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The Supreme Court's Not So Clear Statement in: *Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*

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NOTE

THE SUPREME COURT'S NOT SO CLEAR STATEMENT IN: *EQUAL EMPLOYMENT OPPORTUNITY COMM'N V. ARABIAN AMERICAN OIL CO.*

I. INTRODUCTION

There has been a strong presumption against the extraterritorial application of U.S. labor laws in federal caselaw.¹ However, U.S. courts have universally recognized that Congress possesses the authority to pass laws that have extraterritorial effects.² These courts regularly state that Congress' clearly expressed affirmative intent is necessary to overcome this presumption against extraterritoriality.³

The Supreme Court has recently decided that Congress must put a "clear statement" of its intent to apply a law extraterritorially on the face of the statute in *EEOC v. Aramco*.⁴ However, the Court then failed to heed its own "clear statement" rule and looked beyond the face of the statute for other indicia of congressional intent to extraterritorially apply the law at issue.⁵ In its analysis, the Court looked to such

1. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

2. *Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Foley Bros.*, 336 U.S. at 284-85; *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

3. *Foley Bros.*, 336 U.S. at 285.

4. *Aramco*, 499 U.S. at 248. The Court explained that "[i]n applying this rule of construction, we look to see whether 'language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" *Id.* (quoting *Foley Bros.*, 336 U.S. at 285) (emphasis added).

5. The *Aramco* decision involved a Title VII claim brought by plaintiff, Ali Bourselan, against defendants, Arabian American Oil Company, and Aramco Ser-

sources of congressional intent as the provision, or lack thereof, for a conflict of laws with other nations⁶ and administrative interpretations of the Equal Employment Opportunity Commission (EEOC).⁷ Therefore, although the Court established a rather clear and concise standard by which to judge extraterritoriality, its own analysis in that same decision sowed the seeds of confusion that would soon be reaped by the lower courts.

The inconsistency of the *Aramco* decision has confused the federal courts as to how they should determine whether Congress intended for a law to apply extraterritorially. Specifically, this confusion has caused a conflict among the circuits as to the interpretation of broad language in U.S. labor laws.⁸ The plain language of these labor laws seemingly gives courts the requisite jurisdiction over the disputes before them. However, these laws are regularly not applied extraterritorially for fear of creating foreign policy conflicts for the United States which Congress did not intend.⁹ Therefore, a Supreme Court ruling which allows for split decisions and interpretations among the ranks of the Circuit Courts of Appeal is particularly troublesome due to the ramifications these conflicts may have.

Although it has been overruled by Congress,¹⁰ *Aramco* is

vice Company under Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to e-17 (1988). *Aramco*, 499 U.S. at 244.

6. "It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures." *Id.* at 256.

7. "We are of the view that, even when considered in combination with petitioner's other arguments, the EEOC's interpretation is *insufficiently weighty* to overcome the presumption against extraterritorial application." *Id.* at 258 (emphasis added). This statement leaves one to draw the negative inference that had this interpretation been "sufficiently weighty," then the presumption against extraterritoriality would have been overcome *without* such intent being expressly stated on the face of the statute. See *infra* notes 80-84 and accompanying text.

8. See *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, 968 F.2d 191 (2d Cir. 1992) (holding that Labor Management Relations Act did not apply to issue of whether American parent corporation was liable as alter ego for South Korean subsidiary's alleged breach of collective bargaining agreement); cf. *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir. 1992) (holding that National Labor Relations Act applied to conduct of U.S. union while abroad).

9. See *Pico*, 968 F.2d 191; *Aramco*, 499 U.S. at 264-65 (Marshall, J., dissenting).

10. In direct response to *Aramco* and other Supreme Court decisions limiting the extraterritorial application of U.S. labor laws, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). See Louise B. Moses, Comment, 16 SUFFOLK TRANSNAT'L L. REV. 240, 253-54 n.* (1992) ("Under

an extremely important decision to focus upon when discussing the extraterritorial application of U.S. labor laws. First, *Aramco* is the latest indication of how the Supreme Court will decide cases involving extraterritoriality. Second, Congress' passage of the Civil Rights Act of 1991 provided the Court with the clear statement it required, implying that *Aramco's* clear statement rule has been accepted by Congress. Thus, the *Aramco* decision has won the day as far as Congress is concerned. However, the Court needs to refine its analysis in order to promote certainty and consistency in the lower federal courts, lest its decision be misinterpreted and congressional intent go unheeded.

Part II of this Note reviews the history of the presumption against extraterritoriality in U.S. caselaw. Part II.A discusses both the majority and dissenting opinions of the *Aramco* decision. Part II.B reviews the Second Circuit's 1992 decision against the extraterritorial application of U.S. labor laws in *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*¹¹ and its interpretation of *Aramco*. Part II.C analyzes the Eleventh Circuit's 1992 decision which extraterritorially applied U.S. labor law in *Dowd v. International Longshoremen's Assoc.*¹² as well as that court's novel interpretation of the *Aramco* decision. Part II.D compares and contrasts the approaches taken by the *Pico* and *Dowd* courts which yielded different results regarding extraterritoriality.

In Part III, this Note concludes that the Supreme Court needs to more clearly delineate and apply its so-called "clear statement" rule in order to allow the lower federal courts to determine exactly what is needed to overcome the presumption against the extraterritorial application of U.S. labor laws. The Court should also acknowledge that it has altered the standard by which U.S. labor laws are held to apply extraterritorially by requiring a clear statement of such intent to be included on the face of the statute. The absence of this acknowledgment has caused confusion in the lower courts, as illustrated by a comparison of the *Pico* and *Dowd* cases and their respective inter-

the 1991 Act, Congress expanded the definition of an 'employee' who is protected from discrimination under Title VII to include individuals who are United States citizens employed in a foreign country." (citing Civil Rights Act of 1991 § 109)).

11. 968 F.2d 191 (2d Cir. 1992).

12. 975 F.2d 779 (11th Cir. 1992).

pretations of the *Aramco* decision.

