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Extraterritorial Application of Federal Labor Laws: Congress's Flawed Extension of the ADEA

Multinational enterprises (MNEs) make foreign investments to develop foreign markets, acquire tariff benefits or other forms of protection, obtain cost advantages, and procure raw materials. These efforts result in a flow of people, goods, capital, and information across national boundaries. Multinational enterprises raise standards of living in underdeveloped countries, and help create friendly economic and political partners for their home countries.

The prosperity and employment opportunities delivered by MNEs, however, may be coupled with economic domination. Multinational corporations may also have the capacity to operate outside the reach of

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2. Smith, supra note 1, at 37-38.


4. Id.

5. See Model, The Politics of Private Foreign Investment, 45 FOREIGN AFF. 639, 647 (1967). Model stated:

Too often, the U.S. branches and subsidiaries constitute a sort of technological enclave—foreign-owned, foreign-managed, and foreign-directed—in an economy that remains essentially primitive. Some less-developed countries believe that these enterprises have done less than they could or should to foster . . . a broad and balanced economy. They want the industries that foreign investment has brought to them. But they also want to integrate them with their own economies. They want the business policies of U.S. branches and subsidiaries to be in harmony with national economic, social, and political objectives. They want their own nationals to participate in the ownership, to provide executives and technicians and to have a significant say in the management decisions and policies.
any one nation's jurisdiction. From the view of sovereign governments, "this presumed capacity becomes a critical problem when the global reach is used . . . [to circumvent] the policies of particular nations." Accordingly, some countries "extend the extraterritorial reach of their national jurisdictions, particularly those that see their national policies frustrated by multinational corporations."

The use of extraterritorial jurisdiction may create political problems. One nation's unwarranted extraterritorial actions may intrude into another's domestic affairs, thereby challenging the other nation's sovereignty. The United States mandates extraterritorial in the direction of foreign-owned enterprises. These countries are not asking too much, and they will not be satisfied with less.

Id. In addition, MNEs choose particular host countries not because they desire to aid in economic development, but for profit-motivated reasons. It is, therefore, not unlikely that they will push constantly, everywhere they operate, toward the lowest attainable level of social responsibility; the international transfers they seek will be those that are the least burdensome to them and the most disadvantageous to their workers. They will try to play off national groups of workers against each other in mutually destructive competition for employment opportunities that undermines existing labor standards and retards improvement of standards.

Weinberg, Multinationals and Unions as Innovators and Change Agents, in Banks & Stieber, supra note 1, at 104.


6. Gotlieb, Extraterritoriality: A Canadian Perspective, 5 Nw. J. Int'l L. & Bus. 449, 451 (1983); see also Corcoran, The Trading with the Enemy Act and the Controlled Canadian Corporation, 14 McGill L.J. 174 (1968). In instances where multinationals manufacture goods that are heavily regulated by the nation having jurisdiction over the parent company, that nation will likely pressure the parent to ensure compliance by all its international subsidiaries. This avenue "avoid[s] the appearance of an invasion of jurisdictional sovereignty, inducing [foreign] compliance by pressure on United States parents." Id. at 206. But see Model, supra note 5, at 646 ("An American company with direct investments in a foreign country is subject to the laws of the United States as well as those of the country in which it operates. It has, therefore, a dual loyalty.").

7. Gotlieb, supra note 6, at 451.


10. Id. at 1308-10, 1315-21. For example, the Soviet pipeline sanctions of 1982 placed severe restrictions on American-based multinationals trading with the Soviet Union, their overseas subsidiaries, as well as foreign corporations receiving American goods or producing goods under contract from American companies. See id. at 1309. Many European nations refused to tolerate the sanctions' encroachment on sovereign jurisdiction and ordered their companies not to comply with the directive, even
in the face of swift penalties. Id. at 1309-10. The result was a flood of international litigation involving the validity of the United States’ extraterritorial assertion. See generally Atwood, The Export Administration Act and the Dresser Industries Case, 15 LAW & POL’LY INT’L BUS. 1187 (1983); Marcus, Soviet Pipeline Sanctions: The President’s Authority to Impose Extraterritorial Controls, 15 LAW & POL’LY INT’L BUS. 1169 (1983); Zaucha, The Soviet Pipeline Sanctions: The Extraterritorial Application of U.S. Export Controls, 15 LAW & POL’LY INT’L BUS. 1169 (1983).

11. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982 & Supp. III 1985); Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 1 note, 6a, 45(a)(3) (1982); see also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706, 714 (1962) (“A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries,” where “the conspiracy was laid in the United States . . . respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.”); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291 (3d Cir. 1979) (“Neither the [Sherman Antitrust] Act nor its legislative history gives any clear indication of the scope of the extraterritorial jurisdiction conferred . . .; however, the Supreme Court has made it clear that ‘foreign commerce’ applies to importing, exporting, and other commercial transactions between the United States and a foreign country. Acts and agreements occurring outside the territorial boundary of the United States that adversely and materially affect American trade are not necessarily immune from United States antitrust laws.”) (footnote omitted); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 817 (D.C. Cir. 1968) (“It is plain that where American foreign commerce is affected foreigners may be held under our antitrust laws for restraints thereon. It is also significant . . . that the trade not only has significant contacts and nexus with the United States but also is the province of American concerns.”) (footnotes omitted); In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979) (order compelling discovery production against all but two defendants, acting in concert to violate the antitrust provisions of the Sherman Act for documents located in foreign countries). But see Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 582 (1986) (“Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations’ economies.”) (emphasis added). See generally Hood, The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography, 15 VAND. J. TRANSNAT’L L. 765 (1982).

12. Securities Exchange Act of 1934, 15 U.S.C. §§ 77a-77aa (1982 & Supp. III 1985); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1982 & Supp. III 1985); see also Des Brisay v. Goldfield Corp., 549 F.2d 133, 135 (9th Cir. 1977) (“[T]he fact that an allegedly improper transaction occurred outside the United States or involved parties other than United States citizens has been held not to defeat subject-matter jurisdiction [of the Securities Act], where the securities involved in the transaction were registered and listed on a national exchange and the effect of the foreign transaction adversely affected buyers, sellers and holders of those securities.”) (citations omitted); Travis v. Anthes Imperial Ltd., 475 F.2d 515, 524 (8th Cir. 1973) (“[Sub]ject-matter jurisdiction attaches whenever there has been significant conduct with respect to the alleged violations in the United States. And this is true even though the securities are foreign ones that had not been purchased on an American exchange. Thus, the essential issue is whether the defendants’ conduct in the United States was of such significance to subject them to the jurisdiction of the District Court.”) (citations omitted); Recaman v. Barish, 408 F. Supp. 1189 (E.D. Pa. 1975) (allegedly improper foreign securities transactions must meet either the objective territorial principle, subjective territorial principle, or the impact test before such transaction can have sufficient connection or interest with United States for American securities laws to attach). For a discussion of § 30(b) of the Securities
and export control,\textsuperscript{13} justifying this reach on several policy grounds, ranging from protecting national security interests to regulating domestic business.\textsuperscript{14}

United States labor laws, however, have generally been an exception to extraterritorial application.\textsuperscript{15} This policy recognizes the legitimacy of local control over employment relationships within a foreign sovereign's territorial boundaries.\textsuperscript{16} In 1984, however, Congress deviated from this policy when it amended the Age Discrimination in Employment Act (the ADEA),\textsuperscript{17} extending the statute's reach beyond the territorial limits of the United States, thereby protecting U.S. citizens working abroad from arbitrary age discrimination.\textsuperscript{18} The ADEA binds all U.S. employers, including U.S. citizens, U.S. corporations, and foreign corporations under the control of U.S. interests.\textsuperscript{19} Whereas, several courts previously refused to apply the pre-amendment ADEA extraterritorially in the absence of congressional intent,\textsuperscript{20} the courts

\begin{itemize}
\item \textsuperscript{14} Jennings, \textit{The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes}, 2 GA. J. INT'L & COMP. L. 35, 37 (Supp. 2, 1972) ("From the point of view of the United States any state has a right to defend its own economy from invasion by foreign businesses that do not conform to the standards and practices required by United States law.").
\item \textsuperscript{15} See infra notes 55-76 and accompanying text.
\item \textsuperscript{16} Id.
\item \textsuperscript{18} See infra note 77 and accompanying text.
\item \textsuperscript{19} See infra notes 79-80 and accompanying text.

