Brooklyn Journal of International Law

Volume 32 | Issue 2 Article 8

2007

The Internal Affairs Rule and the Applicability of U.S. Law to Visiting Foreign Ships

Nathaniel Kunkle

THE INTERNAL AFFAIRS RULE AND THE APPLICABILITY OF U.S. LAW TO VISITING FOREIGN SHIPS

INTRODUCTION

Foreign ships[1] have maintained a significant presence in American ports and waters since early in the nation's history.[2] This presence grew substantially during the last century,[3] after many previously American vessels reflagged under flags of convenience.[4] As a result, the vast majority of ships today calling on U.S. ports are foreign-flagged. For example, ninety-five percent of the passenger ships and seventy-five percent of the cargo vessels entering American waters are alien.[5] These numbers underscore the desirability of developing a systematic approach for determining when domestic law applies to visiting foreign ships.

The Supreme Court recently tackled this issue in *Spector v. Norwegian Cruise Line Ltd.*,[6] a case addressing whether Title III of the Americans with Disabilities Act (ADA)[7] applies to foreign-flagged cruise ships in American waters. When the Court granted certiorari[8] to resolve a pair of

---

1. For the purposes of this Note, foreign ships are simply those vessels whose nationality is not American. A vessel's nationality, generally speaking, is determined by the country of her registry and under whose flag she sails. *See* M/V Saiga (No. 2) (St. Vincent v. Guinea), 38 I.L.M. 1323, 1340 (Int'l Trib. L. of the Sea 1999).

2. The impetus behind Congress's enactment of the first cabotage (coastwise trade) laws provides an illustration. Already wary of the influence foreign vessels held over international shipping at the beginning of the nineteenth century, Congress passed the first of these laws in 1817 to protect domestic maritime interests by limiting intranational shipping and the coastwise trade to American vessels. *See* Act of Mar. 1, 1817, ch. 31, § 4, 3 Stat. 351 (repealed 1933). For an in-depth discussion of American cabotage laws, see C. Todd Jones, *The Practical Effects on Labor of Repealing American Cabotage Laws*, 22 TRANSP. L.J. 403, 403–15 (1995).

3. *See* H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 158–61 (1996) (explaining that flags of convenience and open registries arose in the 1920s and 1930s as a result of efforts by American businessmen looking to lower operational costs).

4. A flag of convenience is a flag under which a vessel is registered in order to reduce operating costs and avoid the governmental regulations of the state of its beneficial ownership. Liberia and Panama are the most familiar flag of convenience states. *See* Jane Marc Wells, Comment, *Vessel Registration in Selected Open Registries*, 6 MAR. LAW. 221, 221–27 (1981).

5. Austin P. Olney, *A Report from the Marine Regulatory Front: Partly Cloudy with a Chance of Thunder Storms*, 13 U.S.F. MAR. L.J. 91, 110 (2000).

6. 545 U.S. 119 (2005).

7. 42 U.S.C. §§ 12181–12189 (2006).

8. Spector v. Norwegian Cruise Line Ltd., 542 U.S. 965 (2004).

conflicting rulings from the Fifth and Eleventh Circuits,[9] some commentators believed that it would use the opportunity to clearly define when and how U.S. law applies to visiting foreign vessels.[10] Unfortunately, this expectation went unfulfilled as much of the Court's ruling, a plurality opinion with multiple subparts and voting blocs, has no binding precedential value.[11]

Holding that the ADA's basic requirements do apply to foreign cruise ships, a five-Justice majority eschewed as too "broad" the Fifth Circuit's determination that the "clear statement rule"[12] prohibits domestic legislation from applying to foreign vessels absent specific statutory language.[13] However, a badly fractured Court authored four opinions and ultimately failed to agree on precisely how the rule should operate.[14] Incorporating the "internal affairs rule"[15] into its reading of the clear statement rule, a four-Justice plurality argued that the rule precluded the ADA and other generally applicable statutes[16] from applying to the internal

---

9. *Compare* Spector v. Norwegian Cruise Line Ltd., 356 F.3d 641 (5th Cir. 2004) (holding that Title III does not apply to foreign-flagged cruise ships in American waters), *with* Stevens v. Premier Cruises, Inc., 215 F.3d 1237 (11th Cir. 2000) (holding that Title III does apply to foreign-flagged cruise ships in American waters).

10. *See, e.g.*, Michael A. Orlando, *Enforcement of Federal Law on Foreign-Flagged Ships in U.S. Waters*, INT'L RISK MGMT. INST., Nov. 2004, http://www.irmi.com/Expert/Articles/2004/Orlando11.aspx.

11. *See generally* Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261 (2000) (discussing the ambiguous precedential value of plurality opinions).

12. The clear statement rule is a canon of statutory construction employed by American courts to resolve ambiguities in legislative language. In actuality, there is no one clear statement rule, but rather an array of such rules, all of which require a clear expression of congressional intent within the text of a statute before courts will interpret that statute in a way that encroaches on an area of traditional state authority, raises inconsistencies with international law, or impinges on intergovernmental immunities, just to name a few. William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598–611 (1992).

13. *Spector*, 545 U.S. at 130.

14. Justice Kennedy announced the judgment of the Court and authored an opinion joined by Justices Souter and Stevens, and joined in part by Justices Breyer, Ginsburg, and Thomas. Justice Ginsburg, joined by Justice Breyer, wrote an opinion concurring in part and concurring in the judgment. Justice Thomas concurred in part, dissented in part, and concurred in the judgment in part. Justice Scalia delivered a dissenting opinion, which was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas in part.

15. The internal affairs rule provides that foreign ships are not subject to the jurisdiction of the port state in matters touching only their internal order and discipline unless the peace or tranquility of the port state is disturbed. *See infra* note 36 and accompanying text.

16. Generally applicable statutes are laws whose legislative language contains words of universal application. Typical of most congressional legislation, these laws, if taken at

affairs of visiting foreign ships absent a clear expression of congressional intent.[17] Furthermore, the plurality stated that the rule should be applied on a provision-by-provision basis, such that those statutory provisions not implicating a ship's internal affairs would not trigger the rule and consequently would apply in full.[18] Though the other five Justices did not share this vision of the clear statement rule, their disagreement amongst themselves ruined any chance that they might provide a majority standard. Thus, instead of definitively defining when U.S. law applies to visiting foreign ships, the Court left the question largely unanswered.[19]

This Note examines the internal affairs rule and its interaction with the clear statement rule. Part I explores the jurisdictional issues inherent in applying domestic law to visiting foreign vessels and explains that international law resolves these issues through the internal affairs rule. Furthermore, Part I demonstrates that the United States adheres to the internal affairs rule, believing it to be a well-established international legal principle.[20] Part II examines how the Supreme Court has traditionally applied the internal affairs rule. Through consideration of the Court's Jones Act[21] and National Labor Relations Act[22] precedent, this part aims to establish that the rule restrains the reach of legislation in some circum-

---

face value, would regulate any and all activities around the world. For example, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), Justice Jackson made the following observation of the Jones Act:

> Unless some relationship . . . to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation -- a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

Id. at 577. Rather than give effect to the implausible results that follow from such literal statutory readings, American courts employ canons of statutory construction to establish the law's proper reach. *See id*. at 577–79.

17. *Spector*, 545 U.S. at 130.

18. *Id*. at 138–39.

19. Commenting on *Spector*, one observer quipped, "[A]lthough the Court has rearranged the playing field, the rules of the game remain largely undefined." Philip M. Berkowitz, *ADA and Foreign Employers: New Guidance from the Court*, N.Y.L.J., July 15, 2005, at 5.

[20] Generally speaking, American courts recognize international law as constituting a kind of federal common law. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law" and holding that coastal fishing vessels are exempt from capture as prize of war under customary international law).

21. 46 U.S.C. app. § 688 (2006).