In an increasingly interdependent world where business is commonly conducted on a multinational level, establishing a clear standard for exactly when a U.S. labor law will apply extraterritorially is of great importance due to the ramifications such application may have.¹³ U.S. corporations should be informed of when U.S. labor laws will apply extraterritorially so that they may properly evaluate the decision to relocate overseas and be able to conduct themselves accordingly once abroad. Foreign governments should be aware of when U.S. labor laws will reach beyond American shores and touch conduct occurring in their jurisdictions so as to avoid foreign policy clashes with the United States. Finally, and most importantly, the Supreme Court should provide Congress with a clear standard governing the extraterritorial application of U.S. labor laws so that the people's representatives may properly react either by acquiescing to federal court decisions with which it agrees or by amending the statute at issue so as to overrule such decisions with which it does not.¹⁴

Congress has shown that the clear statement rule is a viable and workable standard under which to operate by its reaction to judicial decisions refusing to apply U.S. labor laws extraterritorially.¹⁵ While *Aramco* has confused the federal courts as to just what is necessary in order to apply a U.S. law extraterritorially, this Note shows that Congress has taken the

13. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992) (arguing that the presumption against extraterritorial application of U.S. labor laws is increasingly unworkable in a shrinking world); see also Frank Balzano, Comment, *Extraterritorial Application of the National Labor Relations Act*, 62 U. CIN. L. REV. 573 (1993) (contending that U.S. labor laws were designed at a time when the issue of extraterritorial application of labor statutes was not particularly important for resolution of labor disputes).

14. See, for example, 29 U.S.C. § 630(f) (1988), which Congress amended to provide, "[t]he term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." This amendment was in direct response to cases such as *Cleary v. United States Lines*, 728 F.2d 607 (3d Cir. 1984), which held that the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), did not apply extraterritorially.

15. See, e.g., Renee S. Orleans, Comment, *Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad*, 16 MD. J. INT'L L. & TRADE 147, 160-65 (1992) (discussing congressional amendment of the Age Discrimination in Employment Act of 1967 [ADEA] to apply overseas in order to overrule such cases as *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984)).

standard to mean that any intention to extraterritorially apply U.S. labor laws must appear on the face of the statute. In addition to being a workable standard, the clear statement rule should be maintained because it gives Congress, and not the courts, the final word on whether a U.S. labor law should be applied extraterritorially. Congress should maintain this power because it is better able to evaluate the foreign policy ramifications of applying U.S. labor laws extraterritorially and is in a better position than the courts to balance competing American labor and business interests.

II. THE HISTORY OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The presumption against the extraterritorial application of U.S. laws dates back nearly two hundred years, to the *Charming Betsy* case.¹⁶ Following this decision, the Supreme Court decided several subsequent cases concluding that while Congress was supreme within the territorial jurisdiction of the United States, the federal courts must presume against the extraterritorial application of U.S. laws unless Congress clearly expresses an intent to do otherwise.¹⁷

The presumption against extraterritoriality continued in this century with *American Banana Co. v. United Fruit Co.*¹⁸ In that decision, the Court refused to apply the Sherman Antitrust Act¹⁹ to occurrences that had taken place in Costa Rica and modern-day Panama,²⁰ although both parties to the dis-

16. *Murray v. Charming Betsy*, 6 U.S. 64 (1804). The case, decided by Chief Justice Marshall, refused to punish a naturalized Danish citizen for violation of a law that, at the time, placed an embargo on trade with France and her colonies. *Id.* "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ." *Id.* at 118.

17. See, e.g., *Schooner Exchange v. McFaddon*, 11 U.S. 116, 122-23 (1812) ("It is beautiful in theory to exclaim '*fiat Justitia—ruat coelum*', but justice is to be administered with a due regard to the law of nations, and to the rights of other sovereigns."); cf. *Wildenhus's Case*, 120 U.S. 1, 18 (1887) ("The principle which governs the whole matter is this: Disorders which disturb only the peace of the [foreign] ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction.") (emphasis added).

18. 213 U.S. 347 (1909).

19. 15 U.S.C. §§ 1-36 (1988).

20. *American Banana*, 213 U.S. at 357.

pute were American citizens.²¹ Justice Holmes reasoned that the United States could not declare foreign practices illegal merely because they violated the Sherman Antitrust Act.²²

The *American Banana* case is notable for the attention it paid to many of the policy considerations that continue to concern the federal judiciary today. Indeed, in some respects, *American Banana* may have been the progenitor to the confusion regarding the extraterritorial application of U.S. laws that exists today. First, the Court was concerned that the broad jurisdictional language of U.S. laws would be construed as applying to extraterritorial situations when Congress did not so intend.²³ Next, the Court worried that these unintended extraterritorial judicial applications of U.S. law would conflict with the laws of other nations and cause foreign policy problems for the United States.²⁴ Finally, *American Banana* established the background rule by which all extraterritorial applications of U.S. law are to be governed.²⁵ That rule dictates that there is a strong presumption against the extraterritorial application of U.S. law which may be overcome only in rare instances.²⁶ It is this background rule that predominates the

21. See *Blackmer v. United States*, 284 U.S. 421 (1932) (holding that a U.S. citizen residing abroad is subject to punishment in U.S. court for disobedience of U.S. laws overseas).

22. "A conspiracy in this country [the United States] to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." *American Banana*, 213 U.S. at 359.

23. "Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only every one subject to such legislation, *not all that the legislator subsequently may be able to catch.*" *Id.* at 357 (emphasis added).

24. The Court stated:

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

Id. at 356.

25. "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* (citation omitted).

26. As the Court explained:

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

discussion of any extraterritorial issue by the federal courts since *American Banana* was decided.²⁷

Forty years after *American Banana*, the Supreme Court restated the presumption against extraterritoriality in *Foley Bros. v. Filardo*.²⁸ The case involved a cook employed by a construction company which had contracted with the U.S. government to do public works projects abroad.²⁹ The employee brought suit against the company demanding compensation at one-and-a-half times his normal wages for overtime that he had allegedly worked while overseas.³⁰ The suit was brought under the "Eight Hour Law"³¹ which, at the time, provided for such overtime compensation for anyone employed by a contractor working for the U.S. government.³²

In *Foley Bros.*, the Court assumed that Congress clearly had the power to apply U.S. laws overseas³³ and framed the extraterritorial application issue regarding the "Eight Hour Law" as a question of congressional intent.³⁴ First, the Court searched the face of the statute for any plainly worded indications that Congress intended the extraterritorial application of the law in question.³⁵ Second, the Court evaluated the "scheme of the [a]ct itself" and decided that it "butresse[d]" its conclusion that the "Eight Hour Law" was not meant to be applied abroad.³⁶ Third, the Court explored the legislative

Id. at 355.

27. See, e.g., *Foley Bros. v. Filardo*, 336 U.S. 281, 287 n.3 (1949) (broad language of U.S. laws must be modified by presumption against extraterritoriality) (quoting *American Banana*, 213 U.S. at 357); cf. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288-89 (1952) (holding *American Banana* was not an obstacle to application of Lanham Act, 15 U.S.C. §§ 1051-1127 (1988), to acts done in Mexico with intent and effect of trademark infringement in United States).

