R.B. at 1222.

installers employed on projects in Iran or other foreign countries outside the United States are not within the [collective bargaining] unit."¹⁵⁵

The Board was a little more lenient in *Freeport Transport*,¹⁵⁶ a case that differed only slightly from *RCA*. An American employee, Robert Carr, was working for Freeport Transport, a Pennsylvania corporation, both in its American locations and in its Ontario terminal. The Board noted that Mr. Carr spent about three-fourths of his time in the United States, and never went more than forty-five miles into Canada. Mr. Carr alleged that he was fired by the company because of his involvement with the Teamsters, and as such he claimed that the company violated Sections 8(a)(1) and 8(a)(3) of the NLRA.¹⁵⁷ The Board distinguished *RCA* and found "the American connection sufficient to establish that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and thus to warrant attachment of the Board's jurisdiction to this case."¹⁵⁸ In essence, the Board felt that it was dealing with an American employer, an American employee, and for all practical purposes, activity that took place within the United States.¹⁵⁹

Whether or not it is accepted that the *Benz* line of cases is generally controlling in this area, the question of the NLRA's extraterritorial reach appears to have been foreclosed. Looking to the rationale stated in *Windward Shipping*, the courts and the Board seem content to apply the Act only to those disputes which will have an impact on American employees and the American economy. Comparing the *RCA* and *Freeport Transport* cases illuminates the conclusion that a dispute affecting American employees is not enough; there must be a corresponding impact on the United States labor market for the Act to apply.¹⁶⁰ It must be remembered, however, that the

155. *Id.* at 1223.

156. *Freeport Transport*, 220 N.L.R.B. 833 (1975).

157. *Id.* at 833.

158. *Id.* at 834.

159. The Board was careful to hedge its finding of jurisdiction with language suggesting that if the facts were slightly more "Canadian," it would deny jurisdiction:

It may be that if this case concerned only a petition by the Union for certification as exclusive bargaining representative of all the employees at the Ontario terminal—even as part of an overall unit of all three terminals [of the company]—the Board would lack jurisdiction because of the involvement of the working conditions of foreign employees, i.e., Canadian citizens. *What is involved here, however, is whether the Act's protection is available to an American citizen and resident allegedly discharged for participating in an American organizational campaign* which for a time looked also to the organization of Canadians.

Id. (citations omitted) (emphasis added).

160. This interpretation of the NLRA cases seems to suggest that the courts may be using a version of the effects doctrine to reach their conclusions. The Eleventh Circuit explicitly used this version of the effects doctrine when it decided *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir. 1992). In that case, the Board had petitioned for an injunction, alleging that the International Longshoremen's Association ("ILA") had violated the NLRA by inducing Japanese unions to engage in an illegal secondary boycott. The District Court issued the injunction and the ILA appealed, claiming among other things that the conduct in question was outside the jurisdictional scope of the NLRA. The Eleventh Circuit affirmed the District Court noting that a substantial amount of the conduct in question took place within the United States. Nonetheless, the court went on to describe the effects doctrine as it applied to the Sherman Act, the Securities and Exchange Act, and the Commodity Exchange Act. In the same paragraph, the court stated "[s]ince the object and effect of the conduct in question was to

“true” decisions regarding the extraterritoriality of the NLRA are only Board decisions. As such, the substance of their holdings is subject to later reversal by the courts or the Board itself.¹⁶¹ Furthermore, there is always the possibility that a piece of legislation like the Workplace Democracy Act¹⁶² will be implemented by Congress.

III. POTENTIAL RAMIFICATIONS OF NLRA EXTRATERRITORIALITY

The courts and the Board have refused to extend the NLRA extraterritorially despite the wide range of presented case scenarios in which the issue has arisen. As was earlier discussed, however, Congress has recently overruled the territorial limitations imposed by the courts on two prominent employment statutes.¹⁶³ Before considering similar legislative preemption with the NLRA, Congress must appraise a number of important issues. These issues can loosely be grouped into two categories, jurisdictional considerations, and practical considerations.

A. Jurisdictional Considerations

1. Subject Matter Jurisdiction

Subject matter jurisdiction defines the authority of a particular adjudicative body to hear certain types of cases. As seen above, the Board and courts have determined that the NLRA does not grant them subject matter jurisdiction to decide extraterritorial disputes. This determination is entirely consistent with the language, history, and purpose of the Act.