22. 29 U.S.C. §§ 151–69 (2006).

stances while having no such limiting effect in others.[23] Part III returns to the Court's decision in *Spector*, and discusses the plurality, concurring, and dissenting opinions. Part IV analyzes these opinions in light of Parts I and II, and concludes that the plurality provides the proper understanding of the clear statement and internal affairs rules. Finally, Part V synthesizes the main points of this Note and recapitulates the lesson learned from *Spector*.

I. JURISDICTIONAL CONFLICT AND THE INTERNAL AFFAIRS RULE

Any attempt by the United States to prescribe laws applicable to visiting foreign ships presents the risk of conflict between sovereigns.[24] This conflict emanates from an overlap between two independent principles of jurisdiction, territoriality and nationality.[25] The United States, as a port state,[26] derives its authority to prescribe laws applicable to foreign vessels through the jurisdictional principle of territoriality.[27] Stemming from a nation's need to control activities within its geographic boundaries, territorial jurisdiction allows port states to regulate conduct that occurs or has effect within their waters.[28] Vessels, on the other hand, are bound by the rules and regulations of their flag state through the jurisdictional

---

23. It is important to remark here that this Note is only concerned with laws containing words of universal application. *See supra* note 16. An express congressional statement that a statute does apply to visiting foreign ships effectively forecloses any question as to its applicability. For example, Congress amended the Seamen's Act of 1915, Act of March 4, 1915, ch. 153, 38 Stat. 1164 (codified in part at 46 U.S.C. § 10313 (2006)), in 1920 to make it applicable to wage disputes between the owners and crewmembers of foreign ships docked in American ports. In *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920), the Supreme Court upheld the applicability of the Act to a dispute between a British crewman and his British ship master for wages owed under a British employment contract for work aboard a British vessel. Given the Act's express demarcation of its reach, the Court explained that any interpretation rendering the Act inapplicable to foreign ships and their crew would undermine Congress's intent "to place American and foreign seamen on an equality of right." *Id.* at 355.

24. Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L.J. 207, 210–11 (2000).

25. *See id*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. b (1987) [hereinafter RESTATEMENT] ("Territoriality and nationality are discrete and independent bases of jurisdiction; the same conduct or activity may provide a basis for exercise of jurisdiction both by the territorial state and by the state of nationality of the actor.").

26. A port state is a state that exercises control over a particular port. *See* McDorman, *supra* note 24, at 210.

27. RESTATEMENT § 402 cmt. h.

28. *See id*.

principle of nationality.[29] By providing vessels with a comprehensive body of laws to govern their shipboard activities, nationality and the law of the flag play an essential role in maritime law.[30] Ships entering foreign ports, therefore, find themselves subject to concurrent port state and flag state jurisdiction.[31]

Though in principle port state jurisdiction is superior to flag state jurisdiction,[32] "the legal certainty does not accurately reflect the tension."[33] Ships have a way of traveling from place to place. Thus if port states attempted to enforce their jurisdiction to the fullest extent upon every visiting vessel, then ships would be forced to navigate through an overwhelming regulatory patchwork.[34] Similarly untenable, if every flag state could claim exclusive jurisdiction over its ships at all times, then port states would be completely defenseless against harmful vessel activities.[35] Aiming for a reasonable solution to this jurisdictional dilemma, the major maritime nations developed the internal affairs rule, which provides that visiting foreign ships are not subject to port state jurisdiction in matters touching only upon the internal order and discipline of the ship unless those internal matters disturb the peace and tranquility of the port.[36]

---

29. *See id*. §§ 402(2), 502(2).

30. David F. Matlin, Note, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1021–22 (1991). While on the high seas, and until it enters another nation's ports and internal waters, a ship is viewed conceptually as a floating extension of its flag state's territory. *See* The Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 25; The Queen v. Anderson, [1868] L.R. 1 C.C.R. 161, 163 (U.K.) (Blackburn, J.) ("[A] ship, which bears a nation's flag, is to be treated as part of the territory of that nation. A ship is a kind of floating island.").

31. *See* RESTATEMENT § 502 cmt. d ("The flag state's jurisdiction also overlaps in some respects with the jurisdiction of the coastal state when the ship is in the territorial sea, contiguous zone, or a deepwater port of that state.").

32. *See* 48 C.J.S. *International Law* § 23 (2006) ("[T]he jurisdiction of a nation to take enforcement action within its territory is absolute.").

33. McDorman, *supra* note 24, at 211.

34. *See Lauritzen*, 345 U.S. at 585 (observing that "there must be some law on shipboard, [and] that it cannot change at every change of waters").

35. Noting the problems posed by this hypothetical situation, Chief Justice Marshall once remarked that "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation . . . [if foreign vessels] were not amenable to the jurisdiction of the country." The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 144 (1812).

36. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 65–66 (3d ed. 1999).

A. The Internal Affairs Rule: Two Theories and International Acceptance

While the finer points of enforcement policy may vary from nation to nation, a survey of the legal practices of the international community reveals that the internal affairs rule is widely accepted.[37] Recently, in *Re Maritime Union of Australia*,[38] the High Court of Australia recognized the internal affairs rule as a valid tenet of international law, and stated that the Australian Industrial Relations Commission should take the rule into account in deciding on remand whether certain Australian labor laws apply to the crews of foreign vessels.[39] Similarly, the Federal Court of Canada ruled in *Metaxas v. The Galaxias*[40] that whether severance pay was owed to several Greek sailors released from their employment aboard a Greek vessel in Vancouver was a question most appropriately answered by the law of the flag.[41]

As regards the internal affairs rule, there are two competing theories to which nations subscribe, the French and the English.[42] The French theory emerged from the consolidated cases of *The Sally* and *The Newton*.[43] Both cases involved assaults by one seaman against another occurring on board American ships docked in France.[44] The Counseil d'Etat[45] began its analysis by remarking that "the rights of the [flag state] ought to be respected touching the internal discipline of the vessel in which the local

37. *See, e.g.*, PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 144–91 (1927) (discussing the practices of Belgium, Brazil, Chile, England, France, Germany, Greece, Italy, Mexico, Norway, Peru, Portugal, Russia, and the United States); Sellers v. Maritime Safety Inspector, [1999] 2 N.Z.L.R. 44 (C.A.) (holding that the Maritime Safety Inspector could not, consistently with international law, require a Maltese ship, sailing from a New Zealand port, to carry radio and emergency equipment).

38. (2003) 214 C.L.R. 397 (Austl.).

39. *Id*. at 419; *see also* Celtic Marine (Hong Kong) Ltd., (2004) P.R. 947273 (Austl. Indus. Relations Comm'n) (acknowledging that the internal affairs rule is a rule of international law), *available at* http://www.airc.gov.au/alldocuments/PR947273.htm.

40. [1990] 2 F.C. 400 (Trial Div.) (Can.).

41. *Id*; *see also* Fernandez v. Mercury Bell, [1986] 3 F.C. 454 (C.A.) (Can.) (citing "the well-established rule of international law that the law of the flag state ordinarily governs the [internal] affairs of a ship"); Rederiet A.P. Moller A/S, [1996] 32 C.L.R.B.R.2d 136 (Can. Labor Relations Bd.).

42. JESSUP, *supra* note 37, at 145.

43. An English translation of this 1806 case is available at A.H. Charteris, *The Legal Position of Merchantmen in Foreign Ports and National Waters*, 1 BRIT. Y.B. INT'L L. 45, 50–51 (1920).

44. *Id*. at 50.