\textit{Zahourek} involved a 43-year-old accountant who, at the time of his employment termination in March, 1981, was a U.S. citizen working for defendant company in Honduras. Plaintiff alleged that he was terminated after requesting a transfer back to the United States. In affirming the district court's dismissal of his ADEA action, the Tenth Circuit held that "the denial of a transfer within the company of an employee working in a foreign country is not covered by the ADEA" because even if remotely involving the United States, at the time of the request the "work place" at which plaintiff's services were being performed was not within U.S. jurisdiction. \textit{Zahourek}, 750 F.2d at 829.

\textit{Cleary} was the first definitive statement regarding the non-applicability of the ADEA to U.S. citizens employed outside of the country by American employers. The case involved a 64-year old plaintiff who was terminated from his position in England
must now resolve whether the post-amendment ADEA applies extraterritorially.

Notwithstanding its noble intent, the 1984 ADEA amendment represents poor legislating. It verges on legal imperialism—the unilateral act of an economically and politically powerful nation applying its laws to conduct abroad, regardless of other nations' interests. By pushing American principles beyond the limits of enforcement, the amendment has unfortunate legal and practical implications.

This Article questions the extraterritorial application of U.S. labor standards in general, and, in particular, the wisdom of the 1984 amendment extending coverage of the ADEA to overseas conduct. The Article first surveys the bases of extraterritorial jurisdiction. It then analyzes the ADEA amendment's legislative history, which suggests an absence of clear congressional intent to apply the amendment extraterritorially. The Article evaluates both the legal and practical international implications of the ADEA amendment in light of past extraterritorial regulatory efforts. Finally, this Article argues that the United States should not afford extraterritorial effects to protective labor legislation.

I. Extraterritorial Jurisdiction and Federal Law

A. Origins and Development

riority controversy developed primarily in the context of economic legis-
lation, the policy considerations and jurisdictional theories apply equally
to labor law.22

1. Jurisdiction Based on Territoriality

Three basic theories support judicial jurisdiction at home and abroad:
territoriality, objective territoriality, or the “effects” principle, and
nationality.23 The territoriality theory grants a sovereign jurisdiction
over all conduct that occurs within its borders.24 Physical control over
the geographical area, not the character or effect of the conduct, creates
the basis for jurisdiction.25

Chief Justice Marshall described the territoriality principle as early
as 1812:

The jurisdiction of the nation within its own territory is necessarily
exclusive and absolute. It is susceptible of no limitation not imposed by
itself. Any restriction upon it, deriving validity from an external source,
would imply a diminution of its sovereignty to the extent of the restric-
tion, and an investment of that sovereignty to the same extent in that
power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation
within its own territories, must be traced up to the consent of the nation
itself.26

Prior to 1945, U.S. courts generally used the territoriality principle to
limit their power when applying federal law. The leading application of
this principle occurred in the 1909 case of American Banana Co. v. United

41-44 (1982 & Supp. III 1985); the National Environmental Policy Act of 1969, 42
1127 (1982 & Supp. III 1985). For background information, see generally Note,
“The NEPA-Abroad” Controversy: Unresolved by an Executive Order, 30 BUFFALO L.
REV. 611 (1981) (examining the extraterritorial application of the National Environmental
(analyzing the extraterritorial application of the Foreign Corrupt Practices Act);
Note, Discretion and the Nuclear Regulatory Commission: The Need to Assess Foreign Environ-
mental Effects of American Nuclear Exports, 19 STAN. J. INT’L L. 477 (1983) (examining the
extraterritorial application of U.S. environmental law).