The underlying purpose of the NLRA is not difficult to discover. In enacting the Wagner Act¹⁶⁴ in 1935, Congress sought to alleviate industrial conflicts between labor and management that interfered with the free flow of intrastate and foreign commerce.¹⁶⁵ To achieve this goal, the Act was

implement a secondary boycott within the United States, we do not believe the location of that conduct is determinative.” *Id.* at 790.

161. Contrary to the courts, the Board does not generally consider itself to be precedentially bound by its earlier decisions. Given the fact that the political makeup of the Board changes with the Presidential Administration, this policy has led to some see-saw results in many labor issues. A good example of this can be seen by looking at the Board’s holdings with regards to misrepresentations made by employers or unions during the course of an election campaign. In *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982), the Board’s opinion gives a clear description of its conflicting opinions on this issue.

162. H.R. 6046, 102d Cong., 2d Sess. (1992).

163. See *supra* notes 92-96, 114-16 and accompanying text.

164. 49 Stat. 449 (1935).

165. Some commentators suggest that the “obstruction to the free flow of commerce” language in the NLRA’s history is largely pretextual. That language exists to support Congress’ authority to enact such legislation under its Commerce Clause power. The real motivating factor behind the statute is simply the intolerable working conditions that existed in America in the early to mid-1930’s. With the country submerged in the depths of the Depression, Congress sought not only to improve working conditions, but to increase the spending power of workers, hoping to stimulate the economy. For a good discussion of the enactment of the NLRA, see Currie, *supra* note 20, at 47-51. (“The inequality of

constructed to promote equal bargaining power between labor and management.¹⁶⁶ Other than its broad definition of the term "commerce,"¹⁶⁷ there is no language in the Act or in its expansive legislative history which suggests Congress intended, or even considered, that its provisions would be applied extraterritorially.¹⁶⁸

The history of the Act is replete with references to "our country"; "the whole country"; "all over the United States." . . . It was America whose problems attracted the notice of Congress; America that elected the congressmen who enacted the statute. The United States Congress was not in the habit of enacting legislation to regulate the economies of foreign nations.¹⁶⁹

The manner in which the Act has traditionally been applied also supports the idea that the NLRA does not grant subject matter jurisdiction over extraterritorial disputes. Historically, the courts have interpreted the NLRA in such a way as to maintain a high level of respect for the right of the employer to retain control over its property. Thus, the Act could be said to guarantee certain "Section 7" rights for employees that may not be interfered with by employers. Other than engaging in conduct that would interfere with Section 7 rights, the employer retains free reign to conduct its business in the manner that will most effectively maximize its profit margin.

One concrete example of the this idea involves union access to the employer's property in organizational drives. In *Lechmere, Inc. v. NLRB*,¹⁷⁰ the Court stated that the employer had a virtually absolute right to bar union organizers from coming onto company property, despite the fact that one of the most important Section 7 rights is the right of employees to organize.¹⁷¹ The Court reasoned that, except in extraordinary cases like logging camps, the union had other reasonable means of communicating with employees in an attempt to organize them.¹⁷² In order to allow the employee's Section 7 right and the employer's property right to exist conterminously, the Court held that it was not an unfair labor practice for an employer to disallow union solicitors on its property.¹⁷³ Moreover, the Court held that if the situation were like that of a logging camp, it would then balance the right of employees to organize against the employer's property rights. Only if the employee rights

bargaining power between employees . . . and employers . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners. . . . The remedy: 'protection by law of the right of employees to organize and bargain collectively.'" *Id.* at 48 (quoting 49 Stat. 449, as amended, 29 U.S.C. § 151 (1958)).

166. More specifically, the Act guaranteed certain rights to employees, namely the right to organize and "bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1988).

167. *See supra* note 117.

168. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 18 (1962).

169. *Currie, supra* note 20, at 50 (citation omitted).

170. *Lechmere*, 112 S. Ct. 841 (1992).

171. *Id.* at 849-50.

172. *Id.* at 848-49.