45. The Counseil d'Etat is France's highest court of administrative justice, settling disputes between individuals and the government. Philippe Fouchard, *The Judiciary in Contemporary Society: France*, 25 CASE W. RES. J. INT'L L. 221, 222 (1993).

authorities ought not to interfere unless . . . the peace and tranquility of the port has been compromised."[46] Then, since in its opinion the assaults failed to create a stir outside the ships themselves, the French court held that the local tribunals had no jurisdiction to entertain criminal prosecutions against the sailors.[47] The French theory thus asserts that port states lack jurisdiction over the internal affairs of visiting foreign ships when those matters do not disturb the port state's interests.[48]

Conversely, the English theory developed from the initial presumption that port states possess absolute jurisdiction over visiting foreign ships.[49] This presumption provided the starting point for the court's analysis in *The Queen v. Keyn*,[50] a case involving a German captain arraigned on criminal charges for running his vessel into an English ship while passing through English waters.[51] After deducing that any criminal conduct that may have occurred would have taken place aboard the German vessel, the court dismissed the indictment and held that the law of the flag controlled.[52] The court explained its decision, in part, by declaring that states may "choose[] to forego the exercise of her law over the foreign vessel and crew, or exercise[] it only when they disturb the peace and good order of the port."[53] Accordingly, under the English theory, while jurisdiction is fully vested in port states as a matter of right, it should not be exercised over foreign vessels unless interests beyond those of the ship and her crew are involved.[54]

The French and English theories differ, therefore, only on the question of whether port state jurisdiction over the internal affairs of foreign vessels is yielded as a matter of right or discretion. Despite this abstract difference, there is no pragmatic distinction between the two theories since both in practice decline jurisdiction when the interests of the port state are not adversely affected.[55] It is this common practice that has solidified into the customary rule of international law[56] that port states should not

---

46. Charteris, *supra* note 43, at 51.

47. *Id*.

48. JESSUP, *supra* note 37, at 154.

49. *Id*. at 169; *see also* Chung Chi Cheung v. The King, [1939] A.C. 160, 167 (U.K.) (declaring that a port state's jurisdiction is susceptible of no limitation not imposed by itself).

50. [1876] 2 Ex. D. 63 (Crown Cases Reserved).

51. *Id*. at 64.

52. *Id*. at 86.

53. *Id*. at 82.

54. Charteris, *supra* note 43, at 45–46.

55. CHURCHILL & LOWE, *supra* note 36, at 66; JESSUP, *supra* note 37, at 192.

56. Customary international law is derived from the consistent practice of states acting out of a belief that international law requires them to act that way. *See* MARK W.

exercise jurisdiction over the internal affairs of visiting foreign ships unless those affairs disturb the peace of the port.[57]

B. The Internal Affairs Rule in the United States

The United States is generally regarded as a subscriber to the English theory.[58] Thus, paralleling the English view, the Supreme Court has held that visiting foreign ships subject themselves to American jurisdiction as a condition of entry.[59] Furthermore, this jurisdictional authority being absolute,[60] the Court has taken the position that the United States is entitled to unqualifiedly enforce its laws against foreign vessels.[61] Nevertheless, recognizing that international law compels a more moderate ap-

---

JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 44–48 (4th ed. 2003). Indeed, consistent state practice is the "best evidence" that a rule has become part of customary international law. RESTATEMENT § 103 cmt. a.

57. It is worth mentioning here that this customary rule was codified in part in the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Article 27(1) of UNCLOS resolves conflicts with respect to criminal jurisdiction on board visiting foreign ships in the following way:

> The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) if the consequences of the crime extend to the coastal State;
>
> (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
>
> (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
>
> (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

UNCLOS, art. 27(1).

58. *See* Charteris, *supra* note 43, at 58; JESSUP, *supra* note 37, at 191.

59. *E.g.*, Patterson v. Bark Eudora, 190 U.S. 169, 179 (1903); United States v. Diekelman, 92 U.S. 520, 525 (1875).

60. Chief Justice Marshall delivered the most famous pronouncement of the nation's complete and plenary authority over its waters in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812), where he declared that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . [and] is susceptible of no limitation not imposed by itself."

61. *See, e.g.*, Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923) (holding that visiting foreign vessels are barred from possessing any alcohol in American ports and waters, regardless of whether flag state law requires its ships to store such spirits, since the Eighteenth Amendment and the National Prohibition Act state a strong public policy against such possession).

proach to jurisdictional enforcement, the Court has stated that applications of domestic legislation to conduct occurring on board foreign ships should comply with the internal affairs rule.[62] This was first explained by the Court over a century ago in *Wildenhus's Case*.[63] There, Chief Justice Waite made the following observation:

> From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace and dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require. . . . Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.[64]

An exhaustive list of all ship matters considered "internal" has never been compiled. Notwithstanding this, it can be pointed out that the internal affairs rule's reasoning has been invoked to relinquish jurisdiction in cases involving terms of employment and wages,[65] collective bargain-

---

62. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19–21 (1963); *see also* Lauritzen v. Larsen, 345 U.S. 571, 585–86 (1953); United States v. Rodgers, 150 U.S. 249, 260 (1893).

63. Mali v. Keeper of the Common Jail (*Wildenhus's Case*), 120 U.S. 1 (1887).

64. *Id*. at 12.

65. *See* Lopes v. S.S. Ocean Daphne, 337 F.2d 777 (4th Cir. 1964); The Albani, 169 F. 220 (E.D. Pa. 1909); The Becherdass Ambaidass, 3 F. Cas. 13 (D. Mass. 1871) (No. 1,203); Saunders v. The Victoria, 21 F. Cas. 539 (E.D. Pa. 1854) (No. 12,377); The Pacific, 18 F. Cas. 942 (S.D.N.Y. 1830) (No. 10,644); Thomson v. The Nanny, 23 F. Cas. 1104 (D.S.C. 1805) (No. 13,984); Willendson v. Forsoket, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682). Where the complaining seaman has been badly mistreated, however, courts have exercised jurisdiction in the interests of justice. *See* The Salomoni, 29 F. 534 (S.D. Ga. 1886); Weiberg v. The St. Oloff, 29 F. Cas. 597 (D. Pa. 1790) (No. 17,357). Jurisdiction has also regularly been exercised where the complaining crewmember is an American citizen. *See* The Neck, 138 F. 144 (W.D. Wash. 1905); The Alnwick, 132 F. 117 (S.D.N.Y. 1904); The Falls of Keltie, 114 F. 357 (D. Wash. 1902).

ing,[66] personal injury,[67] and ship discipline.[68] Being of considerable interest to the flag state[69] and of little interest to the United States,[70] American courts, through the internal affairs rule, have recognized the primacy of flag state law in these matters in order to avoid unnecessary conflicts.[71] On the other hand, where the interests of the United States are significantly affected by internal ship matters, American courts have not shied away from exercising jurisdiction.[72] Indeed, it is well-settled that jurisdiction over foreign vessels and their crew will be asserted when their activities offend "the peace or good order of the port either literally . . . or in some constructive sense."[73] This "port disturbance" exception has been construed broadly, allowing American authorities full discretion to determine for themselves what circumstances warrant an invasion of a foreign ship's internal affairs.[74] Intervention has been most common in cases involving criminal activity[75] and customs or immigration viola-

---

66. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Fruit Dispatch Co. v. National Maritime Union of America, 138 So.2d 853 (La. Ct. App. 1962); Compania Maritima Sansoc Limitada, 1950-1951 CCH N.L.R.B. Decisions ¶ 10,081 (1950).

67. *See* The Paula, 91 F.2d 1001 (2d Cir. 1937); The Magdapur, 3 F. Supp. 971 (S.D.N.Y. 1933); The Falco, 15 F.2d 604 (E.D.N.Y. 1926). Where the injured seaman is an American citizen, however, jurisdiction will likely be exercised. *See* Shorter v. Bermuda & West Indies S.S. Co., 57 F.2d 313 (S.D.N.Y. 1932). *But see* Clark v. Montezuma Transp. Co., 216 N.Y.S. 295 (N.Y. App. Div. 1926).

