Don't Cross That Line! The Case For The Extraterritorial Application Of The National Labor Relations Act

John B. McDonald
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JOHN MCDONALD†

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I. INTRODUCTION

We all have different views of what is just, but none can avoid the built in necessity of making such judgments. This built in necessity is the basis of the laws that govern every society. It is the basis on which we hold people responsible for their actions.

—Alan Greenspan1

In an era of globalization, Congress and United States courts have faced many decisions about American labor law policy. As corporations continue to operate on an increasingly transnational scale, Congress has selectively chosen to address issues relating to civil rights and age discrimination,2 while ignoring the effects of the globalized economy on

† J.D. candidate 2010, University of Miami School of Law; B.A. 2007, Vanderbilt University. Many thanks to Professor Kenneth Casebeer and Kristin Stastny for their invaluable suggestions and guidance on this article. Many thanks as well to my family, especially my parents, for their support.

the National Labor Relations Act ("NLRA"). Specifically, Congress has failed to address whether an American worker employed by a United States company while stationed abroad should enjoy the same protections afforded to identically situated workers stationed within the United States. Consequently, although increasingly globalized corporations are held responsible for their actions when discriminating on the basis of race, sex, or age, they are free to ignore the mandates of the NLRA outside the territorial jurisdiction of the United States. Such a double standard should no longer be tolerated.

The double standard produced by selective congressional action in the extraterritorial context is two-fold. First, Congress has provided worker protection under the NLRA within the territorial United States and failed to provide that protection when workers simply cross a line. Second, Congress has explicitly amended other legislation, such as Title VII of the Civil Rights Act and the Age Discrimination in Employment Act of 1967 ("ADEA"), to provide for extraterritorial protection. However, Congress has not acted to extend extraterritorial protection under the NLRA. In an increasingly globalized world, there is no doubt that the time is ripe for the courts, Congress, or both to hold corporations and workers responsible for all of their actions outside the territorial jurisdiction of the United States.

While Congress has remained idle on the question of whether the NLRA should be applied extraterritorially, the courts have divided on the issue. Presently, the explicit provisions of the NLRA do not extend extraterritorially to domestic American workers stationed abroad, and

4. Id. §§ 151–169. The National Labor Relations Act, as presently codified, was originally enacted as the National Labor Relations (Wagner) Act of 1935, 49 Stat. 449. In 1947, the Wagner Act was amended by the Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947). The next major amendments to the NLRA were made in 1959 by the Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 73 Stat. 519. For the purposes of this article, reference to the National Labor Relations Act is made to the most current version of the act, codified at 29 U.S.C. §§ 151–169.
courts have been especially hesitant to extend domestic worker protection beyond the United States, choosing instead to defer to the judgment of Congress.\textsuperscript{9} Without a clear statutory statement, courts have largely refused to apply the NLRA outside the territorial jurisdiction of the United States.\textsuperscript{10}

Generally, the extension of American labor law beyond the borders of the United States has raised concerns about interfering with laws enacted in foreign countries.\textsuperscript{11} However, the economic and political realities of extending the protection of the NLRA to workers stationed abroad illustrate the double standard described above. Current market trends indicate that the increase in American workers stationed abroad to meet the demands of the growing global economy has complicated the application of United States labor laws.\textsuperscript{12} As a result, the NLRA and the policies it exists to effectuate are becoming increasingly outdated.\textsuperscript{13}

Addressing the issue of the extraterritorial application of the NLRA head on, this Note will examine three possible extensions of the NLRA to American workers stationed abroad. First, the Note will examine the possibility and consequences of extending the NLRA to all United States workers stationed abroad, whether working for United States companies or not. Second, the Note will examine the same possibility and consequences of extending the NLRA to all United States workers employed by domestic companies who are permanently stationed outside the territorial jurisdiction of the United States. Finally, the Note will examine the possibilities and consequences of extending the NLRA to United States workers employed by domestic companies who are only stationed abroad temporarily.

After examining each of the aforementioned possibilities, this Note will make three conclusions. First, United States courts, particularly the Third Circuit Court of Appeals, have erred in refusing to extend the protections of the NLRA to United States workers who are employed by domestic companies and who are stationed abroad only temporarily.\textsuperscript{14} Second, if analyzed correctly, the extension of the NLRA to United States workers who are employed by domestic companies and who are stationed abroad permanently is also practical and unlikely to interfere with any foreign laws. Finally, current globalized market trends, judicial

\textsuperscript{9} See Arabian Am. Oil Co., 499 U.S. at 248; Asplundh Tree Expert Co., 365 F.3d. at 174.

\textsuperscript{10} See, e.g., Arabian Am. Oil Co., 499 U.S. 244.

\textsuperscript{11} Id. at 248.


\textsuperscript{13} See 29 U.S.C. § 151 (2006) (illustrating the underlying policy in the NLRA to even the playing field between workers, both individually and collectively, and employers).

\textsuperscript{14} See Asplundh Tree Expert Co., 365 F.3d 168.
deference in interpreting extraterritoriality, and congressional action in similar areas demonstrates that it is time for Congress to explicitly expand the protections of the NLRA to American workers who are employed by domestic companies and stationed abroad.

Part II of this Note discusses the current market trends in our globalized economy and the economic realities of the newly globalized workforce. Part III argues that judicial deference to Congress on the question of extraterritoriality of the NLRA is inappropriate in light of congressional action in similar areas and outlines what approach courts should take in interpreting the NLRA. Part IV examines the ADEA, the Civil Rights Act of 1964, and the legislative histories of both of these statutes to demonstrate that Congress has acted before to effectuate American labor law in a globalized world. Part V addresses the need for congressional action and reasons that amending the NLRA to provide for extraterritorial application is highly unlikely to produce any foreign relations concerns. Finally, Part VI presents what an actual amendment to the NLRA should look like and provides conclusions.

II. CURRENT MARKET TRENDS IN A GLOBALIZED ECONOMY

Globalization is undoubtedly a moving force in the current market. Indeed, globalization has been one of the defining factors in the development of both current market trends and the recent evolution of American labor law policy. While globalization positively affects the lives of many, the costs of the economic realities it creates can be staggering, especially when existing laws such as the NLRA are becoming increasingly outdated. Further, in our recent history, globalization has created a number of problems in making, interpreting, and adjusting American law.