173. *Id.* at 850.

were weightier would the union gain limited access to company property for the purpose of organizing the employees.¹⁷⁴

Another example of the Court's respect for the employer's right to run its business is found in the *Mackay Radio*¹⁷⁵ doctrine. In *Mackay*, the Court recognized that an employer has the right to hire permanent replacements for striking workers in order to continue production.¹⁷⁶ By allowing an employer to undermine the effectiveness of a strike through the use of permanent replacement workers, the Court again allowed the right of the employer to run its business to contravene a Section 7 right of the employees.¹⁷⁷

As mentioned earlier, the history and language of the NLRA do not manifest a congressional intent to regulate labor disputes overseas. This fact, taken together with the principle that the employer has free rein over all activity not explicitly prohibited in the Act, inevitably yields the conclusion that the Act does not apply extraterritorially. Finally, this conclusion is buttressed by the fact that Congress did not equip the NLRB, the sole administrative body charged with implementing the NLRA, with adequate powers or authority to execute the Act's provisions in an international setting.¹⁷⁸

2. Personal Jurisdiction

Personal jurisdiction refers to the authority of a court to issue a binding judgment on a particular party. The traditional test of personal jurisdiction from *International Shoe Co. v. Washington*¹⁷⁹ requires that the defendant have sufficient "minimum contacts" with the forum such that the maintenance of a suit against the party in that jurisdiction does not offend the notions of fair play and justice.¹⁸⁰

The defendant in most labor disputes will be the employer. The employer in extraterritorial cases will likely be the foreign subsidiary of a multinational corporation. Trying to establish minimum contacts between the foreign subsidiary and the United States could pose some problems. The argument could be made that the subsidiary sells goods in the American marketplace, and, by virtue of that fact, it has sufficient contacts such that it would not be unfair for it to be sued in the United States.¹⁸¹ Another argument could be made that the subsidiary is actually an "alter ego" of the parent company.

174. *Id.* at 848.

175. NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

176. *Id.* at 345-46.

177. 29 U.S.C. § 157.

178. See *infra* notes 194-211 and accompanying text.

179. *International Shoe*, 326 U.S. 310 (1945).

180. *Id.* at 316.

181. This reasoning was rejected in *Asahi v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, the plaintiff was the victim of a motorcycle crash. The crash was caused by a blown tire. The plaintiff sued the tire manufacturer who, in turn, sought indemnification from a Japanese tube manufacturer. *Id.* at 105-08. The Court held that personal jurisdiction over the Japanese company could not be established in California. The Court stated that even if minimum contacts were present, it would not be reasonable to entertain personal jurisdiction over the foreign company. *Id.* at 116.

Because of the substantial involvement of the parent company in the affairs of the subsidiary, it is not unfair for the subsidiary to be sued in the United States. Even assuming that these arguments are accepted to establish personal jurisdiction for United States purposes, they will not be very persuasive to foreign sovereigns who view the subsidiaries as local companies.¹⁸² “[I]t is generally accepted internationally that the nationality of a company is determined by its place of incorporation. . . . [E]ven where nationality is a legitimate basis for extraterritorial jurisdictions, it must remain subject to the primacy of the laws and the policies of the territorial state.”¹⁸³

The personal jurisdiction issue can become even more strained when foreign labor organizations are parties or potential parties to the dispute. Even if there are sufficient minimum contacts between the foreign union and the United States to warrant personal jurisdiction, if the union does not voluntarily consent to such jurisdiction, an embarrassing confrontation could ensue.¹⁸⁴

3. Conflicts of Jurisdiction

The final jurisdictional issue to consider is that which was raised in the Introduction. Considering the case of American workers overseas, even if the United States possessed prescriptive jurisdiction based upon the nationality principle, a conflict of laws would exist since the host country would also have jurisdiction based on territoriality.

There are competing views as to how jurisdictional conflicts should be settled. Many states adhere strictly to the idea that territoriality is the preferred, and best, basis for jurisdiction. Other states, and the Restatement, recognize that there are often more in-depth policy issues at hand. In general, the Restatement imposes an obligation of “reasonableness” on any exercise of jurisdiction.¹⁸⁵ In other words, even though a state may have a legitimate basis for exerting jurisdiction, it should decline to do so when such exertion would be unreasonable.¹⁸⁶ Generally, “reasonableness” boils down to a balancing of interests between the competing states.¹⁸⁷ Because of the effect that labor policy can have on a nation’s domestic economy as a whole, when

182. RESTATEMENT, *supra* note 2, § 414 (1986); Leigh, *supra* note 41, at 636-37; Zimmerman, *supra* note 8, at 125.

183. Zimmerman, *supra* note 8, at 125 (alteration in original).

184. Nothstein & Ayres, *supra* note 7, at 53.

185. RESTATEMENT, *supra* note 2, § 403.

186. *Id.*

187. The Restatement suggests a number of factors for states with competing jurisdictional claims to consider including:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state . . . (e) the importance of the regulation to the international political, legal, or economic system.

