

# American Labor Law on Foreign Soil: Policies and Effects in a Smaller World

“[A statute] must be read in the light of the mischief to be corrected and the end to be attained.”<sup>1</sup>

## I. INTRODUCTION

Labor law is remedial and largely the product of reaction.<sup>2</sup> American courts have been hesitant to apply labor and employment laws such as the Labor Management Relations Act (LMRA)<sup>3</sup> to factual situations which arise in foreign countries even when American workers are affected. So it should come as no surprise that in the recent case of *Labor Union of Pico Korea v. Pico Products*,<sup>4</sup> the United States Court of Appeals for the Second Circuit denied a foreign labor union the right to sue a foreign subsidiary of an American company in a federal court under the LMRA. On the surface, giving a foreign litigant standing to sue under the LMRA would be like forbidding drivers to travel at 65 miles per hour while encouraging them to drive at 75.

However, at a time when the proliferation of catch-phrases like “global economy” and “new world order” is rampant, perhaps the reasoning and impact of such a decision should be given more than summary review. If labor law were to take a progressive turn in light of the changing world, the policy-based underpinning of the Second Circuit’s decision would no longer be applicable; further, if contemporary notice is not taken of the policies contrary to the court’s decision, an aggrieved future party may be forced to look to the empty chair of lost rationale when attempting to articulate such unfamiliar policies

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1. *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944). For a discussion of the statement in the context of the theme of this comment, see David P. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34, 45.

2. See generally 51 C.J.S. Labor Relations §§ 20-25 (1967).

3. 29 U.S.C. §§ 141-44, 151-67, 171-87 (1988 & Supp. 1990 & 1991). The Labor Management Relations Act was passed in 1947 as an amendment to the National Labor Relations Act of 1935. The LMRA is also known as the Taft-Hartley Act and is found with the NLRA and other labor statutes in Title 29. Section 301 of the Act authorizes employers and labor organizations to litigate contract disputes in federal courts.

4. 968 F.2d 191 (2d Cir. 1992), *cert. denied*, 113 S.Ct 493 (1992).

in his changed world. It is with that future party's plight in mind that this note is written.

There are three substantive topic issues addressed in this note. First, the Second Circuit's recent decision will be analyzed to ascertain whether or not it is consistent with the policies which have underlain labor law. This analysis necessarily involves a review of decisions of the United States Supreme Court which have spoken on the issue of extraterritorial application of American law. There will be particular emphasis on the application of labor statutes so as to provide a basis for analysis of the Second Circuit's rationale in *Pico*. Second, policies which run counter to those relied upon by the court will be discussed. Included are 1) a discussion of the Supreme Court's decision in *EEOC v. Arabian American Oil*,<sup>5</sup> which is illustrative of the current debate over the method of determining extraterritorial application of American employment law, and 2) statements of the general policies which throw the traditional approach in question. Third, the impact of continued adherence to the established labor policies will be addressed. Specifically, the possible economic effects on the United States resulting from divergence in policy and the current economic reality will be analyzed.

## II. THE PICO DECISION

On June 24, 1992, the United States Court of Appeals for the Second Circuit decided a novel question. Namely, does the Labor Management Relations Act contemplate a suit by a foreign labor union against a wholly owned American subsidiary operating in a foreign country.<sup>6</sup> Basing its decision on statutory interpretation,<sup>7</sup> a well-established

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5. 111 S.Ct. 1227 (1991).

6. *Pico*, 968 F.2d at 194. The union was organized under the laws of South Korea and had entered a collective bargaining agreement with Pico Korea, a South Korean company which was a subsidiary of Pico Macom, a Delaware corporation. In turn, Pico Macom was a subsidiary of the defendant, Pico Products, which was a New York corporation. The union brought an action in the United States District Court for the Northern District of New York basing its cause of action for breach of that agreement on numerous theories. Prior to a bench trial, the district court dismissed the union's suit under the LMRA, but left two of its state law claims intact and the action proceeded as a diversity suit. At trial, the union tried to pierce the corporate veil under New York law in order to reach Pico Products in its remaining claims against Pico Korea. See *Labor Union of Pico Korea v. Pico Products*, 90-CV-774, 1991 WL 299121 at 4-5 (N.D.N.Y. 1991). The court found that evidence of Pico Products' control over Pico Korea was insufficient to pierce the corporate veil and entered judgment for the defendant. *Id.* at 13. On appeal, the Second Circuit affirmed

lished presumption against extraterritorial application of American labor law,<sup>8</sup> and Congressional intent,<sup>9</sup> the court answered that question emphatically in the negative.<sup>10</sup>

#### A. *The Statute*

The Labor Management Relations Act<sup>11</sup> states that suits under the Act may brought in federal courts “without regard to the citizenship of the parties.”<sup>12</sup> The plaintiff-labor union in *Pico* asserted that such language clearly allowed it to bring suit in a federal court even though its members were citizens of South Korea.<sup>13</sup> The court stated that such an argument was “misplaced because the issue is not plaintiffs’ citizenship, but rather whether the labor agreement at issue is of the type Congress planned on having [the LMRA] control.”<sup>14</sup> The court stated further that such language merely establishes federal question jurisdiction.<sup>15</sup> The union argued that the only limitation on the LMRA’s applicability is that the industry covered by the collective bargaining agreement must be one which “affect[s] commerce.”<sup>16</sup> Once again the court refused to adopt the union’s broad interpretation and commenced to discuss whether the nature of the Act itself, and not just its jurisdiction-granting language, authorized the union’s suit.<sup>17</sup>

To support its finding that the statutory language of the LMRA is not in itself dispositive authority for extraterritorial application, the

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the district court’s findings with regard to the state law claims and in its opinion addressed only the denial of the application of the LMRA to the union’s claim for breach of the collective bargaining agreement. The Second Circuit stated that the LMRA did not contemplate a suit by a foreign labor union, thus affirming the lower court’s ruling in all respects. 968 F.2d at 196. The union filed a petition for certiorari in United States Supreme Court on September 22, 1992, which petition was denied on November 16, 1992. *Labor Union of Pico Korea v. Pico Products*, 113 S.Ct. 493 (1992).

7. *Pico*, 968 F.2d at 194.

8. *Id.*

9. *Id.*

10. *Id.* at 195.

11. 29 U.S.C. §§ 141-44, 151-67, 171-87.

12. Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a).

13. *Pico*, 968 F.2d at 194.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Pico*, 968 F.2d at 194.

court cited *Foley Bros., Inc. v. Filardo*.<sup>18</sup> In *Foley Bros.*, the Supreme Court was concerned with the application of the Federal Eight Hour Law<sup>19</sup> to an American employee of a U.S. government contractor working in Iran and Iraq.<sup>20</sup> The words at issue in *Foley Bros.* stated that the law applied to “[e]very contract made to which the United States, . . . is a party.”<sup>21</sup> Despite the very broad language of the statute, the Court refused to apply the law extraterritorially, stating that there was no language in the statute “that gives any indication of congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.”<sup>22</sup>

The Second Circuit noted further that like the Federal Eight Hour Law, the LMRA did not distinguish between aliens and citizens in its coverage, and that the Supreme Court in *Foley Bros.* thought such an omission important.<sup>23</sup> Thus when read literally, the Eight Hour Law supports suits from alien workers.<sup>24</sup> Apparently finding such an interpretation unpalatable, the Court essentially stated *ipso facto* that the statute must not have been meant to apply to any workers outside the territorial possessions of the United States.<sup>25</sup>

### B. *The Presumption*

The Supreme Court in *Foley Bros.*, the Second Circuit in *Pico*, and indeed most American courts which pass on questions of jurisdiction involving labor and employment laws, do not hesitate to invoke a strong presumption against applying those laws in foreign countries.<sup>26</sup> A root

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18. 336 U.S. 281 (1949).