As a result of globalization, the importance of national borders as barriers for the flow of capital and labor has been virtually eliminated. The rate of economic growth in many developing nations has far outstripped the rate of growth in the United States, resulting in a shift of a significant share of the world's gross domestic product to the developing world, "a trend with dramatic ripple effects." Consequently, United

15. The effects of globalization in the current economy are widely know, and thus only briefly outlined here. The content of this article focuses primarily on how courts and Congress should deal with the effects of globalization while making and interpreting American labor law. For an excellent discussion on the nature, causes, and effects of globalization, see THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).
16. See generally id. (discussing how economic globalization is affecting the world).
18. GREENSPAN, supra note 1, at 13.
States corporations and businesses are increasingly extending their operations on a global scale in order to capitalize on lower costs, a fact that has serious implications for American workers who are not protected under the NLRA abroad. The implications for those workers not protected under the NLRA are evident in the corporate race to the bottom. Corporations taking advantage of cheaper capital and labor abroad are also often able to escape statutes such as the NLRA and the responsibility to bargain collectively, leaving many American workers without a legal recourse outside the territorial jurisdiction of the United States.

For American employers, globalization is a pursuit of higher profits. Indeed, many top officials, including former President George W. Bush, believe that globalization is a source of productivity and great opportunity. An excess in consumer savings, combined with globalization, technology-driven increases in productivity, and the shift of foreign economies to competitive markets, has increased production on a global scale while simultaneously suppressing interest rates and rates of inflation for both developed and developing nations. Furthermore, although the current economic situation indicates a decrease in the benefits attributed to globalization, Democrats and Republicans alike agree that globalization is instrumental in both the recovery of current markets and the development of a stronger economy. Undoubtedly, we all benefit from a more globalized economy with a mobilized workforce and smoother transitions of capital than we would otherwise have in a strictly territorial world.

The global expansion of business opportunities has increased the demand for globally minded employees. In order to effectively realize the benefits of globalization, many American corporations have established programs for American workers to work outside the United States. These programs have established a foundation for both employers and employees to extend business practices outside the territorial

20. Id.
21. See Frommer, supra note 17, at 58.
22. Id. at 57.
28. Id.
jurisdiction of the United States and provided many new opportunities for growth. For example, employers in both the private and public sector are actively encouraging students and young professionals to participate in study abroad programs and international internships to establish and recruit an international base of experienced and effective employees.29

Yet, all of the opportunities afforded by globalization and expansion also create very significant costs, especially for the American workforce. This pursuit for higher profits creates serious tension not only for labor unions battling the runaway shop30 but also for the individual American worker who enjoys the protections of the NLRA.31 The globalized world economy has created many difficulties and challenges in applying United States labor laws to American employers and employees interacting on an international scale.32

One of the most significant reasons why the NLRA should be amended or interpreted to apply extraterritorially is the fact that it was enacted at a time when extraterritorial application was not important.33 The original form of the NLRA was enacted as the National Labor Relations (Wagner) Act of 1935,34 when globalization, although theoretically recognized, was not a key feature of the market. Further, the Smoot-Hawley Tariff Act,35 one of the most highly protectionist measures in our history, was passed just five years before the Wagner Act. Obviously, times have changed. Protectionism and the costs it includes have been replaced with a globalized economy rife with benefits. Now that the full benefits and costs associated with a globalized economy are known and, in large part, realized, international labor relations are increasingly relevant on a global scale. Consequently, there has been significant debate about who is in the best position to address the question of extraterritoriality and whether it should be addressed at all.36 Given the current trend of globalization, the answer must be to address this issue of American labor law in either the courts or in Congress. Neither corporations nor unions should be able to discharge their duties

29. Id.
31. See 29 U.S.C. §§ 151–169 (2006). The underlying policy of the NLRA is to even the playing field between employers and employees, not only between labor organizations and employees.
32. See Balzano, supra note 12, at 573.
33. Id. at 574.
34. 49 Stat. 449.
35. 46 Stat. 590 (1930).
under American law simply by crossing a territorial boundary. Those duties are clearly defined within the NLRA, and both corporations and employees realizing the benefits of globalization should be responsible for their collective actions outside the United States.

United States courts and Congress should balance the corporate race to the bottom with the benefits of uniform application of the NLRA.\(^{37}\) Undoubtedly, Congress may act to provide for the extraterritorial application of the NLRA as it has in the context of civil rights and age discrimination.\(^{38}\) However, Congress has not acted to apply the NLRA extraterritorially, and individual litigants seeking to enforce their rights under the NLRA have been forced to look to the courts for some remedy. Unfortunately for these litigants, the courts have not been the friendliest forum.

III. JUDICIAL DEFERENCE ON QUESTIONS OF EXTRATERRITORIALITY

Where Congress has failed to take action to expressly extend the NLRA extraterritorially, the courts have addressed the positive and normative questions of whether the NLRA protects American workers outside the territorial jurisdiction of the United States. Not surprisingly, globalized market trends and the tensions between a domestic labor law and a globalized reality have forced the courts to consider this issue a number of times.\(^{39}\) This Part will discuss the seminal case decided by the Supreme Court on the extraterritorial application of the Civil Rights Act, \(EEOC v. Arabian American Oil Co.\)\(^{40}\) and the resulting circuit court split over the consequences of that decision within the context of the NLRA. Further, this part will discuss whether the Supreme Court was correct in establishing a presumption against extraterritorial application of American law absent a clear statutory statement from Congress to that effect.\(^{41}\)

A. The Supreme Court on Extraterritoriality:
The Clear Statement Doctrine

The seminal case in which the Supreme Court decided whether domestic law should be applied extraterritorially is \(Arabian American Oil Co.\) In \(Arabian American Oil Co.\), a United States citizen brought a complaint against his United States employer alleging that while sta-

\(^{37}\) Balzano, supra note 12, at 575.
\(^{38}\) See id.
\(^{39}\) See id. at 575–76.
\(^{41}\) The Supreme Court ultimately decided in \(Aramco\) that the proper forum for the debate on extraterritoriality is in Congress, discussed at length below.
tioned abroad he was discharged on the basis of his race, religion, and national origin in violation of Title VII of the Civil Rights Act of 1964. After careful consideration, the Supreme Court decided that the Civil Rights Act did not apply to American workers stationed abroad and chose instead to defer to the judgment of Congress. Speaking for the Court, Chief Justice Rehnquist reaffirmed the "longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" The policies behind this canon provide protection against unintended clashes between the laws of the United States and the laws of foreign nations that could result in international discord.