Id. § 403(2).

considering conflicting labor statutes, it will be difficult to find that the host government does not have the more substantial interests at stake. Through amendment, Congress explicitly rejected the notion that the Fair Labor Standards Act be applied extraterritorially. This decision was based primarily on respect for the right of a sovereign to control activities that will have a substantial impact on its local economy.¹⁸⁸

As discussed previously, extraterritorial application of United States laws has been met with substantial resistance by foreign states.¹⁸⁹ Employment laws, in particular, tend to be more domestic in nature because they "are usually based on historical, political and social factors peculiar to the country involved."¹⁹⁰ Thus, it would not be advisable for the United States to overextend the reach of its labor policies. This is particularly true, as Justice Marshall stated in his *Aramco* dissent, with a statute like the NLRA.¹⁹¹ Such activity easily could be perceived as "imperialism" and provoke retaliatory action. Retaliation could come in any of the earlier mentioned forms¹⁹² or could come in a more reciprocal form. For example, "the application by foreign countries of their labor law to foreign employees working in the United States for foreign companies is certainly within reason."¹⁹³ A foreign state might also attempt to hold an American parent company responsible for the activities of its foreign subsidiary. Either of these actions would be justified using the same logic as that supporting extraterritorial application of American labor laws.

B. Practical Considerations: The Authority of the Board

There are a number of practical considerations weighing against the extraterritorial application of the NLRA. Most of these considerations are linked to the ability and authority of the Board to implement the Act's mandates overseas.

In general, the Board is responsible for deciding two types of cases: representation cases and unfair labor practice cases.¹⁹⁴ The division of labor

188. See *supra* notes 72-76 and accompanying text.

189. See *supra* note 8.

190. Nothstein & Ayres, *supra* note 7, at 50.

191. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 111 S. Ct. 1227, 1239 (1991) (Marshall, J., dissenting).

192. See *supra* note 8.

193. Nothstein & Ayres, *supra* note 7, at 50.

194. The two types of cases are adequately summarized as follows:

A representation case involves a petition for recognition of a bargaining unit. The case may concern the holding of an election for a representative labor organization, the recognition of a labor organization as the exclusive bargaining representative when two or more unions claim such authority, or the decertification of a labor organization that does not represent a majority within the bargaining unit any longer. An unfair labor practice case involves the investigation, prosecution, and disposition of a charge by an employee or group of employees that an employer or a labor organization has violated the NLRA.

Lisa A. Bireline, Comment, *The Policy-Making Function of the National Labor Relations Board: The Change from Adjudication to Rulemaking for Bargaining Unit Determinations in the Health Care Industry*, 25 CREIGHTON L. REV. 117, 119 (1991).

on the Board is established by separating the Board's adjudicative and prosecutorial functions. The five member Board is the adjudicatory body that hears accepted unfair labor practice claims.¹⁹⁵ The General Counsel is the prosecutor for the Board. The office of the General Counsel is supported by a large staff that is divided between the Washington office and thirty regional offices. It is through the regional offices that complaints are filed, investigated, and later presented to Administrative Law Judges and, possibly, the Board. The regional offices also are responsible for processing representation cases, an endeavor that involves setting the details of an election, and then carrying out the actual election itself.¹⁹⁶ Thus, the responsibilities of the Board, and particularly the functions of the regional offices, often are capacious, yet intimate to the particular working relationship at issue. It is easy to imagine the additional strain that would be placed on the Board if the NLRA were applied extraterritorially.¹⁹⁷

First and foremost, the administrative capacity of the Board would have to be augmented to correspond to the expanded territorial base from which labor disputes could arise. The Board would need to establish regional offices within a reasonably accessible vicinity of any geographic territory that would host American companies that employ American workers. The Board's international regional offices would each have to be uniquely equipped and staffed in such a way that they could deal effectively with the special problems posed by the local conditions and laws. For instance, the staff working at a particular foreign regional office would have to maintain a thorough knowledge of domestic law and procedure. More specifically, the Board might encounter problems in one of three areas: (1) investigation and discovery, (2) establishment of an appropriate bargaining unit, and (3) enforcement of judgments.