68. *See Ex parte* Anderson, 184 F. 114 (D. Me. 1910). Where ship discipline rises to the level of torture, however, jurisdiction will be exercised in the interests of justice. *See* Bolden v. Jensen, 70 F. 505 (D. Wash. 1895).

69. *See* Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 67 (1959) (discussing flag states' interests in determining compensation for shipboard torts); Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing*, 69 YALE L.J. 498, 514–15 (1959) (discussing flag states' interests in setting shipboard labor policies).

70. *See* RESTATEMENT § 512 cmt. c (observing that "coastal states usually have little interest" in the internal affairs of foreign ships).

71. Clay J. Garside, Comment, *Forcing the American People to Take the Hard NOx: The Failure to Regulate Foreign Vessels Under the Clear Air Act as Abuse of Discretion*, 79 TUL. L. REV. 779, 790–91 (2005).

72. *See* CHURCHILL & LOWE, *supra* note 36, at 66–67.

73. *Id*. at 66.

74. A broad interpretation of what constitutes a "port disturbance" is necessary, because "[c]ircumstances alter cases and a dispute which at times might have no effect on shore, at other times might have serious local consequences." JESSUP, *supra* note 37, at 180.

75. For example, criminal convictions were upheld in five cases against Italian sailors who, upon learning of the U.S.'s entry into WWII, purposefully destroyed the propulsive machinery of their ships in order to scuttle them in their ports. *See* Polonio v. United

tions.[76] Additionally, in their efforts to protect the peace of the port, American authorities have sometimes imposed obligations on foreign vessels which extend beyond their stay. Requiring that all oil tankers have double hulls,[77] barring any and all possession of liquor during Prohibition,[78] and enforcing antitrust laws on foreign shipping companies[79] are three prominent examples.

Before moving on, it should be noted that the Court's explanation in *Wildenhus's Case* that the internal affairs rule was founded on considerations of comity[80] has resulted in some confusion. Several commentators have understood this to mean that the rule is not a true tenet of international law, but rather a courtesy extended by the United States to other sovereign nations.[81] A closer reading of Chief Justice Waite's opinion, however, reveals that the Court did not leave the internal affairs rule to rest on comity alone, nor did it hold that treaties were necessary to confirm the rule's existence. To be sure, the Court stated that the rule arose from comity originally and indicated that it might be better protected by

---

States, 131 F.2d 679 (9th Cir. 1942); Guigni v. United States, 127 F.2d 786 (1st Cir. 1942); Marchese v. United States, 126 F.2d 671 (5th Cir. 1942); United States v. Scaleggeri, 126 F.2d 1023 (3d Cir. 1941); Bersio v. United States, 124 F.2d 310 (4th Cir. 1941). Additionally, in *Wildenhus's Case*, the Supreme Court upheld the criminal conviction of a Belgian seaman who murdered a fellow shipmate on board a Belgian ship in New Jersey, reasoning that the grievousness of the crime disturbed the tranquility of the port. *Wildenhus's Case*, 120 U.S. at 17–18. Foreign courts, employing the same port disturbance reasoning, have similarly upheld criminal convictions for murders committed on board alien vessels docked in port. *See* Chung Chi Cheung, [1937] 29 H.K.L.R. 22; State v. Dave Johnson Plazen, 4 Int'l L. Rep. 160 (Costa Rica 1928). *But see* Case of Antoni, 6 El Foro 194 (Mex. 1876) (dismissing indictment on the grounds that the murder did not disturb the peace of the port), *reprinted in* MANLEY O. HUDSON, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW 630 (1929).

76. *See* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Buttfield v. Stranahan, 192 U.S. 470 (1904).

77. *See* Oil Pollution Act of 1990, 46 U.S.C. § 3703a (2006).

78. *See* Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923). In a decision strikingly similar to *Cunard S.S. Co.*, the Seychelles Supreme Court in *R. v. Fayolle*, 91 Int'l L. Rep. 384 (Sey. 1971), upheld the conviction of a foreign ship's master under the Green Turtle Protection Regulations for possessing in port green turtle meat fished outside the territorial waters of Seychelles, reasoning that the Regulations stated an absolute policy against green turtle meat possession.

79. *See* United States v. Hamburg-Amerikanische Packet-Fahrtactien-Gesellschaft, 200 F. 806 (C.C.S.D.N.Y. 1911); United States v. Anchor Line, Ltd., 232 F. Supp. 379 (S.D.N.Y. 1964).

80. Comity can be defined as "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

81. *See, e.g.*, Maitlin, *supra* note 30, at 1025.

treaties in the interest of preventing misunderstanding.[82] Nevertheless, as the law stood in the mind of the Court, the internal affairs rule was existent and established in "the general public law."[83] Furthermore, this understanding of the internal affairs rule's status as an international legal principle has been affirmed in subsequent Court decisions.[84]

II. APPLICATION OF THE INTERNAL AFFAIRS RULE

Like other principles of statutory interpretation, the internal affairs rule is a canon of constructive caution.[85] The rule, functionally speaking, presumes that legislation is not intended to regulate the internal affairs of visiting foreign ships unless there is a clear statement from Congress to the contrary.[86] Furthermore, as the following examination of the Supreme Court's Jones Act and National Labor Relations Act jurisprudence makes clear, the internal affairs rule does not take an all-or-nothing approach to the applicability of domestic law. Rather, while the rule may work to restrict a particular statute's reach in one instance, it might not in another.

A. The Jones Act

The Jones Act allows injured seamen to bring actions for damages when their injuries are suffered in the course of employment and are due to the negligence of their employer.[87] In *Uravic v. F. Jarka Co.*,[88] an American stevedore[89] was injured on board a German vessel while he

---

82. *Wildenhus's Case*, 120 U.S. at 12.

83. *Id*. General public law and international law are synonymous. *See* JANIS, *supra* note 56, at 2.

84. *See supra* note 62 and accompanying text. The U.S. Government appears to have adopted this position as well, having relied on this understanding of the internal affairs rule to "protest[] the assertion of jurisdiction over controversies [involving American vessels], by local magistrates in the territory of a foreign State with which no adequate agreements had been concluded." CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 739–40 (2d rev. ed. 1945).

85. *See* Garside, *supra* note 71, at 790–91 (briefly sketching and comparing the internal affairs rule, the Charming Betsy canon, and the presumption against extraterritoriality).

86. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963).

87. 46 U.S.C. app. § 688(a). For a detailed discussion of liability and recovery under the Jones Act, see Brian J. Miles, *The Standard of Care in a Seaman's Personal Injury Action—Has the Jones Act Been Slighted?*, 13 TUL. MAR. L.J. 79 (1988).

88. 282 U.S. 234 (1931).

89. A stevedore is a laborer who loads and unloads vessels docked in port. THE AMERICAN HERITAGE DICTIONARY 1701 (4th ed. 2000). Five years prior to *Uravic*, in

was unloading it in New York harbor.[90] This injury subsequently led to his death.[91] Suit was brought under the Act by the stevedore's administratrix[92] who asserted the negligence of a fellow-servant as the cause of the injury.[93] Speaking for a unanimous Court, Justice Holmes reasoned that the internal affairs rule was inapplicable under the circumstances since the stevedore's activities went "beyond the scope of discipline and private matters that do not interest the territorial power."[94] Indeed, Holmes remarked that it would be "extraordinary" to deny American legal protections to citizens only "momentarily" engaged on board foreign ships.[95] The decision of the New York court[96] holding the Act inapplicable was accordingly reversed.[97]

A separate set of facts yielded a different result in *Romero v. International Terminal Operating Co*.[98] In *Romero*, a Spanish seaman brought suit against his Spanish employer after he was injured on board a Spanish ship docked in Hoboken, New Jersey.[99] The seaman was loading a cargo of wheat onto the ship when a wire cable suddenly slipped, severing his left leg and causing multiple fractures to his right leg.[100] Adhering to the internal affairs rule, the Court held that providing compensation for the injured seaman and regulating the liability of the shipowner were the concerns of the state of their common nationality, and that the United States had no interest in intruding its own policies into that relation-

---

International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), the Supreme Court ruled that a stevedore was a "seaman" for the purposes of the Jones Act.