22. See infra notes 55-76 and accompanying text.

23. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES
§ 10 (1965); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 402 comments c,

24. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES
§§ 10-25 (1965); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 402 com-
ment c (Tent. Final Draft 1985).

25. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES
§§ 10-25 (1965); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 402 com-
ment c (Tent. Final Draft 1985).

The Supreme Court held that U.S. antitrust laws failed to extend to American companies engaging in allegedly monopolistic conduct in a foreign country. In *American Banana*, the plaintiff and the defendant, both American corporations involved in the banana trade, became embroiled in a dispute over the defendant’s acts in Central America. Justice Holmes, writing for the Court, found that American courts could not apply U.S. antitrust laws to actions occurring in other nations. Holmes based his opinion on the territoriality principle:

> 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. . . . 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.

The foregoing consideration would lead in case of doubt to a construction of any statute . . . as confined in . . . effect to the territorial limits over which the lawmaker has general and legitimate power.

Holmes then cited a line of authority, holding that “[a]ll legislation is *prima facie* territorial.”

### 2. Jurisdiction Based on Objective Territoriality: The “Effects” Principle

The United States adopted the objective, or “effects” basis for jurisdiction in 1945. The United States Court of Appeals for the Second Circuit, in deciding *United States v. Aluminum Co. of America* (*Alcoa*), questioned the soundness of *American Banana*’s territorial principle. The defendant, Alcoa, had organized a Canadian corporation through which it joined a Swiss aluminum cartel that controlled the amount of aluminum delivered to the United States, in violation of the Sherman Act.

Judge Learned Hand, writing for the court, stated that the federal courts held jurisdiction over the defendant. Judge Hand found the
domestic effects of the foreign conduct, rather than its situs, controlling. If conduct had "intended and actual" or "substantial and foreseeable" effects within the state, then domestic jurisdiction applied. Judge Hand reasoned that "any state may impose liabilities, even upon persons not with its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."

In 1976, the Ninth Circuit Court of Appeals modified the Alcoa effects principle in Timberlane Lumber Co. v. Bank of Am., N.T. & S.A. Timberlane established a "comity" or "balancing of interests" approach. Under this analysis, "the court weighs the relative interests of the United States against those of other states affected by a particular exercise of U.S. jurisdiction." The Timberlane court listed a number of factors to be considered in applying the balancing test. Although commentators have criticized the Timberlane rule, a number of courts

37. See Alcoa, 148 F.2d at 444; see also Gerber, supra note 34, at 198-200; Picciotto, supra note 27, at 18-19.

38. Alcoa, 148 F.2d at 443-44; see also Gerber, supra note 34, at 198-200.

39. Alcoa, 148 F.2d at 443. The effects principle does not require conduct to take place within the United States for federal jurisdiction to lie. This conflicts with the principles espoused by Marshall and Holmes. See supra notes 23-32 and accompanying text; Gerber, supra note 34, at 199. But see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 comment d (1965) (effects and territorial principles produce mutual jurisdiction).


40. 549 F.2d 597, 618 (9th Cir. 1976), on remand, 574 F.Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).

41. See Gerber, supra note 34, at 185, 203-09.

42. Id. at 185. The court may not assert extraterritorial jurisdiction when "the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction." Timberlane, 549 F.2d at 609; see also Gerber, supra note 34, at 185 n.4.

43. These factors include: the degree of conflict with foreign law or policy; the nationality or allegiance of the parties and the location or principal place of business of corporations; the extent to which enforcement by either state can be expected to achieve compliance; the relative significance of effects on the United States as compared with those elsewhere; the extent to which there is explicit purpose to harm or affect American commerce; the foreseeability of such effect; and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. Timberlane, 549 F.2d at 614; see also Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378, 1384-86 (9th Cir. 1984).