19. 40 U.S.C. §§ 321-26 (repealed 1962). The Federal Eight Hour Law was enacted in 1892 and was designed to provide employees of U.S. government contractors with compensation of one and one-half times their basic rate of pay for all work done in excess of eight hours in a work day.

20. *Foley Bros.*, 336 U.S. at 283.

21. *Id.* at 282.

22. *Id.* at 285.

23. *Pico*, 968 F.2d at 194.

24. *Foley Bros.*, 336 U.S. at 286.

25. *Foley Bros.*, 336 U.S. at 286. The Court stated that unless it read the statute as having no extraterritorial effect at all, it would be forced to conclude that Congress' intent was to regulate the conduct of foreign citizens and that kind of intent “should not be attributed to Congress in the absence of a clearly expressed purpose.” *Id.*

26. Compare *Foley Bros.*, 336 U.S. at 285 (stating that “unless a contrary intent appears, [legislation] is meant to apply only within the territorial jurisdiction of the United States”) with *Pico*, 968 F.2d at 194 (stating that “laws generally apply only in those geographical areas or territories subject to the legislative control of the United States, absent Congress' clearly expressed affirmative aim to the contrary”) (emphasis added).

of authority for this presumption derives from Justice Holmes' opinion in *American Banana Co. v. United Fruit Co.*,<sup>27</sup> where he stated that "[w]ords having universal scope . . . will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch."<sup>28</sup> For various policy reasons, the courts have taken Holmes' words to heart;<sup>29</sup> however, the presumptions created as a result of adherence to these policies are not always uniform.

The fact that the courts have articulated a presumption against extraterritorial application of certain laws necessarily implies that the courts believe that Congress, at least in certain circumstances, has the power to give its legislation extraterritorial effect. For if this were not true, courts would merely state that for one reason or another, Congress was barred from giving such effect to its laws. Indeed, it is almost uniformly stated in the introductory paragraphs of court opinions which address this question, that Congress has the power to regulate outside the territorial boundaries of the United States.<sup>30</sup>

The *Pico* court recognized that Congress could, under the Commerce Clause,<sup>31</sup> regulate the contract dispute there at issue.<sup>32</sup> The question with regard to the LMRA, as articulated by the *Pico* court, was whether Congress had authorized extraterritorial jurisdiction in a case initiated by a foreign labor union.<sup>33</sup> To the Second Circuit, the

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27. 213 U.S. 347 (1909).

28. *Id.* at 357.

29. *Cf. Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) (The Court seemed to suggest that reciprocity of restraint in assertion of jurisdiction is significant, as it pointed out that the local sovereign's jurisdiction is discretionary not mandatory).

30. *See, e.g., Pico*, 968 F.2d at 194; *Foley Bros.*, 336 U.S. at 284; *Benz*, 353 U.S. at 142-43; and *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

31. U. S. CONST. art. I, § 8, cl. 3 states that Congress has the power "[t]o regulate Commerce with foreign Nations."

32. *Pico*, 968 F.2d 194. As it stated this in one simple sentence, the court seemed to assume that it would have jurisdiction apart from the fact that the contract affected commerce within the meaning of the Act. However, the question could become in this kind of case, were there sufficient contacts under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny to give the court jurisdiction over litigants who were arguably both Korean citizens. The importance of this question would become more acute if it were the wholly owned American subsidiary, *Pico Korea*, attempting to enforce a contract with the Korean labor union. Certainly the contract would affect commerce, but would the labor union have sufficient contacts with the United States to allow a federal court to entertain the action?

33. *See id.* at 194. It is unclear from the wording of the court's statement of the issue, i.e., "was § 301 triggered in this case," *id.*, whether this is implicitly

barrier for a federal court to hear such a case was "the broad presumption against extraterritorial application of federal law."<sup>34</sup> The court did not expand upon this language, apparently leaving interpretation of its meaning to be gleaned from a recitation of precedent.<sup>35</sup> There are two key inquiries vis-à-vis the "broad presumption" advanced in *Pico*. First, in light of precedent, what is the current content of the presumption? Second, does the presumption vary over different kinds of cases, and if so, why? To answer both of these questions, it is necessary to review the cases which have established the presumption against extraterritoriality.

### 1. *The Early Cases*

As mentioned previously, Justice Holmes' opinion in *American Banana* is given great weight with regard to the policy of the presumption, so it should come as no surprise that it is one of the most often quoted cases in this area.<sup>36</sup> *American Banana* involved the application of the Sherman Anti-trust Act<sup>37</sup> to a case arising primarily from acts done in Panama and Costa Rica.<sup>38</sup> Although application of the Act was denied in the case, Justice Holmes did not articulate a definite presumption against such application. However, he did note that "[a]ll legislation is prima facie territorial."<sup>39</sup> Holmes considered the assertion that Congressional legislation would extend to acts done in foreign countries a "startling [proposition],"<sup>40</sup> and based his doubt on "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where

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suggesting that there may be fact situations arising principally in foreign countries which could fall within the LMRA, or whether such statement was merely rhetorical. Keeping in mind that *Pico* was a novel question, it certainly seems from the Second Circuit's opinion that it considers the extraterritorial application of the LMRA to foreign litigants foreclosed. *See id.*

34. *Id.*

35. *See id.* at 194-195. (The court reviewed *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *International Longshoreman's Ass'n Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); and *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991)).

36. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

37. 15 U.S.C. §§ 1-7 (1890) (as amended by 104 Stat. 2880 (1990)).

38. *American Banana*, 213 U.S. at 355.

39. *Id.* at 357 (quoting *Ex parte Blain*, L.R. 12 Ch. Div. 522, 528; *State v. Carter*, 27 N.J.L. 499; other citations omitted).

40. *American Banana*, 213 U.S. at 355.

the act is done."<sup>41</sup> Holmes also opined that not only would it be unjust to apply the Sherman Act in the case, but it would interfere with the authority of other sovereign nations.<sup>42</sup> It is clear then that to the extent that Holmes' opinion in *American Banana* helped to establish a general presumption against extraterritoriality, such presumption was based, at least in part, on notions of sovereignty and of fear of interference therewith.

A much stronger statement of the presumption came nine years after *American Banana* in *Sandberg v. McDonald*.<sup>43</sup> In denying application of the Seaman's Act<sup>44</sup> to facts arising from acts done in England, the majority stated that "[l]egislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."<sup>45</sup> To determine whether the presumption was overcome, the Court looked for the purpose of the statute by analyzing its language and also tried to find the intent of Congress with regard to the facts of the case.<sup>46</sup> The majority deferred to the presumption, finding no language which specifically authorized application, and no intent to do so *from the language of the statute*.<sup>47</sup> Even the dissenters who favored application, found that it was the *language* which was broad enough to allow it.<sup>48</sup> Therefore, since none of the Justices were willing to look beyond the four corners of the Act (although the dissenters accused the majority of doing so implicitly),<sup>49</sup> rebutting the presumption in *Sandberg* required, *de facto*, clearly expressed legislative intent on the face of the statute.<sup>50</sup>

41. *Id.* at 356.

42. *Id.*

43. 248 U.S. 185 (1918).

