SHOULD THE FAIR LABOR STANDARDS ACT ENJOY EXTRATERRITORIAL APPLICATION?: A LOOK AT THE UNIQUE CASE OF FLAGS OF CONVENIENCE

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1. INTRODUCTION

Since the mid-1950s there has been a tremendous proliferation of merchant shipping fleets flying “flags of convenience.”¹ Most often, the transferral of flags occurs between vessels of small nations lacking the status of maritime powers and traditional maritime countries, such as the United States. This activity has sparked significant opposition, particularly from U.S. maritime labor unions, which have mounted aggressive campaigns² to protect the wages and working conditions of their membership from the threat of increased foreign competition that often results from reflagging practices.³ Protests, in the form of sympathy strikes supporting foreign flag-ship crews and picketing of foreign vessels, became

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¹ See infra text accompanying notes 61-65 for an explanation of this term. See generally BOLESŁAW A. BOCZEK, FLAGS OF CONVENIENCE 6-12 (1962) (describing the widespread practice of registering merchant vessels under foreign flags).


³ This Comment primarily focuses upon the international labor and economic issues that have arisen as a result of the transfer of vessels to foreign registries. The following analysis was not undertaken with the purpose of exposing all of the negative impacts of open registry on world shipping. For a more general discussion of the adverse consequences of an open registry system, see Moira L. McConnell, "... Darkening Confusion Mounted Upon Darkening Confusion": The Search for the Elusive Genuine Link, 16 J. MAR. L. & COM. 365, 390-91 (1985).
the subject of highly controversial litigation in which U.S. courts were forced to address the novel question of whether U.S. labor laws could be applied to foreign flag-ship vessels. Resolution of much of this litigation rested upon the presumption that domestic federal statutes were not to be accorded extraterritorial application absent a clear congressional directive mandating otherwise.

This Comment suggests that the judiciary’s unyielding adherence to the antiquated principle that domestic statutes should not be extended extraterritorial reach threatens the continued vitality of the American labor force. Section 2 of this Comment concentrates on the origin of the often cited presumption against extraterritorial application of federal statutes. Section 3 traces the courts’ application of this principle to domestic labor laws, charting the courts’ steadfast adherence to the presumption. A brief exposition of the Fair Labor Standards Act (“FLSA”) appears in Section 4. Section 5 illustrates the propriety of applying the Act extraterritorially to cover situations involving flags of convenience. This Comment in conclusion suggests that instead of blindly invoking the infallibility of an outdated presumption, courts must begin their analysis of whether domestic statutes such as the FLSA should be accorded extraterritorial reach by looking to legislative history, domestic public policy, and the possible economic ramifications of denying jurisdiction. If the strict approach to statutory interpretation adopted by the judiciary is not abandoned, and the scope of labor laws continues to be restricted to domestic situations, the consequences to the American labor force are potentially devastating in the present era of increased foreign competition.

2. THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION

The origin of the presumption against extraterritorial application can be traced back to the early part of this century. In 1904, the United States Supreme Court in American Banana Co. v. United Fruit Co. was faced with a case in

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4 213 U.S. 347, 354 (1909) (U.S. corporation sued another U.S. corporation under § 7 of the Sherman Act, claiming that it was the victim of an unlawful monopoly in Costa Rica).
which there had been an attempt to apply a U.S. law extraterritorially. In passing on the issue of whether a federal statute could be applied abroad, the Court adopted a strict rule of construction that would become the cornerstone for future resolution of matters dealing with the issue of extraterritoriality. Absent a clear congressional mandate, a court is obligated to restrict the application of a federal statute to "the territorial limits over which the lawmaker has general and legitimate power." Consequently, "since a nation's legitimate regulatory jurisdiction...extends only to the borders of its territory," acts outside the jurisdiction of the United States were beyond the reach of any American law.

The Court's decision in American Banana to limit the statute's reach reflected the belief that allowing regulation of activities abroad would permit Congress to exceed the limits of its delegated, law-making authority. In arriving at this decision, the Court largely disregarded both the inquiry into congressional intent and the interpretation of the Act's statutory language. Rather, the Court's focus was primarily territorial.

The rigid territorial principle adopted by the American Banana Court was later slightly modified to allow the sparing application of American law abroad. As one commentator has noted, the "strict rule against extraterritoriality [was] slowly evolv[ing] into a rebuttable presumption that American laws apply only territorially." In order to successfully rebut the presumption, it had to be demonstrated that Congress explicitly or implicitly intended the statute to be applied
extraterritorially.\textsuperscript{10} Considerations of foreign jurisdictional sovereignty,\textsuperscript{11} international comity, and fairness\textsuperscript{12} bore heavily upon the courts' determination of whether to require a clear expression of congressional intent. If upholding jurisdiction would conflict with international law by threatening to violate a treaty or a general international principle of sovereignty, courts would generally require that there be a clearly expressed affirmative intention, in either statutory language or legislative history, before giving laws extraterritorial reach.\textsuperscript{13} Although courts no longer seemed to assume \textit{per se} that all extraterritorial applications of U.S. law violated international law, the presumption retained much of the strong anti-extraterritorial bias of America Banana.