1. Investigation and Discovery

Almost any dispute brought before the Board will require some degree of investigation on the part of the General Counsel's office before the decision can be made as to how to resolve or dispose of the dispute. The Board is therefore given broad investigatory powers by Section 11 of the Act.¹⁹⁸ Nothing in the Act, or in case law, however, tends to suggest that the Board's investigatory powers extend overseas.¹⁹⁹ In fact, the Act seems to limit the

195. The Board has the option in both unfair labor practice cases and representation cases to act by adjudication or rule-making authority. Historically, the Board has settled disputes in the adjudicative fashion, and it only recently formally utilized its rule-making authority for the first time. *See id.* at 121-22. *See generally*, Lori McLaughlin, *Collective Bargaining Units in Acute Health Care Facilities: American Hospital Ass'n v. NLRB*, 33 B.C. L. REV. 316 (1992).

196. ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 107-17 (11th ed. 1991).

197. Goldberg, *supra* note 49, at 35.

198. 29 U.S.C. § 161.

199. Nothstein & Ayres, *supra* note 7, at 56.

Board's investigatory powers to the territorial boundaries of the United States.²⁰⁰ Furthermore, "the Federal Rules of Civil Procedure, which provide methods of discovery for obtaining information located abroad, do not apply to administrative proceedings such as those conducted by the Board."²⁰¹

Even if one accepts that federal law permits the Board to utilize its investigatory authority extraterritorially, complications may arise within the domestic law system. Many states view the extraterritorial application of United States laws as imperialistic.²⁰² A United States court or administrative agency ordering documents and subpoenaing witnesses would probably be seen as particularly intrusive. Consequently, many foreign sovereigns have adopted measures designed to frustrate "American imperialism." As described earlier, some of these measures take the form of blocking statutes,²⁰³ which explicitly restrict cooperation with discovery requests that are made pursuant to what is viewed as an unlawful extension of United States law. Even assuming the absence of blocking statutes or similar hostile feelings, a Board member who is inexperienced in dealing with foreign laws may have difficulty negotiating the different legal practices and procedures that exist in a foreign state.

Service and process on a defendant are closely related to the investigatory and discovery issue. Although the Federal Rules of Civil Procedure provide means for service on defendants in foreign countries, unusual or uncooperative domestic laws and procedures might complicate matters.

2. Determination of an Appropriate Bargaining Unit

One of the Board's primary functions in the representative process is determining an appropriate bargaining unit.²⁰⁴ This task involves grouping the employees who will be given the opportunity to be collectively represented by the petitioning labor organization. It is usually done on a case-by-case basis.²⁰⁵ Commonly, the Board takes a number of factors into account, including similarities among the workers with respect to the work they perform, the skills they utilize, and the wages and conditions of employment they receive.²⁰⁶

Problems could arise for the Board in this area if it is confronted with the not-uncommon scenario of an American-based corporation operating a foreign

200. 29 U.S.C. § 161(1) states: "Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

201. Nothstein & Ayres, *supra* note 7, at 56.

202. *See supra* note 8.

203. *See supra* note 8.

204. It is only incumbent upon the Board to establish an appropriate bargaining unit; the Act does not require the Board to establish the most appropriate bargaining unit.

205. *But see supra* note 195.

206. There are a host of other factors the Board may consider including: (1) the frequency of contact or interchange among the employees; (2) the geographic proximity (in the case of an employer with multiple plants); and (3) the history of collective bargaining between the parties. COX ET AL., *supra* note 196, at 283.

plant that employs both American and foreign employees. In this situation, the Board might be forced to establish a bargaining unit of, for example, American clerical workers that would exclude foreign clerical workers who perform exactly the same work under identical working conditions as their American counterparts. This will place the employer in a difficult situation. If a foreign union, in turn, represents the foreign clerical employees, the employer is forced to bargain on two fronts for wages and conditions of employment that affect the same group of workers. This process is inefficient for the employer who would like to minimize the amount of resources it utilizes in its overall bargaining process. There is also the possibility that different contract terms will be negotiated for different clerical workers based on their nationalities. The employer could thereby be forced to segregate employees that are members of the same department. Overall, the employer is vastly restricted in its ability to hire and utilize employees because of the potential bargaining ramifications that might exist if nationalities differ within departments.