44. 38 Stat. 1165 (1915) (regulating, *inter alia*, payment to seamen and rights of arrest for desertion) (later codified at 46 U.S.C. §§ 597, 656, 660-1. Repealed by Pub. L. 98-89 § 4(b) (1983)).

45. *Sandberg*, 248 U.S. at 195 (citing *American Banana*, 213 U.S. at 357).

46. *Id.* at 195-96.

47. *Sandberg*, 248 U.S. at 195.

48. *Id.* at 197, 202 (McKenna, J., dissenting). Interestingly, Justice Holmes was one of the four dissenters who favored extraterritorial application of the Act.

49. *Id.* at 203-04 (dissenting opinion). The dissent said of the majority's construction of the statute that "[t]o qualify these provisions or not to take them for what they say, would, in our opinion, ascribe to the act an unusual improvidence of expression." *Id.* at 200. The dissent stated further that the Court's function in this regard was "the simple service of interpretation, and there is no reason to hesitate in its exercise because of supposed consequences." *Id.* at 202.

50. "Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication." *Id.* at 195.

Just four years after *Sandberg*, the Court seemed to modify the presumption. In *United States v. Bowman*,<sup>51</sup> the Court held that the requisite intent of Congress could be inferred without a clear expression on the face of the statute.<sup>52</sup> The Court stated that when the locus covered by the statute was "not specifically defined, [it] depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power of jurisdiction of a government to punish crime under the law of nations."<sup>53</sup> Concerning interpretation, the Court specifically distinguished the law there involved, a criminal statute, from civil statutes.<sup>54</sup> Therefore, it could be argued that *Bowman* stands for the proposition that where the character of the conduct sought to be regulated is such that it necessarily contemplates foreign facts, all other things constant, the presumption against extraterritoriality will not serve as a bar to application of the statute.<sup>55</sup>

The Court sustained the above proposition in *New York Central R.R. Co. v. Chisholm*.<sup>56</sup> The statute at issue in *Chisholm* was the Federal Employers' Liability Act.<sup>57</sup> Although the language of the Act provided that "every common carrier by railroad while engaging in interstate or foreign commerce shall be liable to any of its employees,"<sup>58</sup> the Court denied application of the Act where a railroad employee had been killed while working in Canada.<sup>59</sup> Acknowledging that Congress could impose liability upon U.S. citizens for torts committed outside the United States, the Court nonetheless stated that the statute "contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose."<sup>60</sup> With *Chisholm* then, it becomes apparent that the Court no longer required an affirmatively expressed Congressional intent on the face of the statute to apply laws extraterritorially.

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51. 260 U.S. 94 (1922).

52. *Id.* at 97.

53. *Id.*

54. *Id.* at 98.

55. *See Bowman*, 260 U.S. at 98. "It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission." *Id.*

56. 268 U.S. 29 (1925).

57. 35 Stat. 65 (1908) (*as amended by* 36 Stat. 291 (1910). Current version at 45 U.S.C. § 51 (1988)).

58. *Chisholm*, 268 U.S. at 30.

59. *Id.* at 32.

60. *Id.* at 31 (emphasis added).

## 2. *Liberalization of the Rule*

Much like a great fish story in which some new twist is added at each telling, so were new and interesting features added to the presumption against extraterritoriality in subsequent opinions, perhaps to allow flexibility in varying fact situations. The case of *Skiriotes v. Florida*<sup>61</sup> is a logical extension of the earlier cases which had defined the presumption. The Court tied together its previous holdings,<sup>62</sup> and stated that where a criminal statute is at issue, it "is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect."<sup>63</sup> In setting out the rationale for allowing extraterritorial application of the statute, the Court stated that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."<sup>64</sup> Although the Court cited *American Banana* for this proposition,<sup>65</sup> it is a much broader statement than Holmes had made. Holmes had stated in an almost reluctant tone that there were situations when the "old notion of personal sovereignty [was kept] alive";<sup>66</sup> but that is quite different from the statement in *Skiriotes*, which places only interference with foreign sovereignty and rights as a barrier to American governance of its citizens abroad.

Lest there be any doubt about the breadth of the statement in *Skiriotes*, the Court gave an example of it in *Steele v. Bulova Watch Co.*<sup>67</sup> The question in *Steele* was whether the language of the Lanham Trademark Act<sup>68</sup> authorized jurisdiction over a case in which an American citizen was alleged to have infringed upon a trademark owned by Bulova Watch Company, through acts done almost exclusively in Mexico.<sup>69</sup> Seizing upon the dicta of *Skiriotes* and its predecessors, which stated that Congress could choose to regulate such a fact situation as

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61. 313 U.S. 69 (1941).

62. See *id.* at 74 (where the Court, *inter alia*, relied on *United States v. Bowman*, 260 U.S. 94 (1922) and *Blackmer v. United States*, 284 U.S. 421 (1932)).

63. *Id.* at 73-74.

64. *Id.* at 73.

65. *Id.*

66. *American Banana*, 213 U.S. at 356.

67. 344 U.S. 280 (1952).

68. 15 U.S.C. § 1051-1128 (1946) (*as amended by* 102 Stat. 3935 (1988)).

69. *Steele*, 344 U.S. at 281.

was therein involved,<sup>70</sup> the Court held that Congress must have intended the Act to apply to this case "in light of [its] broad jurisdictional grant."<sup>71</sup> Incredibly, the language to which the Court was referring stated that the Act applied to "[a]ny person who shall, in commerce, infringe a registered trademark,"<sup>72</sup> commerce being defined as "all commerce which may be lawfully regulated by Congress."<sup>73</sup> And as if saying it made it so, the Court stated that *American Banana* "compels nothing to the contrary."<sup>74</sup> With *Steele* then, it appeared that the presumption could be overcome by the Court's conception of the *purpose* of the statute outside the language contained therein.<sup>75</sup>

Just a year later in *Lauritzen v. Larsen*,<sup>76</sup> the Court recognized that more and more it was being asked to determine whether acts of Congress were to be applied extraterritorially.<sup>77</sup> Although the Court opined that precedent required a narrow construction of such legislation,<sup>78</sup> it nonetheless impliedly assumed that when Congress had left open the question, extraterritorial "application [was] to be judicially determined from context and circumstance."<sup>79</sup>

### 3. *The Labor Cases*

It should now be evident that through the *Lauritzen* decision, the Court had begun to shed the oppressive skin of fear associated with

70. See *Steele*, 344 U.S. at 282 (where the Court also noted *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) and *Blackmer v. United States*, 248 U.S. 421 (1932) on this point).

71. *Id.* at 286.

72. *Id.* at 284 (quoting 15 U.S.C. § 1127).

73. *Id.* Compare this with the statements in *Foley Bros.*, *supra* notes 21-22 and 26, and in *American Banana*, *supra* notes 28 and 39, which declare that broad jurisdictional grants are to be narrowly construed.

74. *Id.* at 288.

75. See generally *Steele*, 344 U.S. at 289-92 (Reed, J., dissenting and stating that while there are some cases where a specific contrary intent to the presumption will not be necessary, this was not one of them).

76. 345 U.S. 571 (1953). *Lauritzen* concerned the application of the Jones Act, 46 U.S.C. § 688 (1920), in a case where a Danish seaman boarded a Danish vessel while in New York City and was subsequently injured while in Havana harbor. *Id.* at 573.

77. *Id.* at 577.

78. The Court quoted two statements by Chief Justice Marshall, one of which held that broad language ought to be limited in application by the intent of the legislature and the other of which stated that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 577-78.