44. Commentators who favor principles of territoriality have criticized Timberlane and the comity test. Gerber, supra note 34, at 185-86, 205-06; Griffin, Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws, 18 Stan. J. Int'l L.
have adopted the Timberlane rule.45

3. Jurisdiction Based on Nationality

Nationality is a third basis of jurisdiction. Applicable to both natural and juridical persons,46 this theory permits a sovereign to regulate the activities of its overseas nationals and corporations.47 Like territoriality, nationality is a discrete and independent basis for jurisdiction.48 For instance, the nationality theory is the jurisdictional basis for an array of French, German, and British criminal statutes or codes.49 Similarly, in

279, 294-96 (1982). Opponents of the comity test criticize the test for, inter alia, being too political, contrary to normative international law, and too amorphous and uncertain. Gerber, supra note 34, at 294-96.


In the antitrust area, Congress codified existing definitions of the effects test as developed by the federal courts. Thus, Congress requires that the alleged conduct have a “direct, substantial and reasonably foreseeable effect” on U.S. commerce in order for a claimant to maintain an action under U.S. antitrust laws. See Export Trading Company Act of 1982 § 402, 15 U.S.C. §§ 6(a), 45(a) (1982 & Supp. III 1985) (excluding from the reach of the Sherman and Federal Trade Commission Acts conduct having no “direct, substantial, and reasonably foreseeable effect” on U.S. domestic commerce, import, commerce, or the export opportunities of a U.S. national); H.R. Rep. No. 686, 97th Cong., 2d Sess. 5-6 (1982) (The intent of the Export Trading Company Act of 1982 was to clarify, not change, the prevailing judicial standard).

46. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10, 26-32 (1965); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 402 comment e (Tent. Final Draft 1985). The nationality of a corporation is that of the state under whose law it is organized. Id. But see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27 comment c (1965) (conflicting theories of corporate nationality include the location of its principle place of business, the siege social selected by the corporation, or the nationality of its controlling shareholders).

47. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 402 comment b (Tent. Final Draft 1985).

48. Id. For instance, “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.” Id.

49. See, e.g., D.P. O’Connell, INTERNATIONAL LAW 898 (2d ed. 1970) (“In 1829 ... Parliament enacted that murder or manslaughter committed ‘whether within the King’s Dominions or without’ was triable in England....”); C.P. art. 9 (1930) (Italian courts have jurisdiction over crimes committed by Italian nationals outside Italian territory); INDIA PEN. CODE § 4 (3d ed. Raju 1965) (India’s criminal laws apply to all Indian nationals beyond Indian territory); C. PR. PEN., art. 689 (Dalloz 1966) (French nationals can be convicted for serious crimes even when committed abroad); StGB § 3 (German penal law applies to German nationals abroad) and § 4 (German penal law even applies to individuals acquiring citizenship after committing criminal act); see also L. Henkin, R. Pugh, O. Schachter, & H. Smith, INTERNATIONAL LAW: CASES AND MATERIALS 445 n.2 (1980). For American statutory uses of nationality, see 18 U.S.C. § 2381 (1982) (American citizens guilty for treasonous acts committed “within the United States or elsewhere....”); 18 U.S.C. § 954 (1982) (Punishment
the United States, the nationality theory provides the jurisdic- 
tional underpinning for the 1984 ADEA amendment.50

Nationality "has long been a recognized basis which will support 
the exercise of jurisdiction by a state over persons."51 The United States 
Supreme Court, for instance, has recognized the nationality principle in 
cases involving trademark infringement and unfair competition,52 fed-
eral taxation,53 and subpoenas issued by U.S. courts.54

B. Extraterritoriality and U. S. Labor Standards

The United States has developed a system of employment and labor-
management relations standards protecting both the individual worker 
and workers covered by collective bargaining relationships.55 Congress 
derives its authority to pass such laws from the commerce clause and the 
contracts clause.56