Because the courts strongly embraced the conflict avoidance principle in extraterritoriality analysis, the domestic impact of decisions denying extraterritorial application was often overlooked. Courts often failed to consider that:

> [T]he doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its "sovereign" walls, while its own regulatory efforts are reflected back in its face.\textsuperscript{14}

As a consequence of the presumption against extraterritorial application, many federal statutes, including several statutes similar to the Fair Labor Standards Act in that they seek to regulate employer-employee relations and have wide domestic

\textsuperscript{10} See, e.g., Blackmer v. United States, 284 U.S. 421 (1932) (where the threshold question in determining extraterritorial application was whether a contrary intent appeared in the statute to rebut the territorial presumption).


\textsuperscript{12} Turley, \textit{supra} note 7, at 612; see also Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 612 (9th Cir. 1976) (noting the importance of the elements of comity and fairness).

\textsuperscript{13} See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (denying extraterritorial application of the National Labor Relations Act where it would have violated international law).

\textsuperscript{14} Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984).
application, have been denied extraterritorial reach. Examination of how the courts considered whether to apply these domestic labor statutes abroad provides insight into the courts' recent interpretation of the FLSA as it applies to seamen on foreign flag vessels.

3. CASE LAW: JUDICIAL TREATMENT OF THE EXTRATERRITORIAL SCOPE OF DOMESTIC LABOR LAWS

In determining the applicability of federal labor statutes in a transnational setting, the United States Supreme Court was faced with the same questions that had been previously raised in assessing the territorial scope of other congressional enactments. Several of these labor statutes will now be examined in turn.

3.1. The Eight Hour Law

In 1949, the Supreme Court in *Foley Bros. v. Filardo* had the opportunity to consider the extraterritorial application of the Eight Hour Law. The plaintiff in this labor case was a U.S. cook hired to feed construction workers employed on U.S. projects in Iran and Iraq. The cook often worked in excess of eight hours a day and was denied the statutorily mandated overtime compensation. Denying extraterritorial application of the Eight Hour Law on the basis of the presumption, the Court stated that "unless a contrary intent appears, [a federal statute] is meant to apply only within the territorial jurisdiction of the United States." The Court further expanded the presumption by recognizing that Congress, when enacting legislation, "is primarily concerned with domestic conditions."

The *Foley* case, which was to become "the most frequently

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15 336 U.S. 281 (1949). The Eight Hour Law provided that no employee “shall be required or permitted to work more than eight hours in any one calendar day,” unless paid for work “in excess of eight hours per day at no less than one and one-half times the basic rate of pay.” 40 U.S.C. §§ 324-25 (1940) (repealed 1962).

16 See supra text accompanying notes 4-14 (discussing the well-settled presumption against extraterritorial application of federal statutes).


18 Id. at 285.
cited\textsuperscript{19} presumption case, is instructive in the area of extra-
territorial applicability of statutes because it illustrates the
Court's adoption of a strict standard requiring a "clearly
expressed purpose" before granting extraterritorial jurisdic-
tion.\textsuperscript{20} Applying the clear congressional intent standard,
courts have consistently rejected extraterritorial application in
every ambiguous employment statute since Foley.\textsuperscript{21}

3.2. The Labor Management Relations Act\textsuperscript{22}

The first case decided by the Supreme Court on the issue
of the National Labor Relations Board's jurisdiction over ships
in foreign commerce, Benz v. Compania Naviera Hidalgo,
S.A.,\textsuperscript{23} involved a flag of convenience fleet vessel. The case
arose as a result of an action brought by the ship's foreign
owner to enjoin a U.S. union from picketing the ship, tempo-
rarily docked in a U.S. port, in furtherance of a strike by the
ship's foreign crew. The Court held that because the labor
dispute at the center of the controversy concerned "a foreign
employer ... operating under an agreement made abroad
under the laws of another nation,"\textsuperscript{24} a jurisdictional grant
would have to be found in the intentions of Congress.\textsuperscript{25} The
Court's decision in Benz turned on its interpretation of the Act