28. *Foley Bros.*, 336 U.S. at 287 n.3 (addressing the way policy concerns should modify interpretation of broad language in labor law statutes that seemingly provide jurisdiction) (quoting *American Banana*, 213 U.S. at 357).

29. *Id.* at 283.

30. *Id.*

31. 40 U.S.C. §§ 321-326 (repealed 1962).

32. See *Foley Bros.*, 336 U.S. at 282-83 (quoting 40 U.S.C. § 325a (repealed 1962)).

33. "The question before us is not the power of Congress to extend the Eight Hour Law to work performed in foreign countries. Petitioners concede that such power exists." *Id.* at 284 (citing *Blackmer v. United States*, 284 U.S. 421 (1932)); *United States v. Bowman*, 260 U.S. 94 (1922).

34. *Id.* at 284-85.

35. *Id.* at 285.

36. *Id.* at 286.

history of the "Eight Hour Law" and found that "the considerations before Congress were domestic unemployment, the influx of cheap foreign labor, and the need for improved labor conditions in this country."³⁷ Finally, the Court summarized its analysis by looking to administrative interpretations of the "Eight Hour Law" and found no conflict with its conclusion that the law did not apply overseas.³⁸

In subsequent decisions, the federal courts often relied on the analytical framework of *Foley Bros.* to decide whether Congress intended a U.S. law to apply extraterritorially.³⁹ The *Foley Bros.* decision did not indicate that any analysis of extraterritorial application issues should stop at the face of the statute. Instead, the Court employed a broad method of statutory interpretation which examined a diverse range of materials in order to deduce the legislative intent behind a statute. Indeed, many cases following *Foley Bros.* gave no indication that the face of the statute was to be the only source of congressional intent.⁴⁰ It is in this respect that the *Aramco* decision has modified the rule of *Foley Bros.* and its progeny.

A. *Equal Employment Opportunity Comm'n v. Aramco*

1. The Majority Opinion

Aramco represents a break with the *Foley Bros.* decision and its progeny, in that it ostensibly limited to the face of the statute any inquiry into whether a law was meant to apply extraterritorially. While the *Aramco* Court voiced the same concerns as the Court in *Foley Bros.*, it did not follow the broad

37. *Id.* at 286-87.

38. "We conclude that administrative interpretations of the Act, although not specifically directed at the precise problem before us, tend to support petitioners' contention as to its restricted geographical scope." *Id.* at 290.

39. See, e.g., *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-283 (1952). In *Steele*, although the court extraterritorially applied the Lanham Act, *supra* note 27, it used the *Foley Bros.* analytical framework.

40. See, e.g., *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 143-44 (1957) (looking to legislative history and "background" of National Labor Relations Act of 1947, ch. 120, 61 Stat. 136 (current version at 29 U.S.C. §§ 151-169 (1988))); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963) ("Petitioners . . . have been unable to point to any specific language in the [National Labor Relations] Act itself or in its extensive legislative history that reflects such a congressional intent.") (emphasis added); *Lauritzen v. Larsen*, 345 U.S. 571, 579 (1953) (looking to "history" of the Jones Act, ch. 153, 38 Stat. 1185 (1915) (current version at 46 U.S.C. app. § 688 (1988))).

statutory analysis established by that decision. Instead, it formulated the clear statement rule which required that any congressional intent to apply a law extraterritorially be explicitly included on the face of the statute. Although claiming to apply this newly formed clear statement rule, the *Aramco* Court inconsistently looked for a conflict of laws with other nations and evaluated the administrative interpretations of the EEOC. It is this inconsistency which has allowed for the subsequent confusion illustrated in the *Pico* and *Dowd* decisions discussed later in this Note.

The *Aramco* decision involved a naturalized American citizen of Lebanese descent who was employed, in Saudi Arabia, by the Arabian American Oil Company, commonly known as "Aramco."⁴¹ The employee brought a Title VII⁴² suit against Aramco alleging that he had suffered employment discrimination and was ultimately fired because of his race, religion, and national origin.⁴³ The acts of which the plaintiff complained all occurred in Saudi Arabia. The United States District Court for the Southern District of Texas dismissed the action on the grounds that it did not have jurisdiction.⁴⁴ The United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court.⁴⁵ Upon rehearing, a deeply divided Court of Appeals, sitting en banc, reaffirmed the decision against Bourselan, who by that time had been joined by the EEOC as a plaintiff.⁴⁶ The Supreme Court affirmed both of the Court of Appeals' decisions and held that Congress did not intend for Title VII to apply extraterritorially.⁴⁷

The *Aramco* Court relied on *Foley Bros.* and *Benz* for the proposition that Title VII could be applied extraterritorially only with "the affirmative intention of the Congress clearly expressed."⁴⁸ However, the Supreme Court restricted the

41. EEOC v. Aramco, 499 U.S. 244 (1991).

42. 42 U.S.C. § 2000e-1 to e-15 (1988). See *supra* note 10 and accompanying text for Congress' amendment of Title VII giving it extraterritorial application in response to *Aramco*.

43. *Aramco*, 499 U.S. at 247.

44. *Id.*; Bourselan v. Aramco, 653 F. Supp. 629 (S.D. Tex. 1987).

45. *Aramco*, 499 U.S. at 247; Bourselan v. Aramco, 857 F.2d 1014 (5th Cir. 1988).

46. *Aramco*, 499 U.S. at 247; Bourselan v. Aramco, 892 F.2d 1271 (5th Cir. 1990) (en banc).

47. *Aramco*, 499 U.S. at 259.

48. *Id.* at 248 (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147

search for this intent to the face of the statute by selectively quoting *Foley Bros.*⁴⁹ and by ignoring the other sources of congressional intent to which the majority looked in *Foley Bros.* and its progeny. The Court then addressed the arguments put forth by the Solicitor General⁵⁰ on behalf of the EEOC, contending that Title VII was meant to be applied overseas. First, petitioners claimed that the words "employer" and "commerce" by themselves were sufficiently broad for Title VII to encompass the acts in question.⁵¹ Second, petitioners claimed that Title VII's "alien exemption" provision,⁵² which stated that the statute would not apply to employers who hired aliens outside of any state, clearly indicated that Title VII could be applied to U.S. employers who hired U.S. citizens outside of the United States.⁵³

The Court summarily rejected petitioners' first argument. Relying upon *Foley Bros.* and its progeny, the Court made clear that the broad language of U.S. labor laws must be tempered by policy concerns such as the avoidance of conflicts of law with other nations.⁵⁴ The Court stated that broad terms such as "employer" and "commerce," without more, are not enough to provide the bases for the extraterritorial application of U.S. labor laws.⁵⁵ Indeed, the Court stated that these "boil-

(1957)).