for unauthorized attempts to influence a foreign government’s relationship with the 
United States by "any citizen of the United States, wherever he may be... ").
51. Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909, 922 (D.C. 
Cir. 1984).
52. Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (under Lanham Trademark 
Act, federal court has jurisdiction over American corporation committing acts of 
trademark infringement in a foreign country); American Rice, Inc. v. Arkansas Rice 
Growers Coop. Ass’n, 701 F.2d 408 (5th Cir. 1983) (federal court has power to hear 
trademark infringement case where ultimate sale of goods by American corporation 
occurred in Saudi Arabia); Branch v. Federal Trade Comm’n, 141 F.2d 31, 35 (7th 
Cir. 1944) (American corporation enjoined from marketing phony "diploma mill" 
correspondence courses in Latin America: "Congress has the power to prevent 
unfair trade practices in foreign commerce by citizens of the United States, although 
some of the acts are done outside the territorial limits of United States"). But see 
Comment, A General Theory of Jurisdiction in Trademark Cases, 8 Loy. L.A. Int’l 
& Comp. L.J. 611, 637-38 (1986) (arguing that in Steele, the Supreme Court would not have 
found a sufficient nexus if jurisdiction were based on nationality alone).
53. Cook v. Tait, 265 U.S. 47, 54-56 (1924) (rejecting the contention that congres-
sional power to impose a tax on a U.S. citizen only exists where the person 
receiving the income, and the property from which income is received, are within 
U.S. territorial limits).
54. Blackmer v. United States, 284 U.S. 421, 436 (1932) (citizen of United States 
residing abroad is still bound by U.S. laws applicable to his situation; therefore, when 
testimony of a citizen abroad is needed in a criminal case, the American court may 
subpoena him).
55. See generally W. Gould, A Primer on American Labor Law (1986); C. Mor-
56. Article I, section 10 of the United States Constitution declares, “No state shall 
... pass any Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10. 
Article I, section 8, clause 3 states, “The Congress shall have the Power to ... regu-
late Commerce with foreign Nations, and among the several States and with the 
Indian tribes.” Id. § 8, cl. 3.

Under the authority of the commerce clause, for example, Congress enacted the 
Fair Labor Standards Act to prevent manufacturers from using interstate commerce 
as a means for distributing goods produced under substandard labor conditions. 
United States v. Darby, 312 U.S. 100, 115 (1941); NLRB v. Jones & Laughlin Steel 
Corporation, 301 U.S. 1 (1937). The Court reasoned that jurisdiction is based on 
“[t]he fundamental principle... that the power to regulate commerce is the power to
United States courts typically have not applied the territoriality principle to labor laws absent express provisions to the contrary.\textsuperscript{57} The courts base this policy on the assumption that Congress intended labor laws to address domestic conditions.\textsuperscript{58}

The 1948 Term of the Supreme Court highlighted the intellectual struggle regarding the extraterritorial application of U.S. labor laws. The Court first permitted such extraterritorial application,\textsuperscript{59} then reversed its position later that year in a second, unrelated decision.\textsuperscript{60}

The first decision, \textit{Vermilya-Brown Co. v. Connell},\textsuperscript{61} involved the minimum wage and maximum hour provisions of the Fair Labor Standard Act of 1938 (the FLSA).\textsuperscript{62} The Supreme Court addressed whether the FLSA applied to work performed on a Bermuda military base which the United Kingdom leased to the United States.\textsuperscript{63} In a five-to-four decision, the Court construed the term “possession” to find that Congress intended that the FLSA apply to employer-employee relations in foreign territory under lease for military bases.\textsuperscript{64} Justice Reed, writing for the majority, concluded: “It is difficult to formulate a boundary to [the Act's] coverage short of areas over which the power of Congress extends, by our sovereignty or by voluntary grant of the authority by the sovereign lessor to legislate upon maximum hours and minimum wages.”\textsuperscript{65}

In dissent, Justice Jackson attacked the majority for extending the statute's reach on technical grounds without fully considering the decision's impact on foreign relations or labor conditions in Bermuda.\textsuperscript{66} Jackson argued for clear evidence by Congress before giving the law

\begin{quote}
enact 'all appropriate legislation' for its 'protection and advancement'...” \textit{NLRB}, 301 U.S. at 36-37.
\end{quote}