\begin{itemize}
  \item \textsuperscript{19} Turley, supra note 7, at 608 n.67.
  \item \textsuperscript{20} Foley Bros., 336 U.S. at 286.
  \item \textsuperscript{21} In addition to the Eight Hour Law, courts have denied the extraterritori-
al application of several other labor laws. See, e.g., Benz v. Compania
Relations Act); New York Cent. R.R. v. Chisholm, 268 U.S. 29, 32 (1925)
(Federal Employer's Liability Act); Air Line Stewards & Stewardesses Ass'n,
Int'l v. Trans World Airlines, Inc., 273 F.2d 69 (2d Cir. 1959) cert. denied,
362 U.S. 988 (1960) (Railway Labor Act); Cleary v. United States Lines, Inc.,
728 F.2d 607 (3d Cir. 1984) (Age Discrimination in Employment Act);
Boureslan v. Aramco, Arabian American Oil Co., 892 F.2d 1271 (5th Cir.
1990) (en banc), aff'd, ___ U.S. ___, 111 S. Ct. 1227 (1991) (Title VII of the
  \item \textsuperscript{22} 29 U.S.C. § 151 (1988). The Labor Management Relations Act
("LMRA") is the amended version of the original National Labor Relations
Act ("NLRA").
  \item \textsuperscript{23} 353 U.S. 138 (1957).
  \item \textsuperscript{24} Id. at 142.
  \item \textsuperscript{25} Ultimately, it was not the foreign nationality of the shipowners that
determined the outcome of the case, but rather the Court's conclusion that
Congress did not fashion the Act for the purpose of resolving disputes
between nationals of foreign countries. Id. at 143.
\end{itemize}
as primarily "concerned with industrial strife between American employers and employees." Supra note 26. The Court's interpretation of the Act's purpose effectively eliminated the possibility of finding the requisite congressional intent necessary for extraterritorial application. Because this intent would not be inferred by the Court "in such a delicate field of international relations," supra note 27, the Act was not given extraterritorial effect.

In 1961, however, the National Labor Relations Board (the "NLRB") attempted to sidestep the Court's ruling in Benz by asserting jurisdiction in West India Fruit & Steamship Co. supra note 26 over a dispute involving an unfair labor practice charge arising from an incident in Cuban waters aboard a foreign flag-ship carrying a foreign crew. Applying the guidelines established in a previous shipping case which had examined the extraterritorial scope of the Jones Act, supra note 28, the NLRB ruled that, notwithstanding foreign registry, an alien crew, and alleged unfair practices occurring outside U.S. waters, there were sufficient U.S. contacts to warrant extraterritorial application of the Act. supra note 29. The NLRB also justified its action as a necessary intervention in a situation that could have had immediate, adverse effects on U.S. commerce. supra note 30.

Six years after the NLRB's decision in West India Fruit, the Supreme Court in McCulloch v. Sociedad Nacional de

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26 Id. at 143-44.
27 Id. at 147.
29 See Lauritzen v. Larsen, 345 U.S. 571 (1953); The Jones Act, 46 U.S.C. app. § 688 (1988) (covering "fally seaman who shall suffer personal injury in the course of his employment") (emphasis added). In Lauritzen, the Court set forth several factors for determining whether to apply the Jones Act extraterritorially. These factors include the nationality of the owners, situs of the injury, country of crew recruitment, nationality of the seamen, and home port of the ship.
30 The NLRB asserted that the fact that a U.S.-owned flag-ship was involved, and that the vessel was continually engaged in U.S. commerce, constituted adequate contacts with the United States. See West India Fruit & Steamship Co., 130 N.L.R.B. at 355.
31 Id. at 352-53. The Board reasoned that "[i]t is the foreign commerce of the United States that is involved in this proceeding, and that surely is a domestic interest of the United States." Id. at 353. The Board's decision completely glosses over the Court's concern in Benz that extraterritorial application might lead to "international discord." See supra text accompanying notes 26-27.
Marineros de Honduras had occasion to review the NLRB’s treatment of the foreign flag jurisdictional issue. In McCulloch, the Court was called upon to determine whether labor relations involving an alien crew on a foreign-flag vessel, owned by a U.S. corporation, affected “commerce” within the meaning of the National Labor Relations Act (“NLRA”). In holding that the Act was not “intended to have any application to foreign registered vessels employing alien seamen,” the Court declined to rely on the beneficial ownership of the vessel or other substantial U.S. contacts to override the principle established in Benz. Thus, McCulloch reaffirmed the Court’s view that absent relatively clear congressional expression to the contrary, labor relations of a foreign vessel and its crew are not subject to U.S. labor law.

The doctrine guiding the decisions in Benz and its progeny was premised upon the idea that intrusions into the management and other internal affairs of foreign ships must be avoided. Under this doctrine, if it were determined that an extension of jurisdiction “would necessitate inquiry into the ‘internal discipline and order’ of a foreign vessel,” jurisdiction would be denied.