79. *Id.* at 577.

extraterritorial application of American laws as expressed in *American Banana*, and had begun to announce presumptions with different strengths which correlated to various fact situations.<sup>80</sup> If *Pico* is to be understood as rightly or wrongly decided, the nature of the presumption articulated by the Court with regard to labor and employment laws must be determined.

One of the early cases to speak on the issue of extraterritorial application of labor laws was *Vermilya-Brown Co. v. Connell*.<sup>81</sup> *Vermilya-Brown* dealt with a claim for overtime pay under the Fair Labor Standards Act (FLSA)<sup>82</sup> by American citizens working on a U.S. military base leased from Great Britain and located in Bermuda.<sup>83</sup> The specific issue was whether in providing coverage of the Act over the "United States or the District of Columbia or any Territory or possession of the United States,"<sup>84</sup> Congress intended the Act to cover the leased military base.<sup>85</sup> After undertaking to determine the legislative history of the FLSA and finding nothing as an aid in construction,<sup>86</sup> the Court stated that "[u]nder such circumstances, our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind."<sup>87</sup> While the statement of the majority may not be repugnant to the

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80. See Conley J. Schulte, Casenote, *Americans Employed Abroad By United States Firms Are Denied Protection Under Title VII: EEOC v. Arabian American Oil Co.*, 25 CREIGHTON L. REV. 351, 357 (1991) (stating that the Court has used a weak presumption when the law sought to be applied extraterritorially will affect only U.S. citizens, and a strong presumption against such application when foreign laws will be infringed upon).

81. 335 U.S. 377 (1948).

82. 29 U.S.C. § 201 (1938) (as amended by 103 Stat. 938 (1989)). For a discussion of the extraterritorial application of the Fair Labor Standards Act and an analysis of the choice of law and the statutory interpretation methods involved therein, see Mary Beth Plummer, Comment, *Choice of Law or Statutory Interpretation?: The Fair Labor Standards Act Applied Overseas*, 3 IND. INT'L & COMP. L. REV. 177 (1992).

83. *Vermilya-Brown*, 335 U.S. at 378-79.

84. *Vermilya-Brown*, 335 U.S. at 379 (quoting 29 U.S.C. § 203(b) and (c)).

85. *Vermilya-Brown*, 335 U.S. at 380.

86. It is important to note that in the previously discussed cases, the judicial norm with regard to determination of legislative intent consisted merely of a review of the statute itself, and arguably an assessment of the purpose of the law in light of the end to be achieved. Thus, *Vermilya-Brown* represents somewhat of a departure in the method of ascertaining Congressional intent, namely by specific reference to legislative history, assuming of course, that the opinions in the previous cases genuinely reflect the actual methods used.

87. *Vermilya-Brown*, 335 U.S. at 388.

disciplines of statutory construction and interpretation, the effect of the Court's self-appointed discretion had a significant impact on the status of the presumption against extraterritoriality. That is, because "[t]he reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms,"<sup>88</sup> the Court could essentially construe the extraterritorial application of the Act *ad hoc*, recognizing only such limits as it decided to impose on itself.<sup>89</sup>

If the inquiry into the content of the presumption against extraterritoriality had ended with *Vermilya-Brown*, the labor union in *Pico* might have had a better environment of precedent in which to argue, in light of the progressive nature of the analysis of Congressional intent. However, *Vermilya-Brown* was a 5-4 decision and the following cases were distinguished in such a way as to preclude its future meaningful use.

*Foley Bros. v. Filardo* has been discussed previously as a case which stands for the proposition that in the absence of an express congressional intention to the contrary, a statute will only be taken to apply within the territorial jurisdiction of the United States.<sup>90</sup> The question to be answered here is whether the Court relied on any specific fact or quantum of facts which are unique to labor statutes.<sup>91</sup> In its analysis, the Court looked at 1) the language of the Act, 2) the legislative history, and 3) administrative interpretations of applicability.<sup>92</sup> Finding no specific language which would support extraterritorial application, the Court implicitly followed the doctrinal analysis of *Vermilya-Brown* while

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88. *Id.* at 385.

89. *Cf.* EEOC v. Arabian American Oil, 111 S. Ct. 1227 (1991). In a dissenting opinion in *Arabian American*, Justice Marshall noted that the majority had selectively chosen bits of precedent language in order to, in effect, create a clear-statement rule, when giving effect to the entirety to the precedent wording would have compelled a different result. *Id.* at 1237. This is an example of the Court's proclivity to articulate ad hoc standards when confronted with the lack of a clear statement of jurisdictional application on the face of the statute, even when the legislative history or circumstances surrounding enactment of the statute would not stand in the way of a rule of application contra to the Court's decision.

90. *See* *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). Remember that *Foley Bros.* was concerned with the application of the Federal Eight Hour Law to an American working in Iran and Iraq. *See supra* notes 19-25 and accompanying text.

91. It might be useful to think about the various factors which seem to influence the Court with regard to application or non-application of the labor and employment laws in these cases using a paradigmatic method. For example: foreign workers + no clear statement + no legislative intent = no application, but American workers + no clear statement + positive legislative intent = application, etc.

92. *See* *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

distinguishing its *Foley Bros.* holding therefrom.<sup>93</sup> This is significant because by looking to facts extrinsic to the statutory language, the Court proved willing to follow its contemporary philosophy of not requiring affirmative Congressional intent expressed on the face of the statute.<sup>94</sup> The Court found that the Federal Eight Hour Law was enacted by Congress with a concern for "domestic labor conditions"<sup>95</sup> and that nothing in the legislative history suggested an intent to make the statute applicable to a contract outside the United States.<sup>96</sup> Further, the Court stated that the administrative interpretations of the Act "afford no touchstone by which its geographic scope can be determined."<sup>97</sup>

If *Foley Bros.* is the grandfather of the presumption in labor cases, then *Benz v. Compañía Naviera Hidalgo, S.A.*<sup>98</sup> is the current head of the family. *Benz* was one of the principal cases relied upon by the Second Circuit in *Pico*<sup>99</sup> and is the pinnacle case denying extraterritorial application of the LMRA. The dispute in *Benz* arose when American union members picketed a foreign ship with a foreign crew while the ship was docked in Oregon.<sup>100</sup> The Court recognized that "the problem presented [was] not a new one," and in that vein it devoted only a modicum of space to articulating the presumption and analyzing the language of the statute.<sup>101</sup> The Court seemed to assume that amorphous jurisdictional language did not end the query, but rather began it.<sup>102</sup> The sole question was "one of intent of Congress as to the coverage of the Act."<sup>103</sup> The Court found that "Congress did not fashion [the Act] to resolve labor disputes between nationals of other countries operating under foreign laws"<sup>104</sup> and that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees."<sup>105</sup>

The *Pico* court similarly relied on *McCulloch v. Sociedad Nacional de Marineros de Honduras*<sup>106</sup> as an extension of the *Benz* analysis.<sup>107</sup> The facts

93. *Id.* at 285.

94. *Id.*

95. *Id.* at 286.

96. *Id.* at 287.

97. *Id.* at 288.

98. 353 U.S. 138 (1957).

99. *See Pico*, 968 F.2d at 194.

100. *Benz*, 353 U.S. at 139.

101. *Id.* at 145.

102. *Cf. supra* notes 78-79 and accompanying text.

103. *Benz*, 353 U.S. at 142.

104. *Id.* at 143.

105. *Id.* at 143-44.

106. 372 U.S. 10 (1963).