49. "In applying this rule of construction [the presumption against extraterritoriality], we look to see whether language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.* at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Justice Marshall criticized that "[t]he majority convert[ed] the presumption against extraterritoriality into a clear-statement rule in part through selective quotation." *Id.* at 263 (Marshall, J., dissenting).

50. The case was argued on behalf of the Bush administration by then-Solicitor General, Kenneth Starr, who recently replaced Robert Fiske as independent counsel in the Whitewater investigation of President and Hillary Clinton. See *Top Whitewater Prosecutor Replaced*, *Star Trib.*, Aug. 6, 1994, available in LEXIS, News Library, STRIB File.

51. *Aramco*, 499 U.S. at 248-49. See Labor-Management Reporting and Disclosure Act of 1959 [LMRDA], 29 U.S.C. § 402(a) (1988), for the definition of "commerce" incorporated into Title VII. See also 42 U.S.C. § 2000e(f) (Supp. V 1993) for Title VII's definition of "employer."

52. 42 U.S.C. § 2000e-1 (1988).

53. *Aramco*, 499 U.S. at 249-51.

54. "It [the presumption against extraterritoriality] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

55. "Petitioner's reliance on Title VII's jurisdictional provisions . . . finds no

er plate⁵⁶ terms must always be defeated by the presumption against extraterritoriality or the presumption will be left with no effect.⁵⁷

Next, the Court addressed petitioners' argument that the alien-exemption provision of Title VII⁵⁸ indicated a clear congressional intent for the extraterritorial application of Title VII.⁵⁹ Petitioners contended that a negative inference drawn from the alien exemption provision "clearly manifest[ed] an intention' by Congress to protect U.S. citizens with respect to their employment outside of the United States."⁶⁰ The provision states, in part, that Title VII "shall not apply to an employer with respect to the employment of aliens outside of any State."⁶¹ The Court rejected petitioners' argument in toto,⁶² fearing the policy ramifications of applying U.S. anti-discrimination statutes abroad.⁶³

Aramco's result is not particularly remarkable since there have been many cases where congressional authority has been confined to the territorial limits of the United States. What is notable and troubling about *Aramco* is the way in which its conclusion was reached. The Court ignored all of the usual material used to deduce congressional intent behind a statute

support in our case law; we have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad." *Id.* at 251.

56. *See id.* at 249-51 (stating boiler plate language never previously applied overseas is not enough to overcome presumption against extraterritoriality). The negative inference to be drawn from this statement is that boiler plate language that *has been* previously applied overseas may be enough to overcome the presumption against extraterritoriality.

57. "If we were to permit possible, or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption." *Id.* at 253.

58. 42 U.S.C. § 2000e-1 (1988).

59. *See Aramco*, 499 U.S. at 253-56 (discussing and rejecting petitioners' arguments that Title VII's alien exemption provision warranted negative inference that U.S. citizens are covered when employed by U.S. employers overseas).

60. *Id.* at 253.

61. *Id.* (quoting 42 U.S.C. § 2000e-1 (1988)).

62. *Id.*

63. The Court proclaimed that:

Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

Id. at 255.

and formulated a new clear statement standard.⁶⁴ It is the majority's break with precedent and inconsistency in applying its clear statement standard upon which the dissent focused.

2. The Dissent

The dissent, like the majority, framed the issue of whether Title VII applies abroad as a function of congressional intent.⁶⁵ The dissent also recognized that a presumption exists against the extraterritorial application of U.S. labor laws.⁶⁶ However, the dissent differed in its method of statutory interpretation, taking issue with the majority's newly-formed clear statement standard,⁶⁷ and ultimately concluded that Title VII was meant to apply extraterritorially.⁶⁸

The dissent performed an exhaustive analysis of the *Foley Bros.* decision and pointed to all of the various factors that the Court considered in that case when it determined that Congress did not intend the Eight Hour Law to apply overseas.⁶⁹ Justice Marshall pointed out that *Foley Bros.* stood for the proposition that "legislative history, statutory structure, and administrative interpretations" are all relevant when deducing whether Congress intended for a labor law to apply

64. "Congress' awareness of the need to make a *clear statement* that a statute applies overseas is amply demonstrated by the numerous occasions in which it has expressly legislated the extraterritorial application of a statute." *Id.* at 258 (emphasis added); see also *id.* at 257-58 (listing examples of Congress' amendment of statutes to apply extraterritorially).

65. "Like any issue of statutory construction, the question whether Title VII protects United States citizens from discrimination by United States employers abroad *turns solely on congressional intent.*" *Id.* at 260 (Marshall, J., dissenting) (emphasis added). Also this quote indicates that the dissent believes that this issue should be treated "[l]ike any issue of statutory construction" as opposed to the new, stricter standard that the majority has formulated. *Id.*

66. See *id.* at 261 (Marshall, J., dissenting) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

67. "But contrary to what one would conclude from the majority's analysis, this canon is *not* a 'clear statement' rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will." *Id.* at 261 (Marshall, J. dissenting).

68. "When these tools [other indications of congressional intent] are brought to bear on the issue in this case, the conclusion is inescapable that Congress *did* intend Title VII to protect United States citizens from discrimination by United States employers operating overseas." *Id.* (Marshall J., dissenting).

69. See *id.* at 261-63 (Marshall, J., dissenting). See also *supra* notes 26-38 and accompanying text.

extraterritorially.⁷⁰ The dissent concluded that “[t]he range of factors the Court considered in *Foley Bros.* demonstrates that the presumption against extraterritoriality is *not* a ‘clear statement’ rule.”⁷¹

Indeed, the dissent stated that the majority’s “drastic”⁷² clear-statement rule is inappropriate when determining the extraterritorial application of U.S. labor laws, but should only be used “to shield important values from an *insufficiently strong* legislative intent to displace them.”⁷³ Justice Marshall implied that the policy concerns focused upon when deciding extraterritoriality are not among the “important values” mentioned above.⁷⁴ The dissent then distinguished the *Benz*⁷⁵ and *McCulloch v. Sociedad Nacional de Marineros de Honduras*⁷⁶ cases, stating that both of those cases involved “the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic laws of another nation.”⁷⁷ The dissent concluded that “[n]othing nearly so dramatic is at stake when Congress merely seeks to regulate the conduct of United States nationals abroad.”⁷⁸

The dissent drew upon a much broader range of materials to determine congressional intent as to the extraterritorial application of Title VII. These materials included the legisla-

70. *Id.* at 263 (Marshall, J., dissenting).