Despite the Court’s seemingly unyielding position with respect to the extraterritorial application of domestic labor laws, the Supreme Court in 1970 decided in International Longshoremen’s Ass’n, Local 1416 AFL-CIO v. Ariadne Shipping Co., another flag of convenience case, that there was no need to bar the NLRB from asserting jurisdiction. International Longshoremen’s Ass’n involved peaceful picketing in Florida ports by U.S. unions to protest “substandard wages paid by foreign-flag vessels to American longshoremen working in American ports.” The pickets, unlike the pickets in Benz or McCulloch, were protesting the substandard wages paid to

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33 Id. at 19.
34 Id.
37 Id. at 196. Earlier suits dealt with the efforts of U.S. unions to represent alien crew members.
fellow U.S. workers. The Court was not compelled to invoke the presumption against extraterritoriality because the case involved domestic U.S. labor relations, rather than the controversies of foreign shipowners and their crews.

3.3. The Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA") originally did not contain language regarding its possible extraterritorial application. Not surprisingly, given the statute's silence regarding its territorial reach, courts were disinclined to extend coverage of the Act beyond the territorial United States. After the Court of Appeals for the Third Circuit, relying on the presumption against extraterritorial application, refused to apply the Act's provisions abroad, Congress recognized that the extraterritorial grant of jurisdiction would not lead to serious conflicts with foreign jurisdictions and economies, while continued judicial restriction of the ADEA to exclusively domestic applications would seriously undermine the purpose of the Act. Accordingly, Congress amended the Act in 1984 to expressly provide for extraterritorial application.

Despite this amendment to the ADEA, however, the presumption against extraterritoriality survived. In *Pfeiffer v. Wm. Wrigley Jr. Co.*, an executive of the Wrigley Corporation filed suit after he was fired by the company's German subsidiary upon reaching age sixty-five. The Court of Appeals for the Seventh Circuit held that the ADEA's extraterritorial mandate would not be applied retroactively to the alleged

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3 The Court specifically noted that "this dispute centered on the wages to be paid American residents..." Id. at 199.
41 Although denying the ADEA extraterritorial application, the *Cleary* court recognized that laws prohibiting age discrimination against U.S. employees working abroad would pose a less serious threat to a foreign economy than laws dictating a certain wage rate under statutes such as the FLSA. *Id.* at 1259.
43 755 F.2d 554 (7th Cir. 1985).
discrimination, which had occurred before the amendment was enacted. Pfeiffer is indicative of the prevailing judicial opposition to the extraterritorial extension of domestic statutes, even in the face of a clear congressional intent.

3.4. Title VII of the Civil Rights Act of 1964

In Boureslan v. Aramco, Arabian American Oil Co., the Court of Appeals for the Fifth Circuit became the first federal appeals court to consider the question of Title VII extraterritorial application. Plaintiff Boureslan, a U.S. citizen, worked as an engineer in Saudi Arabia for Aramco, a Delaware corporation with its principal place of business in Houston, Texas. Alleging that he had been harassed and later fired by his supervisor because of his religious affiliation, Boureslan sued Aramco in federal court, contending, inter alia, that Title VII protected U.S. citizens employed abroad by U.S. corporations from discrimination.

Despite the clear intent of Congress that Title VII be interpreted broadly, the Fifth Circuit adopted a very strict view of the territoriality principle and held that Title VII was not intended to be applied extraterritorially. Boureslan thus illustrates that in the labor context, the presumption against extraterritoriality has become virtually irrefutable.

The foregoing employment cases clearly illustrate the Court's inclination to steadfastly embrace the presumption that "no state may ever exercise its jurisdiction extraterritorially, unless a permissive rule of international law specifically provides otherwise." Nevertheless, a court is not bound by

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44 Id. at 559.
international law to adopt this presumption. Moreover, if the issue of extraterritorial application should arise in a situation justifying the extension of a domestic law, there is no reason why a state should "defer to the exclusive jurisdiction of another simply because the act in question took place within the borders of the other nation."

4. THE FAIR LABOR STANDARDS ACT

This section will examine the extent to which the Fair Labor Standards Act should be given extraterritorial reach. Resolution of this matter, as the preceding cases have indicated, turns on consideration of many factors, including statutory construction, legislative history, international law, and economic consequences.

The Fair Labor Standards Act was enacted in 1938 to rectify labor conditions detrimental to the health, efficiency, and general welfare of workers. Before enacting the FLSA, Congress carefully considered the jurisdictional reach of the Act. As originally enacted, the statute specifically exempted "any employee employed as a seaman" from both minimum wage and overtime requirements. Subsequent amendments to the Act extended the scope of the exemption by providing that "sections 206, 211 and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed within a foreign country. . . ."