107. *Pico*, 968 F.2d at 194-95.

of *McCulloch* are more analogous to the facts of *Pico* than were those of *Benz*. In *McCulloch*, an American union petitioned under § 9(c) of the National Labor Relations Act (NLRA)<sup>108</sup> for representative elections for a crew of alien seaman working on a Honduran vessel. This vessel was owned by a Honduran corporation which was in turn owned by an American corporation.<sup>109</sup> Seizing upon the rationale of its holding in *Benz*, the Court merely restated in *McCulloch* that the legislative history of the NLRA “inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.”<sup>110</sup> In addition, the Court rejected a theory based on “balancing of contacts” on which the National Labor Relations Board (NLRB) had predicated its jurisdiction in its pre-litigation management of the case.<sup>111</sup> Therefore, because the Court had *defined* both the NLRA and LMRA as not contemplating disputes involving foreign workers, a flexible presumption was no longer needed in cases arising under those Acts. By rejecting the balancing of contacts theory advanced by the NLRB, the Court in *McCulloch* seems to have foreclosed actions involving foreign workers regardless of the degree to which American corporations are involved.<sup>112</sup>

The current state of the question of extraterritorial jurisdiction in labor cases, looked at as a subset of all cases involving the proposed extraterritorial application of a statute, is seen by the Court as being guided primarily by the intent of Congress. This intent is evidenced not only in the language of the statute, but also in the legislative history and circumstances surrounding enactment. Because Congress has generally chosen jurisdictional language which is not explicit with regard to extraterritorial application, the Court’s articulation of the presumption has relied less on statutory construction. Essentially, it seems that in the labor cases, the Court assumes that by using amorphous language, Congress expresses only a desire to leave the question open to the Court’s interpretation.

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107. *Pico*, 968 F.2d at 194-95.

108. 29 U.S.C. § 151 (1935) (*as amended by* 61 Stat. 136 (1947)).

109. *McCulloch*, 372 U.S. at 13.

110. *Id.* at 18 (quoting *Benz*, 353 U.S. at 144).

111. *Id.* at 19. Again the Court was concerned over the possible interference with sovereignty—this time in the form of the “internal discipline” of the vessel—which inquiring in to such contacts would presumably create. *Id.*

112. *See id.* The Court feared that inquiry in the quantity and nature of contacts would force the NLRB to disturb the field of maritime law and international relations. *See also supra* note 33.

### C. *The Intent*

As can be seen from the preceding discussion, the phrase "legislative intent" has changed in meaning over the course of decisions involving extraterritorial application of American law. In the beginning, there was strictness of interpretation. Recall that in *Sandberg*, the Court purported to determine legislative intent from the statutory language itself.<sup>113</sup> Thirty years later in *Vermilya-Brown*, the Court stated that it had searched the legislative history of the FLSA to determine Congressional intent, and has consistently used that method to date.<sup>114</sup>

As asserted above, the Court has relied almost exclusively on Congressional intent in determining the question of extraterritorial application of the NLRA and its LMRA amendment. In *Benz* and *McCulloch*, the Court presented the legislative history regarding this question in a seemingly straight-forward manner. The Second Circuit in *Pico* cited *Benz* for the proposition that Congress did not intend the LMRA to reach beyond disputes involving American employers and employees.<sup>115</sup> If that is the controlling thought in the Act, certainly application is precluded under the facts of *Pico*, but what about American employees working for American employers abroad? Does the legislative history of the LMRA as perceived by the Court, amount to a preclusion based on *geography* as the Court's holdings would seem to suggest, or is it based on citizenship? In *Benz*, the Court pulled two quotations from the legislative history of the LMRA made by Chairman Hartley himself<sup>116</sup>, both conspicuously containing the word "American" which the Court saw fit to then italicize.<sup>117</sup> As if using a well-formulated search on a computerized legal database, the *Benz* Court came up with statements about Americans in the context of citizenship. But it is also true that the legislative history of the LMRA shows that Congress was concerned with American *interests*.<sup>118</sup> American interests are not confined

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113. See *supra* note 47 and accompanying text.

114. See *supra* note 87 and accompanying text.

115. *Pico*, 968 F.2d at 195.

116. Representative Hartley was the co-sponsor of the Taft-Hartley Act.

117. See *Benz*, 353 U.S. at 144.

118. See H.R. REP. NO. 245 on H.R. 3020, 80th Cong., 1st Sess. 294 (1947) (stating under the caption "Necessity for Legislation" that "[t]he committee believes that the enactment of the bill will have the effect of bringing widespread industrial strife to an end, and that employers and employees will once again go forward together as a team united to achieve for their mutual benefit and for the welfare of the Nation the highest standard of living yet known in the history of the world."). If the goal to be achieved was a higher standard of living, is the intent of Congress to limit the

necessarily to territorial possessions of the United States, nor are Americans the only group which affects commerce. Because the Court's interpretation did not encompass those facts, perhaps it can be said then that the Court reads legislative history strictly.

However, a so-called strict reading of legislative history could be seen to be in conflict with the Court's opinion in *Vermilya-Brown*. If "[t]he reach of the Act is not sustained or opposed by the fact that it sought to bring new situations under its terms,"<sup>119</sup> then why cannot changed world conditions like those which affected the decision in *Vermilya-Brown*, also play a part in the Court's analysis of the legislative intent of Congress with regard to the LMRA? Arguably, there is another inquiry to be made in light of the Court's statements in *Vermilya-Brown*, namely how does Congress intend its intent to be understood?

#### D. Summary

In light of the Supreme Court's opinions in *Foley Bros.*, *Benz*, and *McCulloch*, the Second Circuit's decision in *Pico* seems rightly decided in that the labor union's assertion of jurisdiction under the language of the LMRA must fail. "Boilerplate language"<sup>120</sup> such as "affecting commerce," "every contract," and "without regard to the citizenship of the parties" has not persuaded the courts that Congress intended to apply the statute extraterritorially.<sup>121</sup> Thus, the *Pico* court properly articulated the issue in the case as whether or not Congress intended that the LMRA cover the labor contract in question.<sup>122</sup> The court relied upon the presumption against extraterritoriality and suggested that more than was factually present in the case would be needed to overcome it.<sup>123</sup> However, the *Pico* court misleads a casual reader slightly in that under the Supreme Court's holdings in *Benz* and *McCulloch*, it is clear that with regard to the NLRA and its LMRA amendments, the presumption can never be overcome when the cause arises from foreign facts.<sup>124</sup>

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Act to territorial application if extraterritorial application would better serve that goal? This is not to presuppose that extraterritorial application would in fact serve that goal. However, the Court has declined to even consider such a possibility.

119. See *supra* notes 88-89 and accompanying text.

120. *Pico*, 968 F.2d at 195 (citing *EEOC v. Arabian American Oil*, 111 S.Ct. 1227, 1231-32 (1991)).

121. See *id.* See also *supra* note 21-22 and accompanying text.

122. *Id.* at 193.

123. *Id.* at 194.