90. *Uravic*, 282 U.S. at 238.

91. *Id*.

92. An administratrix is a woman appointed by a court to manage the assets and liabilities of a deceased person. BLACK'S LAW DICTIONARY 46 (6th ed. 1990).

93. *Uravic*, 282 U.S. at 238. Interestingly, just eleven years earlier, Uravic's cause of action would have failed at the outset since maritime law followed the fellow-servant rule, which barred recovery for injuries caused by other crewmembers. *See, e.g.*, The Osceola, 189 U.S. 158 (1903). With the passage of the Jones Act in 1920, however, Congress abolished the fellow-servant rule as a defense to shipboard negligence liability. Joel K. Goldstein, *The Osceola and the Transformation of Maritime Personal Injury Law: Some Propositions About the Case and Its Propositions*, 34 RUTGERS L.J. 663, 722 (2003).

94. *Uravic*, 282 U.S. at 240.

95. *Id*.

96. Uravic v. F. Jarka Co., 170 N.E. 131 (N.Y. 1929) (decided on authority of Resigno v. F. Jarka Co., 162 N.E. 13 (N.Y. 1928) (Cardozo, C.J.)).

97. *Uravic*, 282 U.S. at 241.

98. 358 U.S. 354 (1959).

99. *Id*. at 356.

100. After the accident, the seaman was taken by ambulance to a hospital in Hoboken where he underwent treatment for the next eight months. Currie, *supra* note 68, at 1 (pulling these facts from the trial record and appellate briefs).

ship.[101] The fact that the injury occurred in American waters was dismissed as a "wholly fortuitous circumstance."[102] Consequently, unlike its determination in *Uravic*, the Court in *Romero* found that the circumstances of the case triggered the internal affairs rule and rendered the Jones Act inapplicable.[103]

B. The National Labor Relations Act

The National Labor Relations Act (NLRA) was enacted to guarantee the right of workers to organize and to bargain collectively without fear of management reprisal.[104] To make the NLRA effective, Congress established the National Labor Relations Board (NLRB), a quasi-judicial body empowered to resolve labor disputes.[105] Such disputes erupted with recurrent regularity in ports throughout the United States during the 1950s, as labor unions, upset over depressed pay scales and working conditions, picketed foreign vessels and attempted to organize their crews.[106]

Benz v. Compania Naviera Hidalgo, S.A.[107] provided the Supreme Court with its first opportunity to consider the NLRB's jurisdiction over labor relations aboard visiting foreign ships.[108] In *Benz*, a Liberian vessel was docked in Portland, Oregon, when its crew suddenly went on strike demanding higher wages and improved working conditions.[109] The crewmen appointed an American labor union as their collective bargaining representative, and the union and others promptly began picketing the vessel.[110] After the shipowner brought suit in federal district court seeking to enjoin the union's activities, the union claimed that only the NLRB could consider the controversy.[111] The Court, however, held that the NLRB lacked jurisdiction under the internal affairs rule, remarking

---

101. *See Romero*, 358 U.S. at 384.

102. *Id*.

103. *See id*.

104. *See* National Labor Relations Act, 29 U.S.C. § 151 (setting forth Congress's findings and declaration of policy with respect to the Act).

105. *See id.* §§ 153–156.

106. *See* Note, *supra* note 69, at 503.

107. 353 U.S. 138 (1957).

108. Suit was brought under the Labor Management Relations Act, 29 U.S.C. §§ 141–197 (2006), an amendment to the NLRA.

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

110. *Id*. at 140.

111. *Id*. at 141. Adjudication of certain activities falling within the ambit of the NLRA are subject to the exclusive jurisdiction of the NLRB. *See* Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 430–34 (1998).

that "Congress did not fashion [the NLRB] to resolve labor disputes between nationals of other countries operating ships under foreign laws."[112]

The rule was similarly employed in *McCulloch v. Sociedad Nacional de Marineros de Honduras*[113] to find that the NLRB did not have authority under the NLRA to order an election for the unionization of foreign seamen recruited in Honduras to serve aboard Honduran vessels. In *McCulloch*, the National Maritime Union[114] petitioned the NLRB for certification as the bargaining agent for the crewmen.[115] The vessels were operated by a wholly owned subsidiary of an American corporation, but their labor relations were governed by several provisions of the Honduran Labor Code.[116] When the NLRB decided to assert jurisdiction and ordered an election to be held among the seamen,[117] both the shipowners and the Honduran labor union which claimed to represent the crewmen filed suit seeking an injunction.[118] The Court unanimously upheld their claims and found the NLRB lacked jurisdiction.[119] Rejecting the "balancing of contacts" test[120] employed by the NLRB, the Court reasoned that such a test would invariably "inquire into the internal discipline and order" of the ships in contravention of "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship."[121]

Distinguishing the factual elements that triggered the internal affairs rule in *Benz* and *McCulloch*, the Court upheld the applicability of the NLRA in *International Longshoremen's Local 1416 v. Ariadne Shipping*

---

112. *Benz*, 353 U.S. at 143.

113. 372 U.S. 10 (1963).

114. Founded in 1937, the National Maritime Union (NMU) organized seamen and waterfront workers, and was one of the most radical labor unions in the United States. The NMU lent support to various anti-colonial and international revolutionary struggles, and called for racial integration of the East Coast shipping industry. Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB L. 275, 311–17 (2004).

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

116. *Id*. at 14. Under these Honduran labor laws, only certain specified Honduran unions were permitted to act as bargaining representatives for seamen serving on board Honduran vessels. *Id*.

117. *See* United Fruit Co., 134 N.L.R.B. 287 (1961).

118. *McCulloch*, 372 U.S. at 12.

119. *Id.* at 21.

120. The balancing of contacts test employed by the NLRB consisted of weighing several factors, such as the nationality of the parties, the place of the dispute, and the beneficial ownership of the shipping corporation, to determine whether jurisdiction was appropriately asserted. *See United Fruit Co.*, 134 N.L.R.B. at 288–90.

121. *McCulloch*, 372 U.S. at 21.

Co.[122] In *Ariadne*, American unions picketed several foreign ships docked in Florida to protest substandard wages paid to American longshoremen.[123] The owners of the vessels attempted to enjoin the picketing in state court, but a unanimous Supreme Court held that the NLRA preempted the field and that the NLRB thus had exclusive jurisdiction to consider the matter.[124] Noting that *Benz* and *McCulloch* each involved situations where NLRA regulation "would necessitate inquiry into the 'internal discipline and order' of a foreign vessel,"[125] the Court remarked that the longshoremen's "casual" involvement with the foreign ships in no way implicated their internal affairs.[126]

III. SPECTOR V. NORWEGIAN CRUISE LINE LTD.

Spector was the first case in twenty years that presented the Court with a domestic statute arguably implicating the internal affairs of a visiting foreign ship.[127] The Court resolved little in the case, however, as the Justices varied greatly in their readings of the aforementioned Jones Act and National Labor Relations Act cases.

A. Background

The plaintiffs in *Spector* were disabled individuals who purchased round-trip tickets for cruises aboard two Bahamian-flagged Norwegian Cruise Line (NCL)[128] ships.[129] The cruises departed from Houston, Texas and sailed to foreign ports of call.[130] During their vacations, the plaintiffs discovered that many of the ships facilities—public restrooms, swimming pools, restaurants, elevators, preferred cabins—were inaccessible to them.[131] Furthermore, the plaintiffs discovered that NCL main-

122. 397 U.S. 195 (1970).

123. *Id*. at 196–97.

124. *Id*. at 200.