According to the Court, the presumption that domestic law will not be applied extraterritorially necessitates an "affirmative intention of the Congress clearly expressed" in order for courts to expand the protection of American laws extraterritorially. Thus, without a clear statement from Congress applying domestic law extraterritorially, the Supreme Court decided that Title VII of the Civil Rights Act did not apply because no clear statement provided for extraterritorial application.

To bolster its finding that Congress would have expressly provided for the extraterritorial application of Title VII if it was intended, the Court discussed at length Congressional amendments to the ADEA. Although the ADEA was originally drafted without any reference to foreign application, Congress specifically addressed potential conflicts with foreign law in amending the ADEA. The amended Act reads that it is not unlawful for any employer to take action prohibited by the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located." The Court's reference to the ADEA established the context in which it is appropriate to apply American law extraterritorially. According to the Court, the clear statement in the ADEA amendments would allow for extraterritorial application of that Act, while the lack of such

42. 499 U.S. at 247.
43. The Court's holding that the Civil Rights Act did not apply extraterritorially was subsequently overruled by legislation. Shortly after the decision in Arabian American Oil Co. was announced, Congress amended the Civil Rights Act to include extraterritorial application.
44. Arabian Am. Oil Co., 499 U.S. at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949)).
45. Id. (citing McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 20-22 (1963)).
46. Id. (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).
47. Id. at 256.
48. Id.
an express statement in the Civil Rights Act foreclosed its extraterritorial application.

By referencing the ADEA amendments, the Court implied that only a clear statement could govern the application of American law outside American borders. Through the amendment process, Congress specifically addressed the terms controlling the relationship between employer and employee outside the territorial jurisdiction of the United States, providing, essentially, that the ADEA still controlled that relationship except when any such practices were in conflict with the laws of the forum country. Essentially, Congress provided a clear statement that age discrimination in employment against American employees would not be tolerated either within the territorial United States or within foreign jurisdictions unless the amended provisions of the ADEA interfered with foreign law.

Individual litigants seeking the enforcement and protection of the NLRA on an international scale were greatly affected by the Court’s decision in Arabian American Oil Co. This is particularly true for litigants seeking the enforcement and protection of the NLRA outside of the borders of the United States. The concept of extraterritoriality involves the application of United States law to conduct in foreign territories. It may be fairly argued that the proper arena for debating whether American laws should apply extraterritorially is Congress. However, the practical effect of the Supreme Court’s decision in Arabian American Oil Co. was to deny the individual litigant of any remedy absent congressional action. Thus, under the Arabian American Oil Co. Court’s reasoning, American corporations, unions, and individual workers retain the ability to flaunt the law outside the borders of the United States. No clear statement for the extraterritorial application of the NLRA exists, so corporations and workers are free to ignore the responsibilities created within the Act. Consequently, the purposes and policies underlying the NLRA are entirely frustrated when viewed in light of the current globalized economy.

The Court’s reasoning in Arabian American Oil Co. did not address the factual context of an American employer stationed abroad only tem-

50. See id.
51. Balzano, supra note 12, at 573.
52. Parts IV and V of this Note discuss at length the practical solution of congressional amendment to the NLRA.
53. See 29 U.S.C. §§ 151–169 (2006). The underlying policy of the NLRA is to even the playing field between employers and employees. It encourages worker organization in various contexts for effective action against employers. See Balzano, supra note 12, at 575 (arguing that, if Congress wanted to ensure that employers and organized labor could not escape United States labor laws, it could act by amending the National Labor Relations Act).
porarily. Thus after *Arabian American Oil Co.*, it remained unclear whether the clear statement doctrine applied to an American worker who was only stationed abroad temporarily. Was there a limit to the clear statement doctrine if the employer or employee activity only affected American employers and employees? Practically, the clear statement doctrine's concern with interfering with foreign law would appear minimal if an employee was stationed abroad only temporarily. However, in the absence of clear guidance from the Supreme Court, the Third and Eleventh Circuit Courts of Appeals split on the question of the applicability of the clear statement doctrine, specifically within the context of the National Labor Relations Act.54

B. Circuit Split: Does the National Labor Relations Act, Without a Specific Provision for Extraterritorial Application, Apply Abroad?

Given unanswered questions left by the Supreme Court in *Arabian American Oil Co.*, the Third and Eleventh Circuit Courts of Appeals have been forced to decide whether the NLRA applies extraterritorially and, if so, under what circumstances. The Third Circuit Court of Appeals, largely employing the reasoning of the Supreme Court in *Arabian American Oil Co.*, decided that the NLRA did not apply extraterritorially.55 The Eleventh Circuit Court of Appeals, however, decided that the NLRA did apply extraterritorially in certain circumstances.56

These two decisions have produced considerable scholarly debate about whether the courts should actually address the extraterritorial application of American labor law.57 Some scholars have urged the courts to extend the reach of domestic American labor laws abroad,58 while others contend that the best forum to address the issue remains with Congress.59 This section will provide a comparative analysis of the various arguments set forth in the Third and Eleventh Circuits, engage the scholarly debate produced by those opinions, and ultimately conclude that it is in fact possible for the courts to apply the NLRA to American employees working for American companies while stationed abroad, whether temporarily or permanently.

54. See supra note 7 and accompanying text.
58. See, e.g., Keithley, supra note 57, at 2138.
59. See, e.g., Balzano, supra note 12, at 573. Mr. Balzano largely assumes that the proper forum for this dispute is within Congress.
The Eleventh Circuit Court of Appeals was the first to address the issue of whether the NLRA applied extraterritorially. In Dowd v. International Longshoremen’s Ass’n, the Eleventh Circuit found that actions in a foreign country did fall within the jurisdiction of the NLRB, and, consequently, within the purview of the NLRA. While the decision in Dowd does not involve any American employees actually stationed abroad, its underlying reasoning on the extraterritorial application of the NLRA demonstrates that American workers should be protected while stationed abroad.

The factual context of Dowd involved a secondary boycott in Japan of the shipment of Florida grapefruits. During the period in question, Florida grapefruit was shipped to Japan from two South Florida ports pursuant to agreements between American exporters and Japanese importers. The International Longshoremen’s Association was engaged in a long-standing labor dispute with two of the American exporters, each of which used non-union labor to load grapefruit shipments bound for Japan, where the fruit was unloaded by Japanese employees.