In 1961, Congress further amended the FLSA, bringing seamen employed on U.S. vessels under the Act. This extension of jurisdiction was somewhat restricted, however, by an amendment which provided that the minimum wage and overtime provisions did not apply to any person "employed as a seaman on a vessel other than an American vessel." The


49 Id.
50 Id. at 14.
51 The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988). Because this Comment addresses issues of extraterritoriality in the context of federal labor law, the following discussion of the Fair Labor Standards Act will be limited to the provisions of the Act that apply to seamen.
term "American vessel" is explicitly defined in the Act as "including any vessel which is documented or numbered under the laws of the United States."\textsuperscript{55}

Unlike the Jones Act,\textsuperscript{56} whose literal interpretation would cover injured seamen anywhere in the world, Congress has limited the applicability of the FLSA to specific seamen and other employees by imposing rigid requirements. In addition to the "American vessel" requirement, seamen must be "engaged in commerce," or be employed by an "enterprise engaged in commerce."\textsuperscript{57}

Although the language of the FLSA seems clear, the applicability of the Act to seamen presents difficulties. Unlike other workers potentially covered by the statute, the services of seamen are often not rendered within the United States. The seamen's unique situation may account for the lack of cases analyzing when commercial activities are sufficiently domestic to trigger application of the FLSA and satisfy the "engaged in commerce" requirement.

Examination of suits brought under the Act indicates that a demonstrable connection to the U.S. economy is critical to a finding of FLSA coverage.\textsuperscript{58} However, the Act has been construed liberally to apply to the furthest reaches consistent with congressional intent. Thus, in Overstreet v. North Shore Corp.,\textsuperscript{59} the Court stated that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.'"\textsuperscript{60}

\textsuperscript{56} See supra note 29 and accompanying text.
\textsuperscript{57} 29 U.S.C. § 206(a).
\textsuperscript{58} See, e.g., Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959) (clarifying the factors necessary to support a finding that the employees seeking coverage under the Act were in fact "engaged in commerce").
\textsuperscript{59} 318 U.S. 125 (1943).
\textsuperscript{60} Id. at 128. See also Mitchell v. C.W. Vollmer & Co., 349 U.S. 427 (1955); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943).
5. APPLYING THE FLSA TO FLAGS OF CONVENIENCE

In order to determine whether the FLSA should be applied extraterritorially in cases involving flags of convenience, a brief exposition of the various issues involved in flags of convenience cases is necessary.61

5.1. What are Flags of Convenience?

Flags of convenience have been defined as "the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."62 Flags of convenience have been variously referred to as 'flags of necessity,' 'free flags,' and 'cheap flags.'63 The term 'flags of necessity' was preferred by U.S. shipowners because it implied "that in order for the shipowners to operate their ships competitively it [was] necessary to register them under such flags."64 On the other hand, American maritime unions, which were opposed to this practice for the reasons discussed earlier, referred to foreign flag ships as 'runaway flags,' which "impl[ies] that they have run away from the flag of the United States under which they should otherwise properly sail."65

5.2. Motives for "Flagging Out"

The reasons ships leave their own countries and register in foreign states vary widely. During World War II, for instance, many shipowners in combatant states re-registered under neutral flags to avoid becoming targets of enemy attack.66 For U.S. shipowners, re-registration during the early part of the war was undertaken to avoid infringement of the U.S.

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61 For a study of flags of convenience, see BOCZEK, supra note 1.
62 Id. at 2.
64 BOCZEK, supra note 1, at 5-6.
65 Id. at 6.
66 Id. at 8.
neutrality policy. Historically, however, U.S. shipowners have abandoned their national flag for reasons somewhat different than those that have motivated shipowners of other nationalities. Other nations' shipowners, including those of Israel, re-register their vessels as a means of avoiding national discrimination. However, the most often cited reasons for the use of alternative registries include avoiding burdensome taxation on earnings, seeking relief from higher safety standards, and reducing operating costs. In short, the principle motives for 'flagging out' are financial.

5.3. The Legal Standards for Reflagging

It is well-settled doctrine that "[t]he nationality of a merchant vessel is considered to be that of the state whose flag it lawfully flies without reference to ownership, where it was built, or by whose State's nationals it is manned." In order to benefit from all of the advantages that accrue from flying a foreign flag, ships must be properly refagged according to the laws of the nation under whose flag they seek to operate. The right to fly the flag of a state is conditioned upon the registration of that ship with the flagstate. Registration is the administrative mechanism by which a state confers its nationality upon a vessel. This process requires the documentation of a ship to evidence its national character. Practices for granting national affiliation to ships through registry have consistently been guided by the general principle that each state individually establishes the

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68 Metaxas, supra note 63, at 51, 53.


71 National character is synonymous with nationality. It symbolizes the flagstate's jurisdictional control and notice of the ship's nationality to other nations. See Clair v. United States, 154 U.S. 134 (1894).
criteria for such conferral. The only restriction placed on states in their decision to reflag is that "the reflagging must be justifiable on its own merits as a reflagging under the international and domestic standards that govern vessel registration." The international standard is embodied in the concept of the "genuine link," which was adopted in 1958 at the Convention of the High Seas as the test for effective flagstate control over ships flying the flagstate's colors. Article 5(1) of the Convention sets out in categorical terms that "[t]here must exist a genuine link between the state and the vessel flying its flag; in particular, the state must effectively exercise its jurisdiction and control in the administrative, technical, and social matters over the vessel."