3. Enforcement of Judgments

Finally, problems might arise for the Board as it attempts to enforce its orders extraterritorially. The Act grants no enforcement authority to the Board itself. Instead, Section 10 authorizes the Board to petition a federal court of appeals for enforcement of its orders.²⁰⁷ If the court of appeals agrees with the Board and issues a judgment against the defendant, the next step will be contingent upon the nationality of the overseas defendant. If the defendant is of American nationality, the court might compel enforcement of its judgment through attachment of property in the United States. Further, if the defendant is the foreign subsidiary of a United States parent company, the court might enforce its judgment against the parent.

If there are no substantial ties within the United States from which the judgment can be fulfilled, or if the underlying order is of an equitable nature, such as a cease and desist order, or an order to bargain, the only way to satisfy the judgment would be against the foreign-based company itself. In these cases, effective enforcement of the judgment would be directly contingent on the actions and policies of the host nation. Most nations act in accordance with the rule of reciprocity.²⁰⁸ That is, most nations will enforce judgments from other nations that do not seriously offend their domestic laws because they want their courts' judgments to be enforced in return. The problem with relying on the rule of reciprocity is that a state will often justify not enforcing an extraterritorial judgment because there is a conflict with its local law. Or, the host nation may view the American judgment as an unlawful interference in its domestic affairs.²⁰⁹ It, therefore, may refuse

207. COX ET AL., *supra* note 196, at 111-13; Nothstein & Ayres, *supra* note 7, at 57.

208. Nothstein & Ayres, *supra* note 7, at 57.

209. *Id.* at 57-58.

enforcement without any good reason.²¹⁰ Even if the host nation does not oppose giving effect to the United States-based judgment, enforcement may be stymied anyway:

Generally, the courts in foreign countries have had difficulty weaving their way through the tangled and confusing web of federal and state decisions in the United States in trying to determine what effect the United States gives to their nations' judgments

On the whole, except where a specific treaty or convention exists between the United States and the foreign country, enforcement of American judgments abroad tends to be difficult and largely impractical.²¹¹

IV. RECOMMENDATIONS

The past twenty years have witnessed a tremendous integration of world markets. This trend is bound to continue, particularly with the opening of markets in formerly inaccessible Eastern Block countries. The question of extraterritorial application of laws will continue to be a major focus of the international business community.

The goal of the United States should be to provide its multinational corporations with predictable guidelines as to how to implement their overseas operations. These guidelines, moreover, should be designed to alleviate or minimize friction with other sovereigns in the international community. If this goal is to be reached with respect to the extraterritorial application of federal employment laws, the current policy will have to change.

The use of the two-tiered presumption has led courts, fairly consistently, to deny extraterritorial application to most American employment laws. These consistent results have not necessarily been accompanied by a sense of predictability. The two-tiered test requires courts to make a subjective determination as to whether a particular employment law would likely affect international relations. Then, the courts must make a second subjective determination as to whether Congress has exhibited the requisite intent to apply the particular statute in question overseas. The potential for the two-tiered presumption to yield inapposite results was realized in the *Vermilya-Brown* and *Foley Bros.* cases.²¹²

The creation of a new test is in order. This new test should acknowledge well-accepted maxims regarding the United States' view of international law; maxims that originally underlay the two-tiered presumption. First, the test must recognize that Congress, if it chooses, has the authority to legislate in such a way as to ignore, or even to directly violate, international law.²¹³

210. Prohibitions on enforcing other states' judgments often will be mandated by the host countries' drawback statutes. See Zimmerman, *supra* note 8, at 121.

211. Nothstein & Ayres, *supra* note 7, at 57 (citation omitted).

212. See *supra* notes 62-71 and accompanying text.

213. Professor Louis Henkin notes:

The language of the Supremacy Clause of the Constitution has been read to imply that laws and treaties of the United States are not only supreme over state law, but are equal in status

Thus, Congress *can* extend the coverage of United States laws extraterritorially without considering the havoc such might wreak on the practices and principles commonly followed in the international community. Second, the test must recognize two canons of statutory interpretation that act as a buffer against Congress' absolute authority to pass laws regardless of their international implications: 1) Congress does not lightly enter into conflicts with international law, and 2) Congress is primarily concerned with domestic affairs.