The International Longshoremen’s Association engaged Japanese unions involved in the unloading of the fruit to participate in a secondary boycott, in which the Japanese unions would agree not to offload fruit loaded by non-union employees. The Japanese unions agreed to participate in the secondary boycott, and several shipments of grapefruit were forced to be diverted to a port in Florida where the International Longshoremen’s Association had an established unionized base. The employers filed a petition for an injunction, alleging unfair labor practices by the International Longshoremen’s Association, which was granted.

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60. 975 F.2d at 789.
61. Id. at 781.
62. Id.
63. Id.
64. Section 8(b)(4)(ii)(b) of the NLRA prohibits coercion or refusals to deal aimed at employers or others not principally involved in a labor dispute while preserving the right of employees to bring pressure on employers who are primarily involved in the labor dispute. 29 U.S.C. § 158(b)(4)(ii)(b) (2006). This is the definition of a “secondary boycott.” Dowd, 975 F.2d at 782.
65. Dowd, 975 F.2d at 781–82.
66. Id. at 782.
67. Id. This discussion will only examine the jurisdictional aspects of the decision. A secondary boycott is defined as an unfair labor practice under the NLRA. The reasons for determining the International Longshoremen’s Association’s actions as an unfair labor practice are outlined in detail in the opinion. See id. at 782–88.
After determining that the International Longshoremen's Association's actions did constitute an unfair labor practice, the Eleventh Circuit considered whether the alleged conduct in the petition fell within the scope of the NLRA. The International Longshoremen's Association argued that, under Arabian American Oil Co., conduct occurring outside the territorial jurisdiction of the United States did not fall under the NLRA, regardless of the origin of the actors or the intent or effect of the conduct. The court rejected this argument, declining to extend either Arabian American Oil Co. or cases involving foreign flagship vessels to the dispute about the extraterritorial application of the NLRA. The court ultimately concluded that

the NLRA reaches the conduct of an American union which solicits a foreign entity to apply pressure overseas with the intent and effect of gaining an unlawful advantage in a primary labor dispute in the United States by coercing American employers.

Of principle importance to the question of extraterritoriality in the court's reasoning was the fact that all the conduct in question involved interaction between American employers and American employees. The court emphasized that the conduct involved in the case did not have an effect on the employment of foreign crews on foreign flagship vessels, and that it did not seek to extend the American Bill of Rights to foreign entities. The conduct alleged to be in violation of the NLRA was strictly within the scope of the relationship between the parties Congress intended to protect in the NLRA and did not involve any interference with the operation of a foreign entity.

2. THE THIRD CIRCUIT: OF LANDSCAPING AND A TRIP TO CANADA

The Third Circuit Court of Appeals in Asplundh Tree Expert Co. v. NLRB was confronted with a substantially similar question and took an entirely different approach to the question of extraterritorial application of the NLRA. The court's decision is especially curious given the factual circumstances giving rise to the case. The court declined to employ the reasoning in Dowd and provided an unworkable framework for the interpretation of the NLRA in a globalized world.

68. Id. at 782.
69. Id. at 788.
70. Id.
71. The court considered whether a line of cases following Arabian American Oil Co. and deciding whether domestic law applied to the loading and unloading of foreign flagship vessels in both American and foreign ports.
72. Dowd, 975 F.2d at 788.
73. Id. at 789.
74. Id. at 790.
75. 365 F.3d 168 (3d Cir. 2004).
The Asplundh decision involved a group of employees who were only temporarily stationed abroad. The decision originated on an appeal from the National Labor Relations Board decision that Asplundh, an American employer, had committed unfair labor practices against a group of employees. Asplundh, a tree trimming services company, had an operations base in Cincinnati, Ohio. Asplundh’s employees were represented by a labor union, which had negotiated a collective bargaining agreement on behalf of those employees.

Asplundh offered its services for natural disaster cleanup in neighboring states, and it was enlisted by several provincial governments in Canada in response to an ice storm. None of the employees working for Asplundh in Canada were required by the company to perform services in Canada, and each of the employees working volunteered for the work. After becoming dissatisfied with the working conditions created by their employer while in Canada, some of the employees became disgruntled and refused to work, thus engaging in concerted activity for mutual aid and protection in order to improve the working conditions that they were subjected to. After returning home to the United States, and after Asplundh learned of the employees’ actions, the employees who were involved in the activity were refused work. Those employees petitioned the National Labor Relations Board for reinstatement, alleging that they had been unfairly discharged in violation of the NLRA. The Board granted the employees’ petition.

The case went on appeal to the Third Circuit Court of Appeals, and the court confronted the question of whether the NLRA should be applied outside the territorial jurisdiction of the United States. Largely ignoring the analysis of Dowd, the court confined its considerations to the underlying logic of the Supreme Court’s clear statement doctrine. In fact, a review of the appellate briefs and the court’s opinion reveals that the Dowd case curiously was not briefed or discussed at all within the opinion.

76. Id. at 170.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id. at 171.
82. Id.
83. Id.
84. The court ultimately concluded that, even if the practices and discharge in question were governed by the terms of the NLRA, the question was moot, because the act would not be extended to American employees temporarily stationed abroad. Id. at 180.
85. Id. at 173.
86. See Brief of Petitioner/Cross-Respondent, Asplundh, 365 F.3d 168 (Nos. 02-1151 & 02-1543).
Recognizing that without a clear statement of extraterritorial application from Congress a presumption against extraterritorial jurisdiction exists, the court considered whether the circumstances of an employee temporarily stationed abroad were compatible with that presumption.\(^{87}\) The court chose to punt on the issue of extraterritorial application of the NLRA for American workers temporarily stationed abroad. Although the court conceded that assuming jurisdiction over an employee who was temporarily stationed abroad and clearly planned to return to the United States within a short time was both a sound policy position and not without force within the policies of the NLRA, the court characterized its function as one of statutory construction.\(^{88}\) Therefore, the court concluded that sound policy arguments on either side of the dispute did not constrain or influence the inquiry.\(^{89}\)

While limiting its analysis to statutory construction, the Third Circuit made a controversial decision in its construction of the term "commerce," as defined within the NLRA. Commerce, as defined in the NLRA, is

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\text{trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.}\(^{90}\)
\]