Two major concerns motivated the establishment of a genuine link requirement. First, the maritime states saw the genuine link as a means of imposing a burden on all flagging states, thus reducing the convenience of an open registry system and lessening the competitive threat of flags of convenience vessels. Second, various groups felt that stricter supervision of vessel conditions by the registering state would eliminate substandard vessels, which detrimentally affect labor and safety conditions at sea.

What constitutes a sufficiently genuine link between vessel and state under international law has been the source of

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73 Wachenfeld, supra note 69, at 177.
74 The concept of genuine link was adopted at the Convention of the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.
76 See Law of the Seas Conventions, S. Exec. Rep. No. 5, 86th Cong., 2d Sess. (1960), reprinted in 106 Cong. Rec. 11, 189-90 (1960) ("Some states, which felt their flag vessels were at a competitive disadvantage with vessels sailing under the flags of others states, such as Panama and Liberia, were anxious to adopt a definition which states like Panama and Liberia could not meet."); Boczek, supra note 1, at 81-86.
77 McConnell, supra note 3, at 369-70; see also Ebere Osieke, Flags of Convenience Vessels: Recent Developments, 73 Am. J. Int'l L. 604, 615 (1979) (stating that "one of the main criticisms leveled against flags of convenience vessels is that the social and working conditions and the level of safety on them are lower than those of other vessels").
continuing controversy.\textsuperscript{78} Though the Convention failed to define the meaning of the term genuine link, the popular view suggests that a genuine link refers to "the legal and functional responsibilities assumed by the flagstate when it confers its national character upon a ship."\textsuperscript{79} The legal requirement is satisfied by registration, and the functional duty "pertains to periodic surveys, safe and proper working conditions, and the social welfare of the crew."\textsuperscript{80} Although procedures for the registration of vessels are substantially identical in every country, differences exist in the enforcement of the functional component of genuine link.\textsuperscript{81} Despite international efforts to develop and implement the functional component of the genuine link, "practical problems such as identification of shipowners-stockholders, inspection expenses and language barriers have rendered enforcement of any standards on board foreign flag ships a difficult matter."\textsuperscript{82}

5.4. Failure To Enforce Minimum Standards

In 1958, the International Labor Organization (the "ILO") addressed the issue of working conditions aboard flag ships. As a result of these discussions several measures were adopted that proposed to deal with the regulation of safety standards aboard flags of convenience. The most important of these resolutions, Social Conditions and Safety (Seafarers) Recommendation (No. 108), "obliged every state to take measures necessary to ensure safety at sea for ships under its flag [and] maintain the safety and welfare of seafarers in its sea-going merchant ships."\textsuperscript{83}

Although these recommendations "represented a significant breakthrough in the efforts to improve the general welfare and


\textsuperscript{79} Id. at 306.

\textsuperscript{80} Id.

\textsuperscript{81} See Economic Consequences of the Existence or Lack of a Genuine Link between Vessel and Flag of Registry. UNCTAD, TD/B/C.4/177, 8 (1972).

\textsuperscript{82} Roat, \textit{supra} note 69, at 82.

working conditions on substandard vessels ... they were not effectively implemented by a large number of ILO members because recommendations do not give rise to binding legal obligations." Consequently, the ILO's campaign against substandard working conditions was not very effective.

The lack of international enforcement mechanisms facilitated the continuation of substandard working conditions and left seamen with little possibility of relief from oppressive employment environments. Given this situation, where despite international efforts, flags of convenience are continually "accused of having low ship safety standards," it would appear that the mandatory application of the FLSA to foreign flag ships is necessary to protect foreign seamen from unscrupulous employers. Moreover, an extension of the FLSA, providing coverage to foreign crews aboard flags of convenience, would eliminate the competitive edge gained by foreign flag operators who are not subject to laws requiring minimum wage levels and working conditions. While an extraterritorial extension of the FLSA might be warranted by public policy considerations, it is necessary to determine whether the statutory requirements of the Act are satisfied before such an extension can be wholly justified.

5.5. Do Flags of Convenience Meet the Statutory Requirements of the FLSA?

Unlike many federal labor statutes, the FLSA provides relatively clear instruction governing its extraterritorial application. As discussed above, there is a two-prong test for determining whether seamen are covered by the FLSA: (1) the seamen must be employed on an American vessel; and (2) the

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" Extension of Remarks, Hon. James J. Florio, "Flags of Convenience" or "Runaway Flags," 131 CONG. REC. E3996 (daily ed. Sept. 11, 1985). See also Extension of Remarks, Hon. William Clay, Extending U.S. Labor Laws to Certain Foreign Flagships, 137 CONG. REC. E680-81 (daily ed. Feb. 28, 1991) (describing conditions aboard flag-ships where workers are "required to work between 18 and 20 hour days for less than a dollar an hour [and] are fed from food stores in which the highest caloric value may have come from the bugs that infested the food.").
seamen must be "engaged in commerce." However, the determination of whether the statute's requirements have been sufficiently satisfied to warrant the extension of the Act is not as clear.