71. *Id.* at 262 (Marshall, J., dissenting).

72. *Id.* at 263 (Marshall, J., dissenting).

73. *Id.* at 262 (Marshall, J., dissenting). Justice Marshall cited many cases which allegedly used the clear-statement rule “to shield important values from an *insufficiently strong* legislative intent to displace them.” *Id.* at 262-63 (citing *Webster v. Doe*, 486 U.S. 592, 601, 603 (1988)) (holding that congressional intent to preclude judicial review of constitutional claims must be clear to avoid a serious constitutional question that would arise if federal statutes were construed to deny any judicial forum for colorable constitutional claims); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985) (holding that Congress may abrogate states’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that where activity exercised by an American citizen is included in constitutional protection, the courts will not readily infer that Congress gave a government department unbridled discretion to grant or withhold it).

74. *See Aramco*, 499 U.S. at 263 (Marshall, J., dissenting) (stating that the clear-statement rule has never been used to “burden” congressional intent regarding extraterritoriality).

75. *Benz v. Compania Naviera Hildalgo*, 353 U.S. 138 (1957).

76. 372 U.S. 10 (1963).

77. *Aramco*, 499 U.S. at 265 (Marshall, J., dissenting).

78. *Id.* (citations omitted).

tive record⁷⁹ and administrative interpretations of the EEOC.⁸⁰ The dissent not only noted the majority's inconsistency with *Foley Bros.* and its progeny, but also pointed out internal inconsistencies within the majority's opinion itself. If a clear statement by Congress is the only element that is able to overcome the presumption against extraterritoriality, then why did the Court expend so much energy looking for provisions for conflicts of law with other nations?⁸¹ Along the same lines, why did the Court pay such careful attention to the EEOC interpretations of Title VII⁸² and refute them as being "inconsistent"?⁸³ If Congress had made a statutory provision for the conflict of laws, it would seem that such a provision would fail the majority's clear statement test. Even less persuasive would be a consistent, thorough, and reasonable EEOC interpretation in light of the strength with which the majority credited the presumption against extraterritoriality.⁸⁴

A problem with the dissent's analysis, putting it at odds with relevant caselaw, is its interpretation of Title VII's broad jurisdictional language. To begin with, the dissent characterized the presumption against extraterritoriality as "weak."⁸⁵ In light of the way that the presumption has been articulated in every case from *Charming Betsy* to *Foley Bros.* and its prog-

79. *Id.* at 272 (Marshall, J., dissenting).

80. *See id.* at 274-77 (Marshall, J., dissenting) (stating that EEOC interpretations of Title VII support extraterritorial application).

81. *See id.* at 256 ("It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the *subject of conflicts with foreign laws and procedures.*") (emphasis added).

82. *See id.* at 256-59 (explaining why the EEOC's construction of Title VII was "insufficiently weighty to overcome the presumption against extraterritorial application").

83. The grounds upon which the majority rejected the EEOC's Title VII interpretation are particularly troubling in light of their supposed clear statement rule. The majority examined the amount of deference that should be accorded an administrative agency like the EEOC and concluded that such deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 257 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976)). The majority should not have had to evaluate even a single one of these factors if all that mattered in this area is the plain wording of the statute. *See supra* note 4 and accompanying text.

84. These inconsistencies are not only an internal problem for this decision but may have caused confusion among the circuits in *Pico* and *Dowd* that is the subject of this Note, and will be discussed more fully later.

85. *EEOC v. Aramco*, 499 U.S. 244, 265-66 (1991) (Marshall, J., dissenting).

eny, this characterization does not appear to be accurate. What the dissent may have been trying to say is that since it would allow a wider range of indications of congressional intent to defeat the presumption, its reading of the presumption is somewhat weaker than the majority's. While the presumption against extraterritoriality may not be as great an obstacle as the majority makes it out to be, with its newly articulated clear statement rule, it is anything but weak.

The weakness of the dissent's analysis lies in its statement that the "terms [of Title VII] are broad enough to encompass discrimination by United States employers abroad. Nothing in the text of the statute indicates that the protection of an 'individual' from employment discrimination depends on the location of that individual's workplace"⁸⁶ According to this statement, any statute passed by Congress, not specifying that it was solely for domestic application, could be applied extraterritorially—the complete antithesis of the presumption against extraterritoriality. While this quotation may be hyperbolic on the dissent's part in its opposition to the majority's overly-restrictive clear statement rule, it does point out a conflict with previous caselaw, and a logical inconsistency in the dissent's approach.

Also important in the dissent's Title VII interpretation are the policy concerns with which it did *not* concern itself. Purporting to be free of any foreign policy or conflict of laws concerns, the dissent felt that the United States was well within its rights to regulate U.S. corporations and the way they treat U.S. citizens abroad.⁸⁷ While it did not explicitly say so, the dissent may have been concerned with protecting U.S. citizens from discrimination based on race, religion, or national origin when employed by U.S. companies abroad. Without having to worry about foreign policy concerns, what policy concern could be more compelling? Indeed, though again not explicitly stated, perhaps the dissent was subordinating the comity concerns that are so central to the presumption against extraterritoriality, to the policy concerns that militate against discrimination. What is troubling about this latter scenario is that the dissent

86. *Id.* at 266 (Marshall, J., dissenting).

87. *Id.* at 274 (Marshall, J., dissenting).

may be trying to balance competing policy concerns that would better be left to the people's congressional representatives.

The *Aramco* dissent foreshadowed the confusion that the majority decision would engender in the lower courts in two ways. First, the dissent highlighted the majority's conflict with earlier decisions, especially its selective quotation of *Foley Bros.*,⁸⁸ which has never been overruled. The dissent also exposed the majority's internal inconsistencies when it mentioned the other sources of legislative intent that the majority had discussed, exceeding the breadth of its own clear statement rule.⁸⁹ These problems would manifest themselves in split decisions by the Second and Eleventh Circuits regarding extraterritoriality the year following the *Aramco* decision.

B. Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.

The *Pico* case involved a union organized under the laws of South Korea and made up wholly of South Korean nationals.⁹⁰ The union wanted to sue the U.S. parent company of the wholly-owned Korean subsidiary by which the union members were employed for contract violations by the subsidiary under the Labor Management Relations Act (LMRA).⁹¹ The portion of the LMRA that addressed the issue of jurisdiction provided, in pertinent part, that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, . . . without regard to the citizenship of the parties."⁹² The Second Circuit reversed a New York Court of Appeals decision allowing adjudication of the suit,⁹³ and held that the dispute between the South Korean union and the U.S. parent company, Pico Products, Inc., could not be settled under U.S. law.⁹⁴

88. *Id.* at 266 ("The majority converts the presumption against extraterritoriality into a clear-statement rule in part through selective quotation.").