125. *Id*. at 198 (quoting *McCulloch*, 372 U.S. at 19).

126. *Id*. at 199–200.

127. Similar to *Benz* and *McCulloch*, the Court in *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104 (1974), held that picketing of two foreign-flagged vessels by American unions to protest substandard wages paid to foreign seamen was an activity affecting the ships' internal operations, and thus was not covered by the Labor Management Relations Act.

128. NCL is a Bermudian corporation offering cruise vacations departing from and returning to United States ports. NCL Corporation Ltd., Annual Report (Form 20-F), at 14 (Mar. 28, 2006).

129. *Spector*, 545 U.S. at 126.

130. *Id*.

131. Brief for the Petitioners at 17–24, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005) (No. 03-1388), 2004 WL 2803188.

tained several policies which were applicable to them but not to other passengers. For instance, NCL charged higher fares and special surcharges on account of the plaintiffs' disabilities and required them to remain subject to removal from the ship should their presence endanger the "comfort" of the other passengers.[132]

Upset over their treatment, the plaintiffs filed suit claiming NCL discriminated against them in violation of Title III of the ADA.[133] Title III prohibits discrimination based on disability in places of "public accommodation"[134] and in "specified public transportation services."[135] To that end, Title III requires covered entities to make "reasonable modifications in policies, practices, or procedures" to accommodate disabled persons,[136] and to remove physical barriers where "readily achievable."[137]

While allowing many of the claims to go forward, the district court dismissed those pertaining to barrier removal on the grounds that the governing ADA compliance regulations did not specifically cover cruise ships.[138] The Fifth Circuit affirmed in part and reversed in part, declaring that the clear statement rule precluded any application of federal law to visiting foreign ships without specific evidence of congressional intent.[139] Finding nothing in either the ADA's text or legislative history to indicate that Congress had thought about Title III's application to foreign cruise ships, the Fifth Circuit held that Title III was wholly inapplicable.[140]

B. The Supreme Court's Opinions

1. The Holding of the Court

The Supreme Court reversed the Fifth Circuit's judgment, criticizing it as being "inconsistent with the Court's case law and with sound princi-

---

132. *Id*. at 20.
133. *Spector*, 545 U.S. at 126.
134. 42 U.S.C. § 12182(a).
135. *Id*. § 12184(a).
136. *Id*. §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A).
137. *Id*. §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C).
138. Spector v. Norwegian Cruise Line Ltd., 2002 WL 34100212 (S.D. Tex. 2002). On November 26, 2004, the responsible agencies did finally issue draft guidelines for cruise ships as well as a notice of proposed rulemaking. *See* Nondiscrimination on the Basis of Disability: Passenger Vessels, 69 Fed. Reg. 69,246 (Nov. 26, 2004) (to be codified at 49 C.F.R. pt. 37); Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels, 69 Fed. Reg. 69,244 (Nov. 26, 2004) (to be codified at 36 C.F.R. pt. 1195).
139. *Spector*, 356 F.3d at 646.
140. *Id*. at 650.

ples of statutory interpretation."[141] In particular, the five-Justice majority[142] held that the Fifth Circuit's articulation of the clear statement rule was too expansive, and that the rule could not be understood as blanketly applying to foreign ships in their entirety.[143] The majority found that cruise ships fall within Title III's definitions of "public accommodation" and "specified public transportation services."[144] Thus, said the majority, the ADA's basic requirements on accommodation of disabled persons presumptively apply to all cruise ships operating in American waters, whether foreign or domestic.[145] The majority then noted that any structural modifications which would bring a ship into non-compliance with its international obligations[146] would not be "readily achievable" and therefore not be required by Title III.[147]

Thus, while acknowledging that some of the plaintiffs' claims were potentially barred, the majority rejected the Fifth Circuit's determination that the ADA was altogether inapplicable to foreign cruise ships. More importantly for purposes of this discussion, the majority unambiguously held that the Fifth Circuit misinterpreted the clear statement rule. The majority could not agree, however, on how exactly the rule worked. Already divided on the issue of whether the clear statement rule disqualified any application of the ADA to foreign cruise ships,[148] the Court diverged further as the majority splintered on the question of what limitations the rule imposed.

---

141. *Spector*, 545 U.S. at 130.

142. Justices Breyer, Ginsburg, Kennedy, Souter, and Stevens constituted the majority.

143. *Spector*, 545 U.S at 130.

144. *Id*. at 129.

145. *Id*. at 132–33.

146. There is an open question here as to what exactly the majority would exclude under Title III's "readily achievable" standard, since "international legal obligation" was not well defined. *See id*. at 135. A simple solution might be to say that an international legal obligation is the same as an obligation of international law. If indeed these terms are equivalent, then rules of customary international law, and therefore the internal affairs rule, would be included in the definition. *See, e.g.*, JANIS, *supra* note 56, at 41–55 (explaining that international custom is a source of international law). It is unlikely that this is what the majority intended, however, since those parts of Justice Kennedy's opinion dealing with the internal affairs rule did not command a majority vote. The majority probably intended international legal obligations to mean "treaty obligations," since they cite as an example the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 164 U.N.T.S. 113. *See Spector*, 545 U.S. at 135.

147. *Id*. at 135–36.

148. The dissenting Justices—O'Connor, Rehnquist, and Scalia—answered this question in the affirmative. For a discussion of their view, see *infra* Part III.B.4.

2. The Plurality Opinion

Three of the Justices from the majority—Kennedy, Souter, and Stevens—equated the clear statement rule with the internal affairs rule. Calling it "the internal affairs clear statement rule," the plurality declared that the rule, absent a clear expression of congressional intent to do otherwise, would simply preclude those applications of the ADA which affect the internal affairs of visiting foreign ships.[149] For instance, they reasoned that NCL's policies of charging disabled persons higher fares and reserving the right to remove them "have nothing to do with [the] ship's internal affairs," so the rule would not prevent Title III from applying to those discriminatory policies in full force.[150] On the other hand, the accessibility claims seeking removal of coamings[151] and other structural barriers "likely would interfere with the internal affairs of foreign ships," thus requiring a clear statement from Congress to achieve that end.[152] Additionally, the plurality stated that the clear statement rule did not mandate an all-or-nothing approach to the applicability of a particular statute. Rather, the rule exempts from the reach of domestic legislation only those applications which implicate "the internal order and discipline of the vessel, rather than the peace of the port."[153]

3. The Concurring Opinion

The remaining two Justices from the majority—Breyer and Ginsburg—did not ascribe any further significance to the clear statement rule. They stated that the rule's sole purpose lays in avoiding conflicts with international obligations, and since the majority's interpretation of the ADA's "readily achievable" standard fulfilled that purpose, nothing more was required.[154] In their view, the extent to which Title III implicated the internal affairs of foreign ships was completely irrelevant.[155] The concurring Justices concluded that domestic law should apply to visiting foreign vessels, even when it affects the ship's internal affairs, so

---

149. *Spector*, 545 U.S. at 138. Justice Kennedy stated that "[t]he relevant category for which the Court demands a clear congressional statement . . . consists not of all applications of a statute to foreign-flag vessels but only those applications that would interfere with the foreign vessel's internal affairs." *Id.* at 132.

150. *Id.* at 133.

151. Coamings are the raised edges around a ship's doors and other openings designed keep water out. THE AMERICAN HERITAGE DICTIONARY 353 (4th ed. 2000).

152. *Spector*, 545 U.S. at 135.

153. *Id.* at 130. It should be noted here that Justice Thomas agreed with this assessment of the rule's operation and joined in this part of the plurality's opinion.

154. *Id.* at 144 (Ginsburg, J., concurring).