Recently, the Court of Appeals for the Third Circuit in Cruz v. Chesapeake Shipping Inc. was faced with the novel question whether foreign seamen employed on Kuwaiti vessels temporarily reflagged under the U.S. flag, which were transferred to a corporation chartered under the laws of a U.S. state, and then immediately leased back to the foreign operating company, were entitled to invoke the protection of the FLSA.

The Kuwaiti request to reflag eleven of its tankers arose from "the immediate political and strategic concern of thwarting further Iranian attacks on its vessels." Because this reflagging transaction was not motivated by economic considerations (i.e., reflagging as a means to avoid taxes or enlist cheap labor), but rather was borne of political concerns, it raised a host of issues concerning the propriety of extraterritorial application not present in the ordinary, "economic" reflagging situations.

The Third Circuit in Cruz first considered whether the seamen were employed on a U.S. vessel within the meaning of the Act. Since the eleven vessels were documented under the laws of the United States, which entitled them to fly its flag, the vessels clearly fell within the definition of a U.S. vessel. The Third Circuit also had no difficulty concluding that the foreign crew met the definition of seamen since they performed "service ... rendered primarily as an aid in the operation of such vessel as a means of transportation." Thus, the seamen in this situation clearly met the first prong of the requirement. The most obvious factor complicating the extraterritorial analysis was that the Kuwaiti ships were primarily involved in operations entirely outside the United States.

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87 932 F.2d 218 (3d Cir. 1991).
88 Wachenfeld, supra note 69, at 177.
89 See supra text accompanying note 52.
90 29 C.F.R. § 783.31 (1991) (providing definition of a seaman).
States. Accordingly, the Third Circuit was forced to consider whether the foreign crews on these ships were covered by the FLSA, as it was unclear whether their activities were sufficiently domestic to satisfy the FLSA requirement that they be "engaged in commerce." Indeed, whether the seamen satisfied the second requirement—the "in commerce" requirement—presented a very difficult question.

Apparently, the Third Circuit's reasoning was shaped by decisions limiting the territorial application of the FLSA. In *Kirschbaum Co. v. Walling*,\(^9\) for instance, the U.S. Supreme Court had held that the Act should not be given extraterritorial effect. Several years later, in *Mitchell v. Lublin, McGaughy & Assocs.*,\(^2\) the Court noted that "Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce,' indicated its intent not to make the scope of the Act coextensive with its power to regulate commerce."\(^3\)

Relying on the *Kirschbaum* line of cases, the Third Circuit in *Cruz* adopted an extremely narrow view of the meaning of the "in commerce" term. In reaching this result, however, the court failed to consider the significance of the fact that, since *Mitchell*, Congress had amended the FLSA to expressly include the coverage of all seamen on U.S. vessels. While this extension of the Act cannot be said to effectively eliminate the "in commerce" requirement, an argument could be made that the legislative history illustrates that Congress "assumed that the 'commerce' requirement would pose no obstacle for seamen on American vessels."\(^4\)

A liberal construction of the "commerce" requirement can also be found from the manifest legislative intent that the Act is to be applied to the "furthest reaches consistent with congressional direction."\(^5\) This mandate is especially instructive considering the broad definition of "commerce." Under the FLSA, "commerce" is defined as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside

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\(^9\) 316 U.S. 517 (1942).
\(^3\) *Id.* at 211 (citing *Kirschbaum Co. v. Walling*, 316 U.S. 517, 523 (1942)).
\(^4\) *Cruz*, at 238 (Alito, J., dissenting).
\(^5\) *Id.* at 211.
A “State” is defined as “any State of the United States or the District of Columbia or any Territory or possession of the United States.” In defining “commerce” to include trade between any state, territory, or possession, and any foreign place, Congress seems to have intended to define “commerce” as trade between the United States and any foreign land.

Because vessels flying the U.S. flag have long been regarded as “part of the territory of [the United States],” the transfer of goods between a U.S. flag-ship and a foreign land may reasonably be regarded as trade between the United States and that foreign land, and thus should constitute “commerce” under the FLSA. Moreover, the McCulloch line of cases, denying extraterritorial application of the NLRA, are inapposite to the flag-ship scenario presented in Cruz. In McCulloch and factually similar cases, the Court refused to intervene in the on-board labor disputes on all foreign-flag vessels with alien crews because it determined such situations were beyond the purview of the federal labor legislation. Yet central to the disposition of cases involving foreign-flag vessels is the question of nationality. Unlike the situation in Cruz, the plaintiffs in the McCulloch line of cases attempted unsuccessfully to secure the protection of the NLRA by arguing that the U.S. ownership of the vessels upon which they were employed created sufficient contacts with the United States to bring them under the Act. The Court in McCulloch, however, ruled that the “inquiry into the ultimate ownership of the vessel for the purpose of determining jurisdiction over shipboard relations must stop at the vessel’s flag.” In other words, when the flag the ship flies is that of the United States,