124. If the Court will not undertake to evaluate contacts, how could it weigh

Although the Court has not articulated the strongest presumption possible, it has taken a strict view of extraterritorial application of the labor laws in question, because of its perception of the intent of Congress based on legislative history. But in determining the Court's true method of analysis, the question obtains, does it fail to establish a stronger presumption, one requiring a clear manifestation of intent on the face of the statute, merely because it peeks ahead to the *outcome* of allowing itself to consider legislative intent? What would happen in an employment case, for example, if in the absence of clear statutory language, the legislative history and circumstances of enactment seemed to suggest that Congress favored application of the law to Americans outside the territorial domain of the United States, in which case the principles of *American Banana*<sup>125</sup> and *Chisholm*<sup>126</sup> might be infringed upon? The Court answered that question in *EEOC v. Arabian American Oil Co.*<sup>127</sup>

### III. CONTRARY CONCERNS

The policy which seems to have influenced the Court the most in developing its strict presumption against extraterritoriality is the fear of interference in foreign affairs;<sup>128</sup> indeed the Second Circuit echoed this fear in *Pico*.<sup>129</sup> But in most judicial undertakings there are competing policies which require a balancing in order to determine a course of action. When world conditions and political philosophies change, but statutory language does not reflect the magnitude of that change, the Court is left either to extrapolate new holdings based on this perceived change in conditions and philosophy, or to merely adhere to the canons of the past. In adhering to the traditional rationale, the Court delegates the duty of revision to the legislature which is perhaps better suited to

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any differences across fact situations? If the definition of the kind of contract disputes justiciable under the statutes has been held not to include those where the litigants are foreign entities, what facts could those litigants point to in order to get their feet in the door of a federal court? See *supra* note 112 and accompanying text.

125. See *supra* notes 39-42 and accompanying text, and *infra* notes 128-29 and accompanying text (discussing the idea of infringement on sovereignty).

126. See *supra* note 41 (discussing Holmes' opinion in *American Banana* stating that the character of action is governed by law of situs) and *Chisholm*, 268 U.S. at 32 (citing *American Banana* for that proposition).

127. For a discussion of the case and criticisms of the Court's decision, see *infra* notes 130-43 and accompanying text.

128. Compare *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) with *Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963).

129. See *Pico*, 968 F.2d at 195.

meaningfully articulate such change. But in the absence of a revised legislative expression of direction, the Court left to its own devices may promulgate rules which will seem arbitrary to some, no matter which course it chooses to follow.

This section of the note will address both the resultant arbitrariness and possible modes of correction. First, an arguably arbitrary result will be shown via a brief discussion of the Court's recent holding in *EEOC v. Arabian American Oil*. Second, the various policies which could serve as rationale for a change in the presumption against extraterritoriality will be analyzed.

#### A. *An Arbitrary Course*

In *EEOC v. Arabian American Oil*, the Supreme Court held that Title VII of the Civil Rights Act of 1964<sup>130</sup> did not apply extraterritorially, so that American employers abroad who employ American workers are not subject to the Act.<sup>131</sup> The case arose from facts involving a naturalized American citizen born in Lebanon, who was discharged while working for an American company in Saudi Arabia.<sup>132</sup> The employee, Bourselan, filed a complaint with the EEOC charging that he was discharged on the basis of his race, religion and national origin.<sup>133</sup> In deciding the question of extraterritorial application of the Act, the majority labeled the jurisdictional language of the statute "boilerplate"<sup>134</sup> and stated that in such cases, the requirement of a "clear statement" was in effect.<sup>135</sup>

The majority holding does not seem at variance with precedent until it is realized that Congress may have actually provided circumstantially through the statutory language itself that the Act apply extraterritorially. Specifically, Congress stated that the Act would "not apply to an employer with respect to the employment of aliens outside any State."<sup>136</sup> The argument by negative implication is, that since Congress sought to specifically exempt alien workers from coverage, it

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130. 42 U.S.C. § 2000e et seq. (1964).

131. See *Arabian American*, 111 S.Ct. at 1236.

132. *Id.* at 1229-30.

133. *Id.* Bourselan, whose state law claims had been dismissed by the district court, also petitioned for certiorari individually in his claim against the company. The Court granted his petition and disposed of the two cases together. *Id.* at 1230.

134. *Id.* at 1231

135. *Id.* at 1235.

136. 42 U.S.C. § 2000e-1 (1988).

must have meant to include American workers.<sup>137</sup> In language that seems to give a restrictive presumption new vitality, the majority stated that “[i]f we were to permit possible, or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.”<sup>138</sup> However, as Justice Marshall pointed out in dissent, the duty of the Court is not merely to look at whether the statutory language specifically supports such application or whether it is too amorphous to be so read;<sup>139</sup> the Court’s mandate is to ascertain Congressional intent by “exhausting all the traditional tools.”<sup>140</sup> Marshall said further that the Court had not applied a “clear statement rule” since *Foley Bros.*, because such a rule is not designed to ascertain legislative intent, but rather to “shield important values from an *insufficiently strong* legislative intent to displace them.”<sup>141</sup>

Exactly why the majority read Title VII the way it did in *Arabian American* is debatable, but the decision itself has been the subject of intense scrutiny.<sup>142</sup> What the Court’s decision offers is evidence of perhaps another shift in the Court’s perception of its role in determining extraterritorial application of labor and employment laws—that is, a shift to the restrictive.<sup>143</sup> In the final analysis, what motivated the Court

137. See *Arabian American*, 111 S.Ct. at 1237 (Marshall, J., dissenting).

138. 111 S.Ct. at 1233.

139. See 111 S.Ct. at 1237 (Marshall, J., dissenting).

140. 111 S.Ct. at 1237 (dissenting opinion). Justice Marshall described these “traditional tools” as “including legislative history, statutory structure, and administrative interpretations.” *Id.* at 1238. Compare Marshall’s list of tools with those in *Foley Bros.* See *supra* note 92 and accompanying text.

141. 111 S.Ct. at 1238.

142. See, e.g., Sean M. Bunting, Note, *The Extraterritorial Force of Title VII: Regulating the Conduct of American Employers Overseas*, 9 HOFSTRA LAB. L.J. 257. See also Schulte, *supra* note 72, at 376 and Adam M. Mycyk, Comment, *United States Fair Employment Law in the Transnational Employment Arena: The Case for Extraterritorial Application of Title VII of the Civil Rights Act of 1964*, 39 CATH. U.L. REV. 1109, 1156 (challenging validity of decision); see also Robert E. Riggs & Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1 (asserting ideological motive for decision); and see Kenneth Kirschner, *The Extraterritorial Application of the Civil Rights Act*, 34 LAB. L.J. 394, 407 (proposing non-application of Title VII prior to the *Arabian American* case).

143. Note the Court’s specific holding in *Arabian American* is not more restrictive than *McCulloch* or *Benz*, since, as has been shown, the Court rarely applies labor and employment law extraterritorially. However, the impact of the Court’s seeming disregard of the scheme of the Act and the conditions for which it was designed to remedy is significant if Congress does not change its current method of drafting statutes.

to so hold may not be as important as the divergence such a holding creates in light of changing economic conditions.

### B. *Time For a Change?*

Although the content and strength of the presumption against extraterritoriality has varied over the years, one thing has remained the same. The constant has been the Court's lamentations about having to articulate a presumption in the first place. In many of the cases discussed previously, the Court has challenged Congress to be more explicit in drafting and by doing so has provided an extra justification for its holdings.<sup>144</sup> Although one can certainly understand the plight of the Court, a distinction should be noted between two types of statutes. There are those which do not give a clear indication of jurisdictional intent on the face of the statute, and those which are devoid of ascertainable intent from the entirety of the history and circumstances. Should the Court not take a stand when the facts of a case merely present a new situation, one not contemplated at the time of enactment of the statute, but one which arguably would have been included in the legislation had Congress been aware of the situation?<sup>145</sup> If the answer is yes, then a more flexible method of extraterritorial application—one which is more likely to afford justice to the litigants—could be utilized. This is not to say that the principle fears which have been the traditional

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Stranger still is the way in which the majority distinguished *Steele* by stating that it was the jurisdictional language in *Steele* which evidenced the Congressional intent to apply the Lanham Act extraterritorially. See *Arabian American*, 111 S.Ct. at 1232. Recall that the conclusive fact in *Steele*, at least according to the *Steele* Court, was the nature of the law to be applied in light of the "broad jurisdictional grant." See *Steele*, 344 U.S. at 286.