\textsuperscript{58} \textit{Foley Bros.}, 336 U.S. at 285.
\textsuperscript{59} \textit{Vermilya-Brown Co. v. Connell}, 335 U.S. 377 (1948).
\textsuperscript{60} \textit{Foley Bros.}, 336 U.S. at 285. Justice Frankfurter explained his own attitude toward this unusual switch: "Because the decision in \textit{Vermilya-Brown Co. v. Connell}, 335 U.S. 377, was one of statutory interpretation, I would feel bound by it were it not still open because rendered at this Term.” \textit{Id.} at 291.
\textsuperscript{61} 335 U.S. 377 (1948).
\textsuperscript{63} \textit{Vermilya-Brown}, 335 U.S. at 377.
\textsuperscript{64} \textit{Id.} at 390.
\textsuperscript{65} \textit{Id.} at 389. Congress effectively overruled \textit{Vermilya-Brown} in its 1957 amendment to the FLSA, which prohibits extraterritorial application of U.S. minimum wage and maximum hour standards. 29 U.S.C. § 213(f) (1982); see also S. Rep. No. 987, 85th Cong., 1st Sess., \textit{reprinted in} 1957 U.S. \textit{CODE CONG. & ADMIN. NEWS} 1756, 1758 ("It is the [Committee on Labor and Public Welfare's] view that the fundamental purposes which the [FLSA] is designed to serve will not be furthered by the application of the act to geographical areas within a foreign country.").
\textsuperscript{66} \textit{Vermilya-Brown}, 335 U.S. at 397. The majority disregarded a State Department communication requesting that the court refrain from expansively construing the statute. \textit{Id.} at 401 (Jackson, J., dissenting).
extraterritorial application. Applying a statute extraterritorially "should be deliberately and consciously done by Congress, in particular matters and with particular regard to local conditions, and perhaps after consultation with [foreign] authorities." 

Four months after Vermilya-Brown, Justice Jackson's viewpoint prevailed when the Court ruled that the Contract Work Standards Act, the "Eight Hour Law," did not apply to a contract between the U.S. government and a private contractor for work performed in the Middle East. Basing its decision primarily on the absence of congressional intent, the Court also discussed issues of international comity. Justice Reed, for the majority, stated:

There is no language in the Eight Hour Law, here in question, that 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. There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.

The Court reached its decision even though the provisions of the Eight Hour Law were utterly "indistinguishable in effect" from the FLSA provisions at issue in Vermilya-Brown.

The Supreme Court also has denied extraterritorial application of the National Labor Relations Act (the NLRA). In two maritime cases, the Court refused to apply the Taft-Hartley amendments to the NLRA to foreign ships in American waters. Citing ambiguous statutory language, the Court noted that "[f]or us to run interference in such a delicate field of international relations there must be present the

67. Id. at 408. Dicta in Jackson's dissent, however, suggests he was more concerned by the Court's construction of "possession" than he was by extraterritorial effect in general:

It would not concern the United Kingdom, or the Colony of Bermuda, if the United States should require its contractors to pay overtime, upon any assumptions which do not imply a possession adverse to theirs. But I do think it will cause understandable anxiety if this Court does it by holding, as a matter of law, that the leased areas are possessions of the United States, like those we govern to the exclusion of all others.

Id. at 408-09.

68. Id. at 397-98.


70. Id. at 285.

71. Id.

72. Id. at 292-93 (Frankfurter, J., concurring). Indeed, the Court paraphrased an advisory opinion by the United States Attorney General, effectively adopting the rationale of the Jackson dissent in Connell. Id. at 286.


75. McCulloch, 372 U.S. at 18; Benz, 353 U.S. at 144.
affirmative intention of the Congress clearly expressed."  

These cases show that courts refrain from extraterritorial application of labor laws unless expressly authorized by Congress. The courts recognize that labor laws by their nature trigger concerns regarding international relations, comity, and administration.

II. The ADEA Amendment

The purpose of the ADEA is to protect citizens from arbitrary age discrimination and "to promote employment of older persons based on their ability rather than age." The ADEA forbids age discrimination in the employment of individuals between the ages of forty and seventy. The Act applies to every employer engaged in interstate commerce who employs twenty or more employees. The definition of an "employer" includes states and other political subdivisions, labor organizations, and employment agencies.