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87 Id. § 203(c).
88 Indeed, the vessels involved in Cruz requested and were granted the opportunity to fly the U.S. flag precisely for the purpose of invoking the principle that the flag a ship flies determines its nationality. See, e.g., Lauritzen v. Larsen, 345 U.S. 571 (1953).
89 See supra text accompanying notes 15-49.
McCulloch leaves little doubt that the flag is to be given paramount consideration when applying U.S. labor statutes extraterritorially. Thus, in keeping with the traditional maritime cases, the facts in Cruz would favor the extraterritorial application of the FLSA.

Aside from literal interpretations of the Act, however, it is well recognized that a "simple reading of the statute is not determinative of its territorial scope." Other inquiries must be made, such as whether "the policies behind the Act would be furthered by its [extraterritorial] application." By applying the FLSA to foreign seamen, the benefit to shipowners of reflagging to escape stringent labor laws is diminished. A decrease in the number of foreign flags would in turn protect the jobs of U.S. seafarers and ensure the continued vitality of the domestic merchant marine, no longer undercut by foreign flag-ships employing crews at substandard wages. Conversely, should the extraterritorial application of the Act be denied, a shipowner will have at his disposal an inexhaustible pool of foreign labor not entitled to the protection of U.S. law. Consequently, the shipowner will refrain from hiring expensive U.S. sailors, which will in turn severely jeopardize the sailors' employment opportunities.

To the extent that U.S. jobs can be protected, the extraterritorial extension of the Act should be supported because it advances the policies of the FLSA by promoting the desired salutary effect on the health of the U.S. shipping industry. Additionally, extension of the Act, although protecting the United States' exclusive interest in the welfare of its labor force, does not conflict with foreign interests or international law. Indeed, the ILO and its signatories would presumably support an extension of U.S. labor law because the FLSA's extraterritorial application would have the effect of improving working conditions aboard foreign flag-ships. Moreover, the enforcement of the U.S. minimum working standards abroad

102 The U.S. Supreme Court has held that the law of the flag supersedes the territorial principle because the reflagged vessel "is deemed to be a part of the territory of that sovereignty whose flag it flies, and [does] not . . . lose that character when in navigable waters within the territorial limits of another sovereignty." United States v. Flores, 289 U.S. 137, 155-56 (1933).
103 Nothstein & Ayres, supra note 48, at 35.
104 Id. at 33.
would not conflict with the sovereignty of other nations, and would provide a means of enforcing human and civil rights commitments to which many nations subscribe.\(^{105}\) Even more importantly, a strong argument exists favoring the extension of the statute in this instance: the United States has a duty to protect the rights of seamen operating on ships flying the U.S. flag.

6. CONCLUSION

Historically, U.S. courts have been reluctant to apply a federal statute extraterritorially unless Congress clearly intended the statute to have such effect. Yet to correctly ascertain Congressional intent, courts must look to legislative history, examine public policy considerations motivating the statute’s enactment, and balance competing sovereign interests. When engaging in this balancing, U.S. courts should take into account the ramifications for the domestic labor force that results from the adoption of the presumption against extraterritoriality.

Unfortunately, the Third Circuit in *Cruz* displayed unwarranted restraint in exercising jurisdiction over flagships. Both statutory history and international comity would dictate the extension of the FLSA in the particular context of *Cruz*. By denying extraterritorial application of the FLSA in *Cruz*, the Third Circuit incorrectly concluded that the dispute, occurring in foreign waters, was without any territorial impact. Although such an assumption might have been valid in the days of *American Banana*, it cannot withstand scrutiny in today’s economically interdependent world.

Indeed, the issue of territorial impact has never been so clearly illustrated as it was in *Cruz*. Yet the court in its analysis seems to have overlooked the ironic result of its decision, whereby the reflagging of a ship, signifying the intent of a neutral state to protect trading and free navigation, has the effect of undermining the continued vitality of the U.S. merchant marine.

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Cruz is a clear example of a situation where the presumption against extraterritoriality should have given way to the needs and requirements of the United States. Instead of adhering to the outdated extraterritoriality principle adopted nearly a century ago in American Banana, the court should have safeguarded U.S. labor interests. It can only be hoped that future cases lead the courts to reconsider their approach to these issues, for unless the restrictive notion of territoriality is soon abandoned in favor of the uniform application of universal principles, the U.S. labor force will suffer significantly in the face of increasing foreign competition, which is not subject to stringent U.S. labor laws.