The court recognized that a literal reading of these provisions not only allowed for a strong inference of extraterritoriality but also allowed for an end to the jurisdictional inquiry in total.\(^{91}\) However, adhering again to the logic of the Supreme Court in Arabian American Oil Co., the Third Circuit refused to assume jurisdiction under the broad interpretation of this language and instead required a more clear statement about the extraterritorial application of the Act.\(^{92}\) According to the court, Congress knows exactly how to provide for extraterritorial application of a domestic law, and the NLRA will not be extended outside the jurisdiction of the territorial United States absent an explicit statement from Congress.\(^{93}\)

\(^{87}\) Asplundh, 365 F.3d at 174.
\(^{88}\) Id.
\(^{89}\) Id.
\(^{91}\) Asplundh, 365 F.3d at 174.
\(^{92}\) Id. at 175.
\(^{93}\) Id. at 180.
3. COMPARATIVE ANALYSIS

In the case for the extraterritorial application of the NLRA, the Eleventh Circuit’s opinion in Dowd and the Third Circuit’s opinion in Asplundh provide competing frameworks. The Dowd court employed what I will call the “relationship approach”—which analyzed the relationship between the actors involved within the statutory context. The Asplundh court, on the other hand, employed what I will call the “strictly territorial approach”—which began by asking where the conduct occurred and adhered to strict statutory construction.

In the case for the extraterritorial application for the NLRA, the relationship approach of the Dowd court provides the correct analytical framework for when the NLRA should apply outside the territorial jurisdiction of the United States. The court correctly defined the relationship established in the NLRA as between American employers and American employees.\(^\text{94}\) In limiting the factual inquiry to the effects that the union’s actions had within the statutorily defined relationship, the Eleventh Circuit was able to apply the policy of the NLRA to a factual context that involved international actors. Simply stated, while the factual context of Dowd involved an international forum, the Eleventh Circuit confined its analysis to the American actors involved.

Furthermore, the opinion in Dowd is consistent with the Supreme Court’s reasoning in Arabian American Oil Co. The Supreme Court’s use of the clear statement doctrine for extraterritorial application of American law was necessary because of the concern of interference with foreign law. The Eleventh Circuit correctly recognized that the factual context of Dowd did not interfere with any foreign laws.\(^\text{95}\) Therefore, the court was correct to decide that the NLRA should apply to the actions of the American union. Dowd’s reasoning should be taken to its logical conclusion. Using the relationship approach, courts should apply the NLRA extraterritorially when the actions involved produce consequences strictly between American employers and American employees.

Conversely, the strict territorial approach employed by the Third Circuit in Asplundh, while adhering to the literal interpretation of the doctrine established by the Supreme Court in Arabian American Oil Co., is largely form without substance. The Asplundh court ignored both the policy reasons justifying the relationship approach established in Dowd and the policy reasons for extending the reach of the NLRA to an American employee who is stationed abroad only temporarily.\(^\text{96}\) Furthermore, the temporary status of the employees stationed abroad was summarily

\(^{94}\) Dowd v. Int’l Longshoremen’s Ass’n, 975 F.2d 779, 790 (11th Cir. 1992).
\(^{95}\) Id.
\(^{96}\) See Asplundh, 365 F.3d at 173.
dismissed as irrelevant. The court chose to confine its review of the dispute to strict statutory construction of the NLRA, searching for an explicit statement from Congress for extraterritorial application, and even then it largely ignored the literal language within the statute.

Apparently, "clear" in the Third Circuit actually means "clear enough." Although the NLRA defines commerce as commerce involving "any foreign country," the Third Circuit reasoned that such an ambiguous statement within the statute would not suffice. According to the court, Congress knows exactly how to explicitly provide for extraterritorial protection under the NLRA, and the statutory language at issue was not a clear enough mandate to extend the protections of the Act abroad.

In fact, such a narrow analysis of the NLRA led the National Labor Relations Board ("NLRB") to refuse to follow the strictly territorial approach established in the Third Circuit. Instead, the NLRB has chosen to follow the reasoning of Dowd and apply the NLRA extraterritorially. In a 2006 order, the NLRB applied the NLRA to a dispute involving the California Transportation Gas Corporation and decided that the NLRA would apply to a group of truck drivers temporarily working in Mexico. Recognizing that the Third Circuit in Asplundh had decided that the NLRA would not apply extraterritorially, the NLRB respectfully disagreed with the court's decision, because the opinion had failed to account for the Eleventh Circuit's decision in Dowd and other case law that had limited the scope of the clear state doctrine established in Arabian American Oil Co. Therefore, the NLRB's position, for now, adopts the relationship approach of Dowd.

Ultimately, in the case for the extraterritorial application of the NLRA, the Third Circuit has provided a weak framework and has done so for all the wrong reasons. Instead of focusing on strict statutory construction of a statute written in an era when globalization had not taken root, greater attention should be paid to the circumstances, relationships, and consequences of each particular inquiry and, as mentioned above, the policies intended to be served by the NLRA. Rather than adhering to strict principles of statutory construction, the proper approach is to focus

97. Id.
100. Id.
102. Id.
103. Id.
104. Id.
on the relationship between the actors, as defined in the policies of the NLRA, and the resulting effects of employer or employee action within that relationship.\textsuperscript{105}

4. SCHOLARLY DEBATE AND THE PROPER APPROACH

The case for the extraterritorial application of the NLRA within the courts has been a subject of much scholarly debate. A leading article by Professor Todd Keithley directly addresses the question of whether the courts should consider the extraterritorial application of the NLRA to workers temporarily stationed abroad, and, if so, how the courts should direct their inquiry.\textsuperscript{106} In reaching the conclusion that the courts should interpret the NLRA to apply extraterritorially, Keithley outlines an analytical model that defines extraterritorial conduct as “conduct that has no intentional effects” in the United States and instructs courts to rely on the “principles of comity” to bar any application of law that would interfere with the foreign relations of the United States.\textsuperscript{107} While the logic of Keithley’s model is persuasive, a better analytical model would involve an additional step of recognizing the statutory relationship created by Congress.