The new test should also recognize ideas that the two-tiered presumption did not acknowledge. The first concept builds on the canon that Congress does not generally legislate in such a way as to violate international law. Given this premise, it should further be assumed that Congress recognizes that there are more preferable means of implementing labor policy in the international arena than by simply extending United States laws overseas. More specifically, diplomatic cooperation and compromise between national governments is always preferable to unilateral action.²¹⁴ The existence of friendship, commerce, and navigation ("FCN") treaties illustrates this point. United States FCN treaties are designed to ensure that American nationals are accorded the same treatment abroad as the host country extends to its own citizens. "Applying domestic labor standards abroad undermines the premise of these treaties. The FCN treaties are 'arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges.' Any attempts by the United States to unilaterally apply domestic standards . . . violates this spirit of mutuality."²¹⁵

The second concept that the new test must acknowledge was illustrated by the case history of the NLRA and many other employment laws. That is, given the domestic nature of labor and employment laws in general, even when they are applied strictly to American employees working abroad, a strong potential for international conflicts remains. Therefore, the courts should eliminate the first tier of the two-tier presumption. Courts should

and authority to each other. It is not unconstitutional for Congress to enact law inconsistent with a treaty of the United States; it is not unconstitutional for the President, with the consent of the Senate, to make a treaty inconsistent with an earlier act of Congress. And in the case of inconsistency between a statute and a treaty, the later one will be given effect by the courts and by the executive.

....

As with respect to a treaty, Congress can at any time legislate to suprcede the development [of customary international law] for purposes of domestic law.

Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1515, 1563, 1566 (1984).

214. In 1984, the member states of the OECD adopted a statement on Conflicting Requirements Imposed on Multinational Enterprises that calls for "'cooperation as an alternative to unilateral action,' and urges member states to 'take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries.'" RESTATEMENT, *supra* note 2, § 403 reporters' note 1 (1986).

215. Zimmerman, *supra* note 8, at 125 (quoting Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863).

assume that whenever the United States attempts to apply its labor policy within the territory of another sovereign, conflicts will arise.

When considering the extraterritoriality of federal labor and employment laws, courts should utilize a new test similar to the test espoused by Chief Justice Rehnquist in *Aramco*.²¹⁶ The presumption against extraterritoriality should be single-tiered, always requiring Congress to have clearly expressed its intent that the statute be given extraterritorial application.

In addition to the requirements asserted by Chief Justice Rehnquist, the courts should further restrict their view of what qualifies as "the intent of Congress clearly expressed." The courts should no longer engage in subjective analyses such as looking for broad statutory definitions of "commerce." Instead, the courts should require an explicit statement of intent that the law applies to Americans working abroad, followed by language that: 1) recognizes the fact that such application might interfere with foreign relations but concludes that the policy issues behind the law are strong enough to justify the possibility of international conflict; or 2) anticipates international conflicts and provides a course of action to alleviate those problems.

By adopting the new test, the courts will neither restrict any powers of Congress nor abandon any principles of international law. Instead, the courts will require Congress to act clearly, and therefore rationally, when considering the overseas application of federal employment laws. This will aid United States multinationals in two ways. First, coverage of the laws to which they are subject will be more readily ascertainable. This fact will facilitate corporate decision-making. And second, United States multinationals will presumably be engaged in a less-hostile global environment due to a diminished perception of "American Imperialism" among the other states in the international community.

CONCLUSION

Currently there are over three million Americans working abroad.²¹⁷ That figure is ever-increasing. Thus, the issue of how to regulate the employment settings of those American citizens is of vital concern. Traditionally, the United States has taken a hands-off approach, allowing the laws of the host countries to govern the overseas employers of American workers. Recently, Congress has flexed the intrusive muscle of the United States with respect to two prominent federal employment statutes. Similarly, calls for the extraterritorial expansion of the NLRA have been made. What can be seen from considering the hypothetical enlargement of the NLRA's territorial scope, however, is that if such international encroachment is to be effected, it should be done carefully. The courts must require clear congressional intent to extend United States employment laws abroad. Presumably, informed, responsible legislating will precede such clear intent. For the benefit of United States

216. See *supra* notes 106-08 and accompanying text.

217. Waks, *supra* note 114, at 16.

multinational employers and employees alike, the courts must ensure that Congress does not become extraterritorially “trigger-happy.”