144. See, e.g., *Lauritzen*, 345 U.S. at 593 (stating that the assertion of what is in the best interest of the United States "would be within the proprieties if addressed to Congress."); *McCulloch*, 372 U.S. at 22 (stating "just as we directed the parties in *Benz* to the Congress, which 'alone has the facilities necessary to make fairly such an important policy decision' . . . we conclude here that the arguments should be directed to the Congress rather than to us.") (citation omitted); and *Arabian American*, 111 S.Ct. at 1236 (stating that "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot."). Congress took the Court's challenge and amended Title VII to cover American citizens abroad. See Civil Rights Act of 1964 as amended by Civil Rights Act of 1991, § 701(f). Congress did provide an exception where complying with the Act would cause the employer to violate foreign law. § 702(b) Cf. 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.

145. See *supra* notes 87-89 and accompanying text.

underpinning of the presumption against extraterritoriality would be ignored, just that they would be balanced against other concerns.

In these cases, the Court has announced a fear of interference with the laws of other nations.<sup>146</sup> But it should first be noted that there is no general prohibition against the exercise of extraterritorial jurisdiction found in international law.<sup>147</sup> Additionally, the Court itself has recognized that the United States may regulate the conduct of its citizens abroad.<sup>148</sup> Of course, it complicates the matter if the facts which give rise to the dispute occurred in a foreign nation, but not fatally so if the law of the situs does not cover the situation or does not conflict with American law.<sup>149</sup> This notion in itself is not repugnant to the holding already announced by the Court in *Steele v. Bulova*.<sup>150</sup>

In this alternative framework, the next line of analysis would be to ascertain the intent of Congress to have the statute apply extraterritorially. However, if it had already been established that neither international law, nor the law of the foreign situs of the action precluded the entry of American law, why articulate a restrictive presumption?<sup>151</sup> The Court could in that event balance the interest of the rights sought to be vindicated through litigation with the possible effects on foreign sovereignty and foreign relations. The more qualitative contacts the litigants have vis-à-vis the American law, the more weight that should be given to application of the statute.<sup>152</sup> Conversely, the more likely that the litigation would *actually* interfere with foreign interests (not just violation of foreign law, but also infringement upon custom and industry standards, for example), the more weight the Court should give to non-application.<sup>153</sup>

The Second Circuit in *Pico* recognized that “[i]n the present ‘global economy’ ever-expanding trade makes it increasingly possible that foreign industry might affect commerce ‘between a foreign country and

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146. See *supra* notes 39-42 and accompanying text. See also *supra* notes 128-29 and accompanying text.

147. See 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 *supra*, note 64 and accompanying text.

148. See *supra* notes 61-66 and accompanying text.

149. See Nothstein & Ayres, *supra* note 147, at 21-25.

150. See *supra* notes 67-75 and accompanying text.

151. Cf. Nothstein & Ayres, *supra* note 147, at 30.

152. *Id.* at 30-31.

153. Compare to the “governmental interest technique” as articulated in Nothstein & Ayres, *supra* note 147, at 32-34.

any State.”<sup>154</sup> Precisely because this is the current reality, the fact situations presented to the courts have outpaced the development of the presumption against extraterritoriality. Writing just after the Court had decided *McCulloch*, Professor David Currie articulated the Court's failure in this regard when he stated that:

Mr. Justice Clark correctly acknowledged in *McCulloch*, as the Court has often recognized, that in international conflict of laws as well as elsewhere a statute means what the legislature intended it to mean. But the attempt to carry out the will of Congress should not be abandoned simply because legislative history reveals no evidence of attention to the specific problem at hand. Every law, as Mr. Justice Holmes taught, is an expression of social policy; the job of statutory construction is to ascertain and effectuate the purpose for which the statute was enacted. A statute, the Court has written, ‘must be read in the light of the mischief to be corrected and the end to be attained.’<sup>155</sup>

#### IV. THE EFFECTS

As illustrated by the Supreme Court's decision in *Arabian American* and the Second Circuit's decision in *Pico*, the judicial route of choice in the changed world so far is one of adherence to the canons of the past. The Court can hardly be blamed for not rushing to undertake a task which is not only unfamiliar to its daily exercise, but also contrary to its mandate; drafting statutes is for the legislative branch. Putting aside the issue of the application of labor and employment laws to American citizens abroad, do the Court, the Congress, or the People of this nation want a South Korean labor union to have “justice” in an American court against an American company? Under the traditional American approach to dealing with foreign interests, perhaps few would take up the union's cause. However, after watching American corporations migrate in vast numbers to places such as South Korea, in search of more favorable labor costs and perhaps more favorable *labor laws*, the People might want to re-evaluate that question.

It is not the intent of this section to quantitatively measure the impact of the presumption against extraterritoriality on corporate migration. There are no doubt countless factors which combine to spur

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154. *Pico*, 968 F.2d at 195 (quoting the jurisdictional language of the LMRA).

155. See Currie, *supra* note 1, at 45.

corporations to locate or relocate their operations in foreign countries. This section merely attempts to briefly show what economists have written about American labor policies and their impact on the nation's economy and on the labor movement. The eye here is to be placed on divergence in American law and international business reality.

#### A. *Economics in a Changed World*

Changed world conditions have impacted the effectiveness of American labor policy. Because of the increase in capital mobility, Direct Foreign Investment (DFI) has increased where factor costs are lower.<sup>156</sup> As a result, "[b]y moving or threatening to move, corporations are in perfect position to force one group of workers to compete directly with another."<sup>157</sup> Therefore, the power of unions to bargain and strike is diminished because management can "simply walk off with the machinery."<sup>158</sup> One of the effects of the decline in union power has been a decline in wage increases. In the United States during the period from 1982 to 1988, pay for non-union workers rose significantly more than for union workers.<sup>159</sup> In the past, union workers had fared better than their non-union counterparts.<sup>160</sup> Some economists feel that the effectiveness of traditional policies of advancing union worker's interests is declining as the transnational economic climate develops.<sup>161</sup> At issue in restructuring governmental policies designed to meet the world economic changes are macro-economic aspects such as freedom of move-

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156. See JAGDISH BHAGWATI, *POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS* 310 (Douglas A. Irwin ed., 1991). Factor costs comprise the various inputs involved in the production process, including direct and indirect labor costs.

157. Barry Bluestone, *Deindustrialization and Unemployment in America*, in *DEINDUSTRIALIZATION AND PLANT CLOSURE* 12 (Paul D. Staudohar and Holly E. Brown, eds., 1987).

158. June Nash, *The Impact of Worldwide Industrial Restructuring on a New England Community*, in *LABOR IN THE CAPITALIST WORLD-ECONOMY* 264 (Charles Bergquist ed., 1984).

159. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *BULLETIN 2319, EMPLOYMENT COST INDEXES AND LEVELS, 1975-88* at 2 (1988). Union workers wages rose 18.1% while non-union workers wages rose 26.1%. *Id.*

160. *Id.*

161. See RICHARD EDWARDS AND PAOLO GARONNA: *THE FORGOTTEN LINK: LABOR'S STAKE IN INTERNATIONAL ECONOMIC COOPERATION* 115-17 (1991). The authors suggest that traditionally, the two methods by which labor has sought to advance its interests are through national labor unions and social democratic state politics. They view these methods as becoming less effective in carrying out the goals of labor as the international economic structure becomes more regionalized by investment zone and not contained by geographical sovereignty. *Id.*

ment and management of mass migration, and micro-economic aspects such as occupational health and safety and child care.<sup>162</sup> Although some of the issues are not new, economists from different theoretical camps argue that a change in policy is required to cope with change in the international economy.