Keithley’s two step approach begins with applying an effects test to determine whether the conduct at issue had intentional and unlawful effects in the United States or in a foreign country.\textsuperscript{108} Keithley argues that courts interpreting the NLRA should first maintain a presumption against the extraterritoriality of the law but define extraterritorial conduct as conduct that has no intentional effects in the United States.\textsuperscript{109} According to Keithley, the Third Circuit in Asplundh took the wrong approach of strict territoriality because the court misread Arabian American Oil Co. and its progeny to foreclose all extraterritorial application of the NLRA.\textsuperscript{110} Also, according to Keithley’s article, the Third Circuit failed to recognize that some conduct is both intra- and extraterritorial.\textsuperscript{111} Keithley’s solution is to apply an effects test\textsuperscript{112} of the presumption against extraterritoriality in order to determine who is affected by the actions at issue.\textsuperscript{113} Keithley’s test recognizes that the conduct of the company at issue caused intentional and unlawful effects strictly within

\begin{itemize}
\item[105.] See Dowd v. Int'l Longshoremen's Ass'n, 975 F.2d 779, 790 (11th Cir. 1992).
\item[106.] See Keithley, supra note 57, at 2135.
\item[107.] Id. at 2136.
\item[108.] Id. at 2164.
\item[109.] Id. at 2163.
\item[110.] Id. at 2163–64.
\item[111.] Id. at 2164.
\item[112.] This test examines who is affected by the conduct that violates the NLRA. Specifically, the test examines whether such conduct has any effect on foreign nations.
\item[113.] Keithley, supra note 57, at 2164.
\end{itemize}
the United States, and thus that conduct was within the reach of the NLRA. The opposite approach, according to Keithley, would be unjust, as it would be analogous to allowing a person to step across the U.S.-Canadian border, commit murder, and not be prosecuted under the law of the United States.

The second step in Keithley’s analytical model employs the doctrine of comity, stating that an act of Congress should not be construed to violate the law of nations if any other possible construction remains. According to the article, principles of comity provide Congress with a large measure of leeway when enacting legislation, particularly legislation intended to regulate the actions of American companies. Kiethley suggests that asserting jurisdiction over an American company operating abroad would not create any serious risk of interference with a foreign nation’s ability to regulate its own commercial affairs and, consequently, no consideration of comity would prevent the American employee from claiming the protection of United States law.

a. An Additional Step

Although Keithley’s analytical model is sound, an additional step is needed to properly determine whether the NLRA should be extended extraterritorially in a given factual context. Beginning with an analysis of the effects of employer or employee action outside the territorial jurisdiction of the United States skips the most important consideration in the analytical process—defining the proper relationship between the actors as defined in the NLRA. This relationship is the crucial distinction between employer or employee action that was intended to be captured within the NLRA and, as discussed above, is the apparent basis for the Dowd decision. I would propose that an additional step be added to Keithley’s model that would first examine the relationship between the actors involved. This proposed test is termed the “relationship-effects” test.

This refined approach begins with the recognition that Congress intended to level the playing field between American employers and American employees. Therefore, the first step courts should take in

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114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
121. See Dowd v. Int’l Longshoremen’s Ass’n, 975 F.2d 779 (11th Cir. 1992).
analyzing extraterritorial disputes is to determine the origin of the relationship at issue. Courts should first, on an ad hoc basis, examine what conflict or practices give rise to the dispute and determine whether the central relationship at issue is between the American employer and the American employee. If the conflict simply involves American actors who are not interfering with foreign labor law, courts should simply end the inquiry there. Similar to the Eleventh Circuit's analysis in Dowd, this analytical model properly narrows and focuses the true conflict in dispute—the conflict between American employers and American employees whose actions only produce legal consequences within the United States.

After determining the statutory relationship in dispute, courts should then determine whether compliance with the provisions of the NLRA would be in violation of the law of the forum country. Specifically, the court should shift its analysis from the relationship between the actors to the relationship between both actors collectively and the foreign country. If the action has no consequences within the law of the foreign country, the territorial forum should not be a factor in the court's inquiry. Conversely, the court should not extend extraterritorial application of the law if the employer or employee action results in the violation of foreign labor law.

Finally, contrary to the Third Circuit's express intention to avoid matters of policy in Asplundh,¹²² courts should specifically consider the circumstances that gave rise to the alleged violations of the NLRA. The distinction between American employees temporarily stationed abroad and American employees permanently stationed abroad is important in this context. While the presumption against extraterritoriality exists with practical importance,¹²³ courts should carefully consider whether the consequences of employer or employee action are limited in scope. Given a specific factual context, courts should determine whether the violations of the NLRA only have consequences between the American actors involved and, if so, whether the legal ramifications of enforcing the NLRA affects those actors alone. Applying this method, neither the labor organization collectively bargaining for employees nor the American corporation operating in a foreign country can evade the statutorily mandated labor practices established under the NLRA.

While a manageable standard may exist for courts to extend the reach of the NLRA extraterritorially, both the Supreme Court and the

¹²³. See EEOC v. Arabian Am. Oil Co., 499 US. 244, 246 (1991) (discussing the importance of avoiding judicial interference with foreign law).
Third Circuit Court of Appeals have declined to adopt any such approach. The individual litigant outside of the Eleventh Circuit is not likely to find any relief for violations of the NLRA in an international forum. However, those litigants may band together in the political process and seek Congressional amendment of the NLRA. Such action has been successful twice in recent history, first in the amendment to the ADEA and then in the amendment to Title VII of the Civil Rights Act.

IV. THE NEED FOR CONGRESSIONAL ACTION: A STATUTORY COMPARISON

There is no question that Congress has the ability to extend the application of the NLRA extraterritorially. Congress must revisit the NLRA to take into consideration the economic realities of today's globalized economy. Currently, Congress has acquiesced as employers maintain a significant advantage over employees. Judicial deference to Congress on the question of extraterritoriality mandates congressional action to address this specific situation. With the increasing importance and relevance of the interaction between American corporations and the international workforce, it is time for Congress to answer this call.

In fact, Congress has directly answered such calls previously by exercising its power to revisit outdated legislation in similar arenas. After the decision in Arabian American Oil Co., Congress acted and amended Title VII of the Civil Rights Act to provide for extraterritorial application. That statute now provides:

It shall not be unlawful . . . for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining . . . to take any action otherwise prohibited . . . with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

The legislative history of the amendment to the Civil Rights Act to provide for extraterritorial application of the statute indicates that the amendment was passed in order to ensure effective remedies for both employees and employers. In his signing statement, former President

124. See id.; Balzano, supra note 12, at 573.
125. This is especially evident when one recognizes that Congress has provided amendments to Title VII of the Civil Rights Act and the ADEA, but has ignored the extraterritorial application of the NLRA. See supra text accompanying note 2.
127. Id. § 2000e-1(b).
George H.W. Bush announced that the amendment to Title VII of the Civil Rights Act ensured that aggrieved parties had effective remedies in keeping with the statute.\textsuperscript{128} Furthermore, debates in Congress indicated that the amendments to the Civil Rights Act were necessary to strengthen and improve federal civil rights in order to provide for a valid remedy in a changing society.\textsuperscript{129}

Similarly, Congress has acted to provide protection to employees against age discrimination in employment outside of the territorial jurisdiction of the United States by amending the ADEA. The Age Discrimination in Employment Act implicitly extended protection of the Act extraterritorially by providing the following.