89. *See id.* at 271 (Marshall, J., dissenting).

90. *Labor Union of Pico, Ltd. v. Pico Products, Inc.*, 968 F.2d 191, 192 (2d Cir. 1992).

91. *Id.* at 192-93; Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1988).

92. 29 U.S.C. § 185(a) (emphasis added).

93. *Filardo v. Foley Bros., Inc.*, 297 N.Y. 217 (1948).

94. *Pico*, 968 F.2d at 193.

The *Pico* court began its analysis by examining the broad language of the statute quoted above and determined that the issue of this case was whether Congress intended this sort of labor contract to be covered by section 301 of the LMRA.⁹⁵ The court then quoted *Foley Bros.*⁹⁶ for the presumption against extraterritoriality and *Aramco* for the proposition that the plaintiff carries the burden of showing that Congress intended the statute to apply abroad.⁹⁷ First, the court quickly disposed of plaintiff's contention that the phrase "without regard to citizenship," in section 301 of the LMRA, alone gave the court jurisdiction.⁹⁸ The court found that this language was simply an affirmation of federal question jurisdiction over the dispute only when section 301 had been "triggered."⁹⁹ The court's methodology very much resembled the way that the *Aramco* court dealt with the boiler plate language of Title VII.¹⁰⁰ The *Pico* court came to the same conclusion regarding this type of language when it stated that it "does not overcome the broad presumption against extraterritorial application of federal law."¹⁰¹

Next, the court addressed plaintiff's argument that the work performed by the employees represented by the South Korean union may "affect commerce" within the meaning of section 301 so as to provide for the extraterritorial application of the LMRA.¹⁰² Here, the court cited *Aramco* for the idea that boiler plate language may not overcome the presumption against the extraterritorial application of U.S. labor laws.¹⁰³ The court gave policy concerns as its motivation for construing the LMRA not to apply to this situation, saying to do otherwise "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice."¹⁰⁴ In this way, the

95. *Id.*

96. *Id.* at 194 (citing *Foley Bros.*, 336 U.S. at 285).

97. *Id.* at 194 (citing *EEOC v. Aramco*, 499 U.S. 244, 249 (1991)).

98. *Id.* at 194.

99. *Id.* "In other words, when it is triggered § 301 provides federal question jurisdiction. The question before us is the threshold one: was § 301 triggered in this case." *Id.*

100. See *supra* notes 56-57 and accompanying text.

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

102. *Id.* at 195.

103. *Id.* at 195 (citing *EEOC v. Aramco*, 499 U.S. 244, 249-51 (1991)).

104. *Id.* at 195 (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963)).

Pico court remained truer to the policy concerns of *Foley Bros.* and its progeny.

However, the *Pico* case is more remarkable for what it did not address than what it did. That is to say, the analysis of the *Pico* court was restricted to the face of the statute.¹⁰⁵ There was no examination of administrative interpretations, legislative history, or the scheme of the act—all of which figured prominently in *Foley Bros.* and its progeny prior to *Aramco*. Here, in contrast to the *Foley Bros.* line of cases, all the court considered were the policy reasons behind the presumption against extraterritoriality and the plain wording of the statute. In this way, *Pico*, decided one year after *Aramco*, exemplified the strict application of the clear statement rule the *Aramco* court had formulated.

C. *Dowd v. International Longshoremen's Association*

The *Dowd* case was much more complex than *Pico* and involved significantly more conduct on American soil. *Dowd* addressed the issue of whether a provision of the National Labor Relations Act (NLRA)¹⁰⁶ that prohibits secondary boycotts¹⁰⁷ should apply where an American longshoremen's union had persuaded its Japanese counterpart to threaten to refuse to unload cargo ships loaded in the United States by non-union labor.¹⁰⁸ The court affirmed an injunction against the Inter-

105. "If Congress wants federal courts to enforce collective bargaining agreements between foreign workers and foreign corporations doing work in foreign countries according to the body of labor law developed pursuant to § 301, such legislative purpose must be made unmistakably clear. *The statute evinces no such purpose.*" *Id.* (emphasis added).

106. 29 U.S.C. §§ 151-169 (1988).

107. *Id.* at § 158(b)(4)(ii)(B) (1988). Section 158(b) provides in pertinent part that:

[i]t shall be an unfair labor practice for a labor organization or its agents . . . (4)(ii) to threaten, coerce, or restrain *any person engaged in commerce* or an industry *affecting commerce*, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other . . . person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Id. (emphasis added).

108. *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779, 781-83 (11th

national Longshoremen's Association (ILA) issued by the district court,¹⁰⁹ finding the existence of an unfair business practice as defined in the NLRA.¹¹⁰ Though there were several issues in *Dowd*, it is only the ILA's contention that there was no jurisdiction under which to apply the anti-"secondary boycott" that will be addressed here. The ILA made this claim because the acts of which plaintiff complained did not occur within the territorial limits of the United States but in Japan.¹¹¹

The ILA advanced a simple territorial¹¹² argument which, in short, stated that because the alleged secondary boycott occurred in Japan, by and among Japanese nationals, the boycott was beyond the scope of the NLRA.¹¹³ Responding to this argument, the court summarized the basic history of the presumption against extraterritoriality citing *Foley Bros.* and its progeny.¹¹⁴ Arriving at the same conclusion as *Aramco*, *Foley Bros.*, and all of the cases mentioned above, the *Dowd* court stated that whether the NLRA would be applied extraterritorially in this instance was purely a question of congressional intent.¹¹⁵

The *Dowd* court's loose interpretation of *Aramco* is particularly notable in light of the strict rule that *Aramco* had supposedly established. The *Dowd* court wrote: "The Court [in *Aramco*] held that Title VII focuses purely upon domestic employment relationships and that the structure of the statute did not suggest that Congress intended to regulate the termination of an American citizen by an American employer where the employee worked and was discharged in Saudi Arabia."¹¹⁶ The *Dowd* court thus glossed over *Aramco*'s clear statement rule and looked to such things as the "focus," "structure," and "suggestions" of Title VII—things the *Aramco* Court did not consider. Reading *Aramco* broadly, the *Dowd* court allowed

Cir. 1992).

109. *Dowd v. International Longshoremen's Ass'n*, 781 F. Supp. 1565 (M.D. Fla. 1991).