Some argue that failed economic policy and misprioritization stand in the way of economic evolution. For example non-wage labor costs, such as benefits, pensions and job security devices—things sought to be enforced through collective bargaining agreements—are increasingly important items for companies to control, and could be easily targeted by governmental policy for change.<sup>163</sup> However, the political ramifications of mandating short-term cuts in such costs to promote long-term competitiveness are seen as undesirable. Furthermore, the significance of maintaining an affirmative policy rather than a policy of inaction is not seen as persuasive.<sup>164</sup> But the failure to strive for a change in policy leaves in place antiquated federal labor laws which “continue to distort the playing field in U.S. labor relations.”<sup>165</sup> American corporations are no longer bothering to play within the rules of American labor laws, they merely subvert them by going abroad, defeating the purpose of such laws.<sup>166</sup>

The purpose of the LMRA was to provide balance in the relationship between employer and employee.<sup>167</sup> Multinational corporations (MNC's) are now able to easily transfer “economic activities to places where unions are weak and labor costs and standards are low.”<sup>168</sup> By being willing to move their operations to developing nations, American firms have taken advantage of the fact that unions have traditionally found it difficult to effectively expand their organizations internationally.<sup>169</sup> Even where American companies can make a reasonable profit

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162. *See id.* at 117-21.

163. *See generally* ROBERT A. HART, *THE ECONOMICS OF NON-WAGE LABOUR COSTS* 7-33 (1984) (defining non-wage labor costs) and *see id.* at 162 (stating that there are strong arguments for government policies designed to reduce such costs).

164. *See id.* at 162-63.

165. MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 187 (Cato Institute 1987).

166. *See* Nash, *supra* note 158, at 264.

167. *See supra* notes 2-3 and accompanying text. *See also* note 118 and accompanying text. *Cf. supra* note 115 and accompanying text.

168. RAY MARSHALL, VERNON M. BRIGGS, JR., AND ALLAN G. KING, *LABOR ECONOMICS: WAGES, EMPLOYMENT, TRADE UNIONISM, AND PUBLIC POLICY* 641 (5th ed. 1984).

169. *Id.* *See also*, Nash, *supra* note 158, at 264.

in the United States, they are willing to move to foreign countries to realize minimal profit increases when the climate for economic expansion is better abroad.<sup>170</sup> Thus the balance, once guaranteed by federal labor law, has shifted unfavorably for unions.<sup>171</sup>

### B. *Solutions*

There is a division among economists as to what theory, protectionism or free marketeering, will best serve American workers. Some economists see protectionist measures as an important way to re-energize the labor movement, as at least a beginning to a solidifying of the American industrial base.<sup>172</sup> Specifically, one theory of coping with corporate flight and deindustrialization is to have stricter plant-closing laws and to statutorily strengthen union's bargaining position or weaken that of corporations.<sup>173</sup> Other economists take the free market approach and suggest that in addition to promulgation of laws which open transnational trade, laws governing, among other things labor, taxation, and insurance should be harmonized therewith.<sup>174</sup> The free marketeers see the very nature of unions in the current economic climate as repressive and would seek to do away with much labor legislation.<sup>175</sup>

A perhaps less extreme view is that the policymakers in the United States must see things the way they are now, not the way they would

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170. See Bluestone, *supra* note 157, at 12.

171. The advantages which various countries have for American firms may not necessarily correspond to the level of development. For example, although the American influence on the development on South Korea, the center of the dispute in *Pico*, has found the country with somewhat advanced labor legislation, a diminished enforcement capability inherent in the South Korean system undermines effectiveness of the laws. See INTERNATIONAL LABOR PROFILES 174 (Grand River Books 1982) (a compilation of a series of pamphlets published by the BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T OF LABOR). In some developing countries, however, human rights violations and illegal contracts are the result of the lower social costs of production. See WALTER R. MEAD, THE LOW-WAGE CHALLENGE TO GLOBAL GROWTH: THE LABOR COST-PRODUCTIVITY IMBALANCE IN NEWLY INDUSTRIALIZED COUNTRIES 24 (Economic Policy Institute 1990).

172. See generally BARRY BLUESTONE ET AL., CORPORATE FLIGHT: THE CAUSES AND CONSEQUENCES OF ECONOMIC DISLOCATION (The Progressive Alliance 1981).

173. See *id.* at 79-94 and Bluestone, *supra* note 157, at 14.

174. See EDWARDS AND GARONNA, *supra* note 161, at 35.

175. See REYNOLDS, *supra* note 165, at 148 (stating that "[e]xpressed in blunt terms, U.S.-style unions are government-supported worker cartels that interfere with the price mechanism and therefore impede the advance of prosperity. A prime objection to unions is that they reduce the level of real wages, despite all the ostentatious struggle to raise the prices of union labor.").

like them to be as an extension of the time when the United States ruled the world economy.<sup>176</sup> Many theorists agree that the regional nature of the developing centers of production will break down the traditional notion of nationalism with regard to labor.<sup>177</sup> As a result, unions may have to abandon historically adversarial positions vis-à-vis management<sup>178</sup> as the standard of living of union members will be lowered one way or the other.<sup>179</sup>

## V. CONCLUSION

Congress has left the jurisdiction-granting provisions of some of the more important labor and employment laws open for interpretation by the Supreme Court. The Court's task in evaluating nebulous statutory wording for the sometimes "mythical" intent of Congress is not enviable. However, the Court's analysis appears unfulfilling from the perspective of those seeking to enforce such laws extraterritorially and those who favor a basis of interpretation which coincides with the current world economic conditions. Congress has not articulated a new philosophy of the fundamental rights of employees and employers which will guide the United States into the next century, and the Court has not felt itself at liberty to impose any view other than that which flows through judicial restraint.

In the context of today's complex and internationally integrated economy, the labor laws which have been the subject of the debate over extraterritorial application seem much older than their years. It would be difficult for any jurist to find a meaningful way to correlate a statute which was written in part to remedy the perceived problem of communist infiltration into labor unions,<sup>180</sup> to a fact situation involving multiple countries, multiple layers of corporate entities and a multitude of ramifications for choosing one road or the other. The answer does not necessarily lie in holding American-owned foreign subsidiaries amenable to suit from their foreign employees in American courts. But to have the Court attempt to extrapolate what the intent of Congress in 1935 or 1947 would be today is folly. The current

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176. See HAZEL J. JOHNSON, *DISPELLING THE MYTH OF GLOBALIZATION: THE CASE FOR REGIONALIZATION* 150 (1991).

177. See, e.g., *id.* at 1-16. See also EDWARDS AND GARONNA, *supra* note 161 at 116 (stating that "the economic world in which workers must seek to advance and defend their interests can no longer be appropriately conceived of in national units.").

178. See JOHNSON, *supra* note 176, at 131.

179. *Id.* at 140.

180. See H.R. REP. NO. 245 on H.R. 3020, 80th Cong., 1st Sess. 295 (1947).

Congress should take heed of the Court's challenges and make its meaning clear with regard to extraterritorial application of labor and employment laws; but Congress should first determine what it intends to mean by taking notice of the expanding economy of this shrinking world.

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