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located

\textsuperscript{130}

The desire for effective remedies, specifically in the extraterritorial context, is also evident in the legislative history of congressional amendments to the ADEA. The Senate Report on the amendment indicates that such changes were necessary to strengthen and broaden the provisions of the ADEA to insure that older individuals retain effective remedies under the Act.\textsuperscript{131} Likewise, the House Report on the amendments to the ADEA indicates that legislation was necessary to provide effective remedies for employees.\textsuperscript{132}

The same logic that Congress employed in amending Title VII of the Civil Rights Act and the ADEA should be applied to the NLRA in order to provide more effective remedies in an increasingly globalized economy. Congressional inaction is an implicit statement that the policies encompassed in the NLRA are not as important as those in the Civil Rights Act or the ADEA, and the NLRA must similarly be amended.

\textsuperscript{132} H.R. 5383, 95th Cong. (2nd Sess. 1978).
This would eliminate the courts’ concerns of interfering with foreign labor and employment laws and even the playing field between American employers and American employees outside the territorial jurisdiction of the United States.

V. The Need for Congressional Action: Amending the NLRA

In light of the logic and purposes of congressional action in similar areas of American labor law, this section will analyze three possible congressional extensions of the NLRA and set the stage for what a proposed amendment to the NLRA should look like. Three possible extensions of the NLRA are discussed in order of the increasing practicality for extraterritorial application of the Act. The first possible extension is to provide for extraterritorial jurisdiction for all employees, whether working for an American corporation or not. The second possible extension of the NLRA is to provide for extraterritorial application for all American employees employed by American corporations and stationed abroad permanently. The third possible extension provides extraterritorial jurisdiction for American employees employed by American employers and stationed abroad only temporarily.

A. Extraterritorial Application for All

The first possible extension of the NLRA is to provide extraterritorial jurisdiction under the Act for all American employees stationed abroad. This is obviously the most troublesome of the three possibilities, because it carries the highest probability of interfering and conflicting with foreign law. The extension of extraterritorial protection for all American employees stationed abroad would produce practical difficulties for both American employees and American corporations.

Extraterritorial jurisdiction for American employees employed by foreign corporations would undoubtedly lead to an interference with the laws of the foreign nation. For example, an American employee employed by a foreign corporation is subject to the laws of the foreign country. The laws of the forum country may or may not restrict employees from engaging in union activity or bargaining collectively. Therefore, an American employee who engages in union activity may not be protected by the labor law of the forum country, and an extension of the NLRA to cover the employee’s activity would produce a direct conflict in available remedies. Furthermore, the NLRA as originally enacted was intended to govern the relationship and even the playing field between American employees and American employers.133

Moreover, providing extraterritorial protection under the NLRA for foreign employees working for American corporations would also produce practical difficulties. Foreign employees are not protected within the NLRA.\textsuperscript{134} Therefore, the provision for extraterritorial jurisdiction for foreign employees stationed abroad is most likely unwise. Specifically, the extraterritorial extension of the NLRA for foreign employees working for American corporations would likely create tension between the labor laws of the forum country and the statutory scheme created in the NLRA. For example, the laws of the forum country may or may not provide for a variety of different actions in order to secure collective bargaining. If the laws of the forum country are in conflict with the NLRA, again, there would be an inconsistency in the available remedy and an interference with foreign law. Such an interference and difference in available remedies would create tension not only within the scope of the relationship between the employer and the employee, but also between nations as a whole.

B. Extraterritorial Application for American Employees Employed by American Employers and Stationed Abroad Permanently

The second possible extension of the NLRA is to provide extraterritorial jurisdiction under the Act for all American employees employed by American corporations and stationed abroad permanently. Initially, this jurisdictional extension may give cause for concern because the American employee at issue resides in a foreign country. Extending the NLRA in this fashion might appear to create the same inconsistency in remedies discussed in the previous section. However, a proper analysis demonstrates that this extension is entirely feasible. A provision of this kind is certainly workable if Congress employs the same judgment it has in amending the Civil Rights Act and the ADEA.

By providing extraterritorial application of the NLRA in all circumstances except when such practices or activities will conflict with the laws of foreign nations, Congress can respond to and account for the effects that globalization has had on the underlying policies of the NLRA and restore balance between American employers and American employees. The judicial concern about the effects of any employer or employee conduct and the presumption against extraterritoriality will be satisfied because a clear congressional statement on the extraterritorial application of the NLRA will be present. Furthermore, the relationship Congress intended to create within the NLRA\textsuperscript{135} will be properly

\textsuperscript{134} Id.
\textsuperscript{135} See id.
defined and effectuated between American employers and American employees in both the domestic and the international forum.

Again, it is important to note that an amendment to the NLRA may be passed without violating foreign law or producing conflict with foreign nations. This is true in the sense that Congress may limit the consequences of statutory violations to the American actors involved.\textsuperscript{136} Properly analyzed, the conduct of American employees permanently stationed abroad and the conduct of American corporations operating abroad would be internalized in a relationship between two parties that Congress originally intended to protect.\textsuperscript{137} It matters not that the employee is permanently stationed in a foreign country or that the corporation is operating on foreign soil. The terms of the conduct of both the corporation and the employee would be governed by the NLRA without regard to where the conduct occurred, as long as the conduct was not in violation of foreign law.

C. Extraterritorial Application for American Employees Employed by American Employers and Stationed Abroad Only Temporarily

The third and most obvious extension of the NLRA is to provide extraterritorial application of the Act for American employees employed by American corporations and stationed abroad only temporarily. This extension is the most obvious because it involves only American actors, only limited and temporary duties on foreign soil, and only consequences that result strictly within the territory of the United States. This was the question considered by the Third Circuit in \textit{Asplundh}.\textsuperscript{138} If the courts are unwilling to extend the NLRA to American employees who travel abroad for a short time with the obvious intent of returning to the territorial United States, Congress must act to destroy the invisible line of discrimination.