110. See *Dowd*, 975 F.2d at 781.

111. *Id.* at 783.

112. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(a) (1987).

113. *Dowd*, 975 F.2d at 787. The ILA cited *Aramco* to support this territorial argument.

114. *Id.* at 787-88.

115. *Id.* at 787.

116. *Id.* at 787-88 (citing *EEOC v. Aramco*, 499 U.S. 244, 245 (1991)) (emphasis added).

itself considerable maneuverability regarding the policy considerations it would address in its decision.

While the above reading of *Aramco* seems to fly in the face of that case's clear statement rule, perhaps the confusion of that decision alluded to earlier played a part in the *Dowd* court's interpretation.¹¹⁷ Though not cited in *Dowd*, perhaps the mention of the lack of preparation for conflicts of law¹¹⁸ or the analysis of EEOC interpretations¹¹⁹ in *Aramco* sufficiently confused the *Dowd* court so that it was able to read that decision broadly. One can speculate that perhaps the *Dowd* court placed the policy of protecting innocent third parties from secondary boycotts above the comity concerns that figured so prominently in the decisions from *Foley Bros.* to *Aramco*.

The *Dowd* court distinguished cases such as *Benz* and *McCulloch*, in part, by stating that the policy concerns present in those cases simply were not present in the case at bar.¹²⁰ Instead the *Dowd* court took a decidedly instrumentalist approach, primarily concerned with achieving an equitable result. The *Dowd* court stated that it would be "unsophisticated" to allow an American union to get away with violating the NLRA simply because it persuaded a foreign proxy to do its bidding.¹²¹ The court looked to the evil that the NLRA was designed to remedy and determined that Congress intended "to protect persons *in commerce* from a secondary boycott."¹²² Purporting to be free of the policy concerns of *Foley Bros.* and its progeny, as well as *Aramco*, the *Dowd* court did not even address the broad "in commerce" term of the NLRA that was of such central importance in previous cases.¹²³ The broad congressional objective of preventing secondary boycotts against innocent parties seemed to provide all the justification that the

117. "The longstanding tradition of restraint in applying the laws of this country to ships of a foreign country—a tradition that lies at the heart of *Benz* and every subsequent decision—therefore is irrelevant in this case." *Id.* at 788 (citing *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 221 (1982)).

118. See *supra* note 6.

119. See *supra* note 7.

120. See *Dowd*, 975 F.2d at 788-89.

121. "ILA would have us hold that conduct occurring outside the geographic boundaries of the United States may not be reached by the NLRA, without regard to the origin of the actors or the intent and effect of the conduct." *Id.* at 788.

122. *Id.* at 789 (emphasis added).

123. See, e.g., *supra* notes 47-54 and accompanying text.

court needed to conclude that the NLRA applied extraterritorially.¹²⁴

The *Dowd* court buttressed its policy analysis by focusing on the intent and effect of the defendant's conduct.¹²⁵ This intent and effect doctrine allows a court to exercise jurisdiction outside of U.S. territorial limits if an actor intended the unlawful effect of his conduct to occur within the United States.¹²⁶ The court also applied a theory which holds that conduct *substantially* occurring within the geographic territory of the United States may be subject to American jurisdiction.¹²⁷ This latter analysis went so far as to characterize the situation in *Dowd* as domestic as opposed to extraterritorial. The use of this theory may be a further attempt by the court to distinguish the case at bar from those which had previously articulated and applied the presumption against extraterritoriality. In this way, the court became free to achieve what it believed was a just result despite the presumption against extraterritoriality.¹²⁸

D. Analysis

A comparison of *Pico* and *Dowd* reveals the types of confusion that the *Aramco* decision engendered in the Circuit Courts of Appeal. The first difference is the way in which the two courts addressed the policy concerns inherent in the extraterritorial application of U.S. laws. A second difference is the way the courts viewed the consequences of their respective exercises of jurisdiction over their cases. While *Dowd* looked to the result that was to be achieved by its exercise of jurisdiction for any foreign policy conflicts, *Pico* said the exercise of such jurisdiction should be avoided regardless of the result precisely due to the policy concerns associated with the presumption against extraterritoriality. Finally, both courts differed in their charac-

124. "Since the object and effect of the conduct in question was to implement a secondary boycott within the United States, we do not believe the location of that conduct is determinative." *Dowd*, 975 F.2d at 790.

125. See *id.* at 789-90; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

126. *Id.* § 402 cmt. d.

127. *Id.* § 402(1)(a).

128. The *Dowd* court also points out that the impact of this decision is upon a domestic union that is subject to domestic jurisdiction anyway. *Dowd*, 975 F.2d at 788.

terizations of their respective cases. *Pico* explicitly stated that the dispute at hand was of a predominantly foreign nature, while *Dowd* made very sure that its exercise of jurisdiction was proper by attempting to characterize the case at bar as a territorial one.

Dowd took a different approach than both *Pico* and *Aramco* to the policy concerns associated with the presumption against extraterritoriality. The court began by framing the issue of whether a violation of the NLRA had occurred as one of "purpose" and "effect" to cause a secondary boycott within the territory of the United States.¹²⁹ The court stated that the geographic location where the conduct occurred was not as important as "the origin of the actors or the intent, or effect, of the conduct."¹³⁰ Looking to cases such as *Benz*, the *Dowd* court concluded that the policy concerns that figured prominently in those cases were not present in the case before it.¹³¹

Pico's approach to the policy concerns associated with the presumption against extraterritoriality differs in several important ways from *Dowd*. *Pico* asserted that the plain wording of the statute may have allowed jurisdiction absent the policy concerns present when applying a law extraterritorially.¹³² When interpreting the broad language of a statute, the *Pico* court revealed its sensitivity to foreign policy concerns when it expressed its concern that "[i]n the present 'global economy' ever-expanding trade makes it increasingly possible that foreign industry might affect commerce 'between [a] foreign country and any State.'"¹³³ However, just because these foreign industries may affect U.S. commerce, the court stated that

129. *Id.* at 781.

130. *Id.* at 788.

131. *Id.* ("The *Benz* cases do not represent generally applicable boundaries of commerce, but instead a judgment that Congress did not intend to interfere with the internal operation of foreign vessels."); see *EEOC v. Aramco*, 499 U.S. 244, 261 (1991) (Marshall, J., dissenting).

132. As the *Pico* court stated:

A rigid and literal reading of this provision might permit the instant action to lie. But since the extraterritorial application of our laws is not favored because such may readily lead to inadvertent clashes with the laws of other nations, we cannot presume Congress intended a Korean labor contract to come within § 301's compass.