155. *Id.* at 145.

long as "there is good reason to apply our own law" and no potential for "international discord" exists.[156]

4. The Dissenting Opinion

The dissenting Justices, like the plurality, thought that the clear statement rule incorporated the internal affairs rule when the application of American law to visiting foreign ships was at issue.[157] Indeed, they understood the internal affairs rule to be an established rule of international law.[158] Despite this shared belief, the dissent disagreed with the plurality and majority on two points. First, the dissent stated that any application of domestic legislation implicating the internal affairs of a ship would trigger the clear statement rule, thus preventing that application.[159] Consequently, the dissent declined to accept the majority's invitation to construe Title III's "readily achievable" standard to avoid conflicts with international obligations.[160] As they saw things, the clear statement rule achieved that result on its own.[161] Second, parting ways with the plurality, the dissenting Justices thought that the ADA and other statutes could not be selectively applied under the rule.[162] In their view, since some applications of Title III would affect the internal affairs of foreign cruise ships, the absence of a clear congressional statement rendered the entire statute inapplicable.[163]

IV. ANALYSIS

Spector's holding with respect to the clear statement rule is rather limited. The Court clearly rejected the position taken by the Fifth Circuit that the rule applies to visiting foreign ships in toto. However, this is as far as the majority went. Left unresolved were questions regarding both the scope of the rule and its operation. First, an open issue remains as to whether the clear statement rule tracks the internal affairs rule, or

---

156. *Id*.

157. *Id*. at 149 (Scalia, J., dissenting) ("The plurality correctly recognizes that Congress must clearly express its intent to apply its laws to foreign-flag ships when those laws interfere with the ship's internal order.").

158. *Id*. at 150.

159. *Id*. at 155.

160. *Id*. at 153–54.

161. *Id*. at 154.

162. *Id*. at 156.

163. *Id*. at 157 ("Since some applications of Title III plainly affect the internal order of foreign-flag ships, the absence of a clear statement renders the statute inapplicable—even though some applications of the statute, if severed from the rest, would not require a clear statement.").

whether it instead seeks only to avoid international conflicts. Second, assuming that the clear statement rule's scope is defined by the internal affairs rule, the issue of whether the rule operates on a provision-by-provision or an all-or-nothing basis remains undecided. Both of these questions will be considered in turn, and it will be argued that the plurality's position provides the proper standards.

A. The Scope of the Rule: Confirming the Internal Affairs Rule

Though not reflected in the Court's holding, a majority of the Justices in *Spector* confirmed the vitality of the internal affairs rule. Seven Justices held the view that the clear statement rule requires specific congressional intent before domestic statutes will be construed to interfere with the internal affairs of visiting foreign ships.[164] This interpretation of the clear statement rule's scope is correct since it confers on flag states the deference over regulation of their ships' internal matters long afforded them by both the United States and the international community.[165]

1. Correcting the Concurrence

The idea of the "internal affairs clear statement rule" was not unanimously accepted, however, as the two concurring Justices declared that the clear statement rule's scope went no further than avoiding conflicts with international legal obligations.[166] Supporting their conclusion, the concurring Justices stated that *Benz* and *McCulloch* simply held that congressional statutes should not be construed so as to violate international obligations when other interpretations remain available.[167] Reading the internal affairs rule into the clear statement rule, for them, then, was an over-inclusive means of avoiding such conflicts since doing so would preclude applying domestic legislation in cases where no conflict exists.

This position is problematic for several reasons. First, the concurring Justices' conclusion rests on an incomplete interpretation of *Benz* and *McCulloch*. Those cases did indeed hold the NLRA inapplicable to the foreign ships in question for fear of provoking international discord,[168]

---

164. Justices Kennedy, O'Connor, Scalia, Souter, Stevens, Thomas, and Chief Justice Rehnquist all held this view. *See supra* Parts III.B.2 and III.B.4.

165. *See supra* Part I.

166. *See supra* Part III.B.3; *see also supra* note 146 (discussing the ambiguity of the term "international legal obligation").

167. *Spector*, 545 U.S. at 143–44 (Ginsburg, J., concurring).

168. The Court in *Benz* stated that it would not hold the NLRA applicable to the foreign ship's labor relations without a clear congressional statement, since to do otherwise would "run interference in such a delicate field of international relations." *Benz*, 353 U.S

but hardly by paying lip service to the vessels' internal affairs. Rather, *Benz* and *McCulloch* identified the NLRA's intrusive effect on the ships' internal labor affairs as being the root cause of the conflict,[169] which is why *McCulloch* cited as authority the "rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship."[170] Second, in arriving at their conception of the clear statement rule, the concurring Justices appear to conflate two related canons of statutory construction, the internal affairs rule and the Charming Betsy canon. Derived from Chief Justice Marshall's statement in *Murray v. Schooner Charming Betsy*[171] that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[172] the Charming Betsy canon's principal aim is to harmonize domestic law with international law.[173] The majority's interpretation of Title III's "readily achievable" standard to avoid conflicts with international legal obligations is a good example of the Charming Betsy canon at work.[174] However, while the plurality thought more was needed from the clear statement rule since foreign ships were involved, the concurring Justices did not. The plurality was right. Relying solely on the Charming Betsy canon under these circumstances is impractical given that port state law and flag state law are not always amenable to harmonization.[175] When the two laws conflict, courts must sometimes abandon harmonization efforts and focus instead on determining which law will prevail. Here is where the internal affairs rule shows its worth, since its raison d'être is to answer that question.

As an aside, it is possible that the "errors" just discussed were an attempt by the concurring Justices to strip the internal affairs of visiting foreign ships of the partial immunity to which they are currently enti-

---

at 147. Similarly, in *McCulloch*, the Court remarked that ruling in favor of NLRA regulation "would raise considerable disturbance . . . in our international relations." *McCulloch*, 372 U.S. at 19.

169. *See supra* Part II.B.

170. *McCulloch*, 372 U.S. at 21.

171. 6 U.S. (2 Cranch) 64 (1804).

172. *Id*. at 118.

173. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998).

174. *See supra* note 147 and accompanying text.

175. Such is the case whenever port state law and flag state law truly conflict, a frequent occurrence in foreign vessel actions. Indeed, in many of the Supreme Court's cases involving the application of domestic law to visiting foreign ships, the governments of the vessels involved have filed briefs alerting the Court to the existence of a conflict of laws. *See* Symeon Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223, 224–25 (1982).

tled.[176] While this "solves" the problems just mentioned, such an approach creates new problems of its own. First, pragmatically speaking, its excessive self-interestedness is counterproductive. To be sure, no one expects port states to sacrifice their own policies out of sheer altruistic concern for those of flag states, and international law is clear that flag state jurisdiction yields to port state jurisdiction.[177] However, it is unjust and unfair for vessels to expect that their conditions might vary with each port at which they call. Moreover, this move towards territorial exclusivity will not only wreck havoc on the international shipping industry,[178] but will also "invite retaliatory action from other nations."[179] Second, from an international law perspective, this shift is illegal. Unless stripping foreign ships of their partial internal affairs immunity is attained by treaty or other agreement, one state's unilateral disregard for that immunity is contrary to international law.[180] That this act might signal the beginning of a new general practice among nations, thus eventually altering customary international law, will not save that act from the stigma of illegality.[181] If such a shift in international law is indeed desired, then concerted action by formal agreement should be pursued rather than unilateral action in defiance of existing law.[182]

---

176. That this may have been the concurring Justices' ulterior motive is signaled by the advocacy of some commentators that the United States take such an approach. *See, e.g.*, R. Tali Epstein, Comment, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application?: A Look at the Unique Case of Flags of Convenience*, 13 U. PA. J. INT'L BUS. L. 653 (1993) (arguing that stripping foreign ships of their partial internal affairs immunity will benefit the American labor force).

177. *See supra* note 32 and accompanying text.

178. *See supra* note 34 and accompanying text.

179. *McCulloch*, 372 U.S. at 21.

180. *See* JANIS, *supra* note 56, at 41–44 (describing the binding nature of customary international law).