Extraterritorial application of the NLRA would protect American employees and employers against actions that have consequences strictly within the territorial United States. The logic of extending application of the NLRA extraterritorially to American employees stationed abroad only temporarily is very similar to those employees stationed abroad permanently.\textsuperscript{139} The proper relationship would be defined within the statute, and the policies underlying the NLRA would remain effective in

\textsuperscript{136} See Dowd v. Int'l Longshoremen's Ass'n, 975 F.2d 779, 781–82 (11th Cir. 1992) (holding that the NLRA does apply between American employers and employees even when international actors are involved).

\textsuperscript{137} Id.

\textsuperscript{138} Asplundh Tree Expert Co. v. NLRB, 365 F.3d 168 (3d Cir. 2004).

\textsuperscript{139} The preceding section providing for extraterritorial application of the NLRA for
a globalized reality. In fact, the extension of the NLRA to those employees stationed abroad only temporarily would likely produce less conflict with the laws of a foreign nation. An employee who travels for a relatively short time outside the territorial jurisdiction of the United States is likely to have little, if any, effect on a foreign nation administering its own laws.

VI. THE NEW AMENDMENT

As the preceding discussion indicates, the likely effects of extending extraterritorial jurisdiction under the NLRA are certainly manageable. Congress should act and amend the NLRA with a provision similar to that which follows.

It shall not be unlawful for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining to take any action otherwise prohibited with respect to an employee in a workplace in a foreign country if compliance with such section (the NLRA) would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located. When such conduct does not violate any foreign law, the National Labor Relations Act effectively governs the conduct and relationships between United States employers (or United States corporations) and United States employees, labor organizations, or employment agencies.140

This proposed amendment accomplishes two very important tasks. The first sentence in the amendment would exempt compliance with the NLRA if any conduct would violate the laws of a foreign nation. While the first sentence may be sufficient standing alone to apply the NLRA extraterritorially, the second sentence bolsters its assertion by providing a clear statement of congressional intent.

The amendment as a whole addresses the fact that the NLRA must be revised in order to provide employers and employees protection in a globalized economy. The amendment also provides a “clear enough” statement for those courts that are still hesitant to apply the law extraterritorially. The amendment leaves no doubt that the NLRA is newly equipped to compensate for an increasingly globalized economy.

Certainly, such an amendment would have both benefits and drawbacks. The benefits largely consist of revising American labor law to

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140. The first part of the proposed amendment is largely a reproduction of the congressional amendment to Title VII of the Civil Rights Act. See 42 U.S.C. § 2000e-1 (2006).
account for an increasingly globalized economy. No longer would an American employer or employee be able to evade the statutory mandates of the NLRA by refusing to bargain collectively or by acting outside the scope of a collective bargaining agreement. This is true for two reasons. First, such actions constituting violations of the NLRA would be explicitly prohibited within the statute. Second, corporations or employees violating the provisions of the NLRA would no longer be able to avoid responsibility for those actions in any court, regardless of whether the court was previously willing to extend the protections of the statute abroad.\(^1\)\(^4\)\(^1\)

The proposed amendment would also likely involve certain drawbacks. Judicial management of such a standard would no doubt lead to a variety of legal problems, such as when exactly employee or employer action would violate foreign law. However, such a standard would still prove workable. Distinguishing activity that has consequences solely between American employers and employees from activity that involves the internal operation of foreign entities has been successfully managed within the courts.\(^1\)\(^4\)\(^2\) Furthermore, courts have also consistently managed to apply American labor law abroad after a statute has been amended, notably within the context of civil rights and age discrimination discussed above.\(^1\)\(^4\)\(^3\)

VII. Conclusion

In conclusion, the time is ripe for Congress to act and amend the NLRA, providing for extraterritorial application. Should Congress choose not to act and continue to acquiesce in a double standard of worker protection, then, alternatively, courts should take the more reasonable approach and extend the protections of the NLRA extraterritorially. The underlying policy of the Act as originally enacted seeks to establish equilibrium between employers and employees.\(^1\)\(^4\)\(^4\) The NLRA is essential to even the playing field between employers and employees. It encourages worker organization in various contexts for effective action against employers.\(^1\)\(^4\)\(^5\) Congressional inaction in this arena has

\(^{141}\). See supra text accompanying note 3.

\(^{142}\). See Int'l Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970) (holding that American seamen working on American docks and not interfering with the operation of foreign flagships were entitled to the protection of the NLRA); Torrico v. IBM, 213 F. Supp. 2d 390 (S.D.N.Y. 2002) (holding that an employee's status as a United States employee would allow for protection under the American with Disabilities Act while stationed abroad temporarily).

\(^{143}\). See Steinle v. Boeing Co., 785 F. Supp. 1434 (D. Kan. 1992) (noting that Arabian American Oil Co. had been legislatively overruled and applying the Civil Rights Act according to the newly established legislative intent), aff'd, 24 F.3d 1250 (10th Cir. 1994).


\(^{145}\). See Balzano, supra note 12, at 573.
produced a double standard, providing explicit protection for employers and employees only within the territorial jurisdiction of the United States. Congress has also acted to amend other statutes to address the effects of globalization, yet has not done so with the NLRA.

Current trends in the globalized economy produce a wide variety of benefits. However, those benefits are accompanied by a host of costs, one of which is the inability of American labor law, particularly the practices and mandates established within the NLRA, to keep pace with the globalization of American corporations and American business. As employers and employees continue to span the globe to take advantage of globalization, the Supreme Court of the United States as well as the courts of appeals have been hesitant to judicially expand the jurisdiction of the NLRA. While a framework for judicial extension is certainly feasible, the courts have refused to administer it. The deference of the courts has forced individual litigants to resort to the political process, and a proper analysis demonstrates that congressional revision of the NLRA to provide for extraterritorial application is a workable standard.

The equilibrium originally created under the NLRA has been destroyed by the economic realities of a globalized economy. The problem is a narrow one and merits serious consideration, especially given that the NLRA may be amended carefully as not to interfere with the laws of foreign nations. It is time for Congress, the courts, or both to dispense with rigid application of an outdated law. Dispense with form, and adhere to substance. That is the new congressional mandate while considering the extraterritorial application of the National Labor Relations Act.

147. See Frommer, supra note 17, at 55.