Labor Union of Pico Korea, Ltd. v. Pico Products, Inc., 968 F.2d 191, 192 (2d Cir. 1992) (emphasis added).

133. *Id.* at 195 (quoting 29 U.S.C. § 152(6) (1988)).

jurisdiction must be declined because "constru[ing] § 301 as governing collective bargaining agreements in such an industry 'would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.'"¹³⁴

While the *Pico* court looked to the means of obtaining jurisdiction for any foreign policy conflicts, the *Dowd* court focused on the result that exercising such jurisdiction would have. According to *Dowd*'s analysis, no harm would be done as long as an American entity was being regulated.¹³⁵ If one were to use the *Pico* analysis, a *Dowd*-like result would have been likely since the plaintiff in *Pico* sought relief against two American parent companies. The difference in policy assessments between the two courts—one that looks at means, the other that looks at ends—may possibly be attributed to the *Aramco* decision which failed to clarify exactly which judicial practice offends foreign policy concerns—the means of achieving jurisdiction over a foreign act or the result of regulating a foreign entity. If it is the former, then the *Dowd* court is clearly wrong in exercising jurisdiction over this act that occurred substantially outside of U.S. territory. However, if it is the latter, then both *Pico* and *Aramco* are flawed since the results achieved would have fallen upon American entities.

It was the alleged freedom from these policy concerns that allowed the *Dowd* court to reach what it believed to be a just result, while the presence of these policy concerns precluded the *Pico* court from even reaching the issue. The *Aramco* court paid little attention to the underlying controversy in that case, a Title VII discrimination suit where the employer was accused of egregious conduct, and focused almost exclusively upon the policy concerns associated with the presumption against extraterritoriality.¹³⁶ Similarly, the *Pico* court's only mention of the underlying dispute was in its summary of the district

134. *Id.* (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963)).

135. The *Dowd* court stated that the issue of whether it had jurisdiction over the Japanese unions involved in the case was not before it. However, had it been, it seems rather clear that these unions *would* have fallen under the jurisdiction of U.S. federal courts according to its "purpose and effect" analysis. See *Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779, 790 n.10 (11th Cir. 1992).

136. *EEOC v. Aramco*, 499 U.S. 244, 245 (1991) (limiting mention of underlying controversy to perfunctory summary of facts as alleged in plaintiff's complaint).

court's findings of fact.¹³⁷ The fact that the defendant in that case was owned by an American parent company was not deemed relevant to the consideration of whether that collective bargaining agreement was to fall under § 301 of the LMRA.¹³⁸

In contrast, the nature of the dispute in *Dowd* figured very prominently in that court's evaluation of the jurisdictional issue. The *Dowd* court stated that a U.S. union could not avoid the penalties of U.S. law simply by soliciting a foreign entity to do its bidding.¹³⁹ Once the court had determined that the purpose and effect of the conduct occurring outside U.S. borders was to improperly influence a primary labor dispute *within* the United States, the *Dowd* court stated that the NLRB, by issuing its injunction, was simply trying to halt the evil that the statute was designed to remedy.¹⁴⁰ Focusing on the underlying dispute and looking to the practical result of its decision, the *Dowd* court achieved what it deemed a just result, though in the same situation the *Aramco* and *Pico* courts may have found jurisdiction lacking, regardless of the result to be achieved in those cases.

The *Pico* and *Dowd* courts differed in the characterizations of their respective underlying disputes. The *Pico* court made it exceedingly clear that this dispute was of a foreign nature with the bulk of the acts of which plaintiff complained having been committed upon foreign soil.¹⁴¹ In contrast, *Dowd* attempted to show that the underlying dispute of its case could arguably be considered territorial.¹⁴² One may wonder why the *Dowd* court needed to make this argument since it had so convincingly stated that it had jurisdiction over the act under the "purpose and effect" doctrine. Perhaps the court was trying to shield itself from reversal by leaving an alternate ground upon which to decide the case.

137. *Pico*, 968 F.2d at 192-93.

138. *Id.* at 194.

139. *Dowd*, 975 F.2d at 789-90.

140. *See id.* at 789.

141. *See Pico*, 968 F.2d at 192-93.

142. *See Dowd*, 975 F.2d at 789.

III. CONCLUSION

With the collapse of Communism, the emergence of viable Third World markets, and the expansion of regional and world free trade agreements, the extraterritorial application of U.S. labor laws will continue to become a much more prominent problem than it already is today. Congress should have the final say on what competing policy interests should prevail in this sensitive area because it is the most politically accountable branch of our government. It would be a terrible mistake for the judiciary to decide when to apply U.S. labor laws extraterritorially because it lacks accountability to American workers and businesses alike, as well as the resources needed to evaluate which competing interests should prevail in this area. In this way, the *Aramco* clear statement standard is necessary, viable, and workable.

The logical inconsistencies in *Aramco* that have caused a conflict among the circuit courts of appeal are not the only problems apparent in that decision. As long as the Supreme Court purports to follow precedent, it will continue to cause inconsistent interpretations and applications of its clear statement standard. The Court should be forthcoming and state that it has modified *Foley Bros.* and its progeny by requiring congressional intent to apply a law extraterritorially to explicitly appear on the face of the statute. The Court should also remain true to its clear statement rule and limit its examination of congressional intent solely to the face of the statute. Until the Court does so, there will continue to be dissension among the ranks of the federal courts.

This dissension will only prove a disservice to American labor and industry. Workers will not clearly know what their rights are while employed by U.S. businesses abroad and American businesses will not be certain as to what their obligations are under U.S. law. This uncertainty will cause instability for American workers and businesses alike at a time when certainty and stability are needed so that Americans can make better cost evaluations in deciding whether to go abroad in the first place. Adding stability to these cost evaluations will help U.S. businesses compete in an ever more demanding world market while informing American workers of their rights when abroad.

The clear statement standard should be maintained by the Supreme Court because it makes the most politically accountable branch—the legislature—responsible for making law in this sensitive area. Judicial activism will only work a hardship on American businesses and workers by adding to the uncertainty behind U.S. labor laws as well as having the potential to create foreign policy problems for the United States. The judiciary lacks the requisite power to decide what competing policies should prevail in U.S. business and labor relations abroad. Whether these competing interests are lower costs of doing business versus social concerns for American workers or American intervention in another country's affairs versus foreign policy restraint, the legislative branch has the necessary resources and jurisdiction to hear both sides of these controversies and decide which should prevail. Anything less would remove this area of law from the most politically accountable branch of our government (the legislature) to the least (the judiciary) in an area where American workers and corporations, not American jurists, most need to be heard.

James Mathieu