181. *See* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 531–32 (2004).

182. That the United States once held this opinion and acted upon it is revealed by instructions sent from Washington to the American Minister in Madrid on October 28, 1852, during discussions arising out of the treatment accorded to an American vessel, *The Crescent City*, by the officials of Spain in Cuba. In those instructions it was said:

> You will state that this government does not question the right of every nation to prescribe the conditions on which vessels of other nations may be admitted into her ports. That, nevertheless, those conditions ought not to conflict with the received usages which regulate the commercial intercourse among civilized nations. That those usages are well known and long established and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation.

2. The Internal Affairs Rule and Modern Conflict of Laws Methodology

Another argument in favor of the clear statement rule incorporating the internal affairs rule is that the internal affairs rule is consistent with modern conflict of laws[183] theory, "interest analysis"[184] in particular. When port states seek to apply their laws to visiting foreign ships, true conflicts routinely arise. Such is the case whenever port state law and flag state law differ and the policies underlying each have a genuine claim to application.[185] In this situation, interest analysis holds that port state courts should normally apply port state law.[186] Because of the concurrent flag state interests, however, interest analysis also asserts that port state courts may take "a more moderate and restrained interpretation" of port state law.[187] This means that port state courts may recognize the applicability of port state law, but, in deference to the contrary interest of the flag state, will decline to assert for the port state an interest in having its law applied.[188]

This is all that the internal affairs rule requires. The rule presumes that port states do not intend to interfere with matters that are primarily of concern only to the ship and its flag state. If, however, those matters affect the peace of the port, then that presumption is effectively rebutted. Thus, the internal affairs rule does not seek to simply subserviate port state law to flag state law, but rather to mitigate the tension when the two conflict. This sensitivity to the substantive aspects of the two laws demonstrates the internal affairs rule's compatibility with prevailing conflict of laws theory.

H.R. EXEC. DOC. NO. 86, 33d Cong., 1st Sess., at 24 (1853).

183. Conflict of laws is that branch of jurisprudence which deals with disputes subject to the conflicting laws of two or more states. BLACK'S LAW DICTIONARY 299–300 (6th ed. 1990).

184. Developed by Professor Brainerd Currie, interest analysis seeks "to ensure that the law which is applied in the majority of cases will be the one whose application in a particular context will serve the purposes for which that law was created." Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1047 (1987).

185. *See id*.

186. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178.

187. *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

188. A judicial operation of this sort was famously performed in *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961), where Justice Roger Traynor, after observing that California would be constitutionally justified in applying its Statute of Frauds to deny a claim against the estate of a local domiciliary, chose not to attribute to the California legislature an intent to preclude enforcement of an oral agreement executed in Nevada for the benefit of Nevada domiciliaries when Nevada had no similar statute in accordance with its policy of vindicating the reasonable expectations of its people.

B. The Rule's Operation: A Provision-by-Provision Argument

The debate within the Supreme Court over whether the clear statement rule applies on a provision-by-provision or all-or-nothing basis proved more contentious than that over the rule's scope, as the Justices closely split four to three favoring the former approach over the latter.[189] The plurality reasoned that since the NLRA was held applicable in *Ariadne* but not in *Benz* and *McCulloch*,[190] the same provision-by-provision approach should be taken with respect to the ADA.[191] Specifically, the plurality thought that the clear statement rule would restrain only those Title III provisions which touched upon the vessel's internal affairs, leaving all the remaining provisions effective.[192]

The dissenting Justices believed that the plurality's approach encompassed an "utterly implausible" view of congressional intent.[193] They stated that Congress could not have had separate intent with respect to each provision of Title III, and that Congress either did or did not have foreign ships in mind when it enacted the statute.[194] Consequently, since Title III did not contain a clear statement as to its applicability to foreign vessels, the fact that some of its provisions implicated their internal affairs necessarily rendered the entire statute inapplicable.[195] The dissent, therefore, took the plurality to task for attempting to force foreign ships into compliance with Title III requirements that were never intended to apply to them.[196]

While the dissenting Justices' argument is persuasive at a glance, closer inspection reveals that it rests on an inconsistency in reasoning. The dissent, like the plurality, threw its support behind the internal affairs rule, a rule that presumes Congress does intend its laws to regulate the non-internal affairs of foreign vessels. Thus admitting Congress's intent to regulate the non-internal affairs of foreign vessels, the dissent cannot fairly argue that a provision-by-provision approach, whereby non-internal matters are automatically subject to regulation while internal matters require a clear statement, somehow fails to regard that intent.

---

189. *See supra* Parts III.B.2 and III.B.4. As an aside, the two concurring Justices, though not in favor of the internal affairs rule conception of the clear statement rule, noted that they agreed with the plurality's provision-by-provision approach to the rule. *Spector*, 545 U.S. at 143 n.1 (Ginsburg, J., concurring).

190. *See supra* Part II.B.

191. *Spector*, 545 U.S. at 138.

192. *Id*. at 138–39.

193. *Id*. at 156 (Scalia, J., dissenting).

194. *Id*.

195. *Id.* at 157.

196. *Id*. at 156.

Rather than "delusional,"[197] it is entirely rational to believe that Congress intends some provisions of its statutes to apply to visiting foreign ships while intending exemptions with regards to others.[198] Moreover, the plurality's adoption of the provision-by-provision approach adheres not only to previous Court practice with respect to this clear statement rule,[199] but with other clear statement rules as well.[200]

V. CONCLUSION

The clear statement rule is the canon of statutory construction employed by American courts to determine the applicability of U.S. law to visiting foreign ships. Due to the ever-increasing number of foreign vessels calling on American ports, there is a great need for a more definite and authoritative restatement of that rule. Indeed, while considering the applicability of the ADA to foreign cruise ships, the Court in *Spector* was well aware that its decision would have important implications for the applicability of other statutes as well.[201] It is therefore unfortunate that the Justices could not come to an agreement on the rule's scope or operation.

While the uncertainty over the proper standards to apply to the clear statement rule may not have been fully resolved in *Spector*, the case nevertheless provides an answer. By assimilating the internal affairs rule and the provision-by-provision approach into its articulation of the clear statement rule, the plurality adhered to the traditional American viewpoint and exercised due regard for international law. There is reason,

---

197. *Id*.

198. The dissenting Justices are likely correct that Congress did not "in fact" have individualized intent with respect to each provision of Title III. *See id*. However, it defies reality to expect Congress to have foreseen and considered every contingency arising under the statute. Given this situation, the determination that courts need to make is "what Congress would have wished if these problems had occurred to it." Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) (Friendly, J.).

199. *See supra* Part II.

200. For example, the Court took the same provision-by-provision approach when it applied the "presumption against extraterritoriality" to a couple of cases involving the Seamen's Act of 1915. *Compare* Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920) (holding that Section 4 of the Act does apply extraterritorially to invalidate wage advancements), *with* Sandberg v. McDonald, 248 U.S. 185 (1918) (holding that Section 11 of the Act does not apply extraterritorially to invalidate wage advancements).

201. In rejecting the Fifth Circuit's articulation of the clear statement rule, the plurality noted the adverse consequences that such a broad reading of the rule would have for Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered section of 42 U.S.C.). *See Spector*, 545 U.S. at 132.

therefore, to expect that their opinion will be followed in future cases going forward.

Nathaniel Kunkle[*]

* B.A. Johns Hopkins University (2001); J.D. Brooklyn Law School (expected 2007). I would like to thank the following people: the staff of the *Brooklyn Journal of International Law* for their assistance in the preparation of this Note; the staff of the Brooklyn Law School Library, especially Jean Davis and Victoria Szymczak for their expertise; my parents, Kevin and Shirley Kunkle, and brother, Jesse Kunkle, for their constant encouragement; and my wife-to-be, Krista Margies, for listening to tales of *The Becherdass Ambaidass.*