Pre-amendment ADEA cases held that Congress did not intend to apply the Act to overseas conduct. Rather, by incorporating the enforcement provisions of the Fair Labor Standards Act into the ADEA, Congress intended to exclude the foreign work environment from coverage.

76. Benz, 353 U.S. at 147; see also McCalloch, 372 U.S. at 19 (quoting Benz). The extraterritorial application of Title VII of the Civil Rights Act of 1964 remains unresolved due to conflicting lower federal court opinions. See Boureislan v. ARAMCO, 653 F. Supp. 629 (S.D. Tex 1987) (rejecting the extraterritorial application of Title VII due to its legislative history); Bryant v. International Schools Services, Inc., 502 F. Supp. 472 (D. N.J.), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982) (construing the language of Title VII to protect Americans working outside the United States from discrimination on the basis of race, color, religion, sex or natural right); see also Kirschner, The Extraterritorial Application of Title VII of the Civil Rights Act, 34 Lab. L.J. 394 (1983).

77. 29 U.S.C. § 621(b) (1982). Another purpose of the ADEA is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." Id.

78. Id. § 631(a).

79. Id. § 630(b). Note, however, that to fall within the definition of "employer," a person must have employed twenty or more workers "in each of twenty or more calendar weeks in the current or preceding calendar year." Id.

80. Id. However, "employer" does not include the U.S. government or "a corporation wholly owned by the Government of the United States." Id.

81. See supra note 20.

82. Section 7(b) of the ADEA states that:

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in section 11(b), 16 (except for subsection (1) thereof) and, 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217) [29 U.S.C.S. §§ 211(b), 216, 217], and subsection (c) of this section. Age Discrimination Employment Act, P.L. 90-202, § 7(b), 81 Stat. 602, 604 (1967) (codified as amended at 29 U.S.C. 626(b) (1982)).

Section 16(d) of the FLSA, cited above by the ADEA, provides that "no employer shall be subject to any liability or punishment... on account of his failure to comply with any provision... of such Act (1) with respect to work... performed in a workplace to which the exemption in section 213(f) of this title is applicable." 29 U.S.C.
A. Legislative History of the ADEA Amendment

On November 18, 1983, Senator Charles E. Grassley, Chairman of the Committee on Labor and Human Resources' Subcommittee on Aging, introduced Senate Bill No. 2167, extending the ADEA's coverage to U.S. citizens employed abroad. On April 26, 1984, Senator Grassley introduced Senate Bill No. 2603, the Older American Act Amendments of 1984, to reauthorize the Act and to incorporate virtually all of Senate Bill No. 2167. On May 24, 1984, the Senate passed Senator Grassley's reauthorization bill, along with the amendment providing extraterritorial coverage under the ADEA. Congress then established a conference committee to reconcile Senate Bill No. 2603 with the version of the bill passed by the House of Representatives. Although the House amendment had no comparable extraterritorial provision, the conference committee accepted the Senate's ADEA amendments without any changes, thereby approving the extraterritorial provision embodied in Senate Bill No. 2603. The conference committee noted that it had "taken the unusual step of considering these minor amendments within this reauthorization because of the late-ness of the session."

§ 216(d) (1982). Section 15(f) in turn provides that the conduct covered by FLSA shall not apply "to any employee whose services during the work-week are performed in a workplace within a foreign country. . . ." Id. § 215(f). A fortiori, the ADEA does not apply to overseas conduct; if Congress had intended the ADEA to apply abroad, the above-mentioned FLSA provisions would not have appeared in the ADEA. The Supreme Court adopted this line of reasoning in Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute. That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."). See, e.g., DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1285 (5th Cir. 1986); Pfeiffer v. Wm. Wrigley, Jr. Co., 755 F.2d 554, 555-56 (7th Cir. 1985); Zahourek v. Arthur Young & Co., 750 F.2d 827, 828-29 (10th Cir. 1984); Cleary v. United States Lines, Inc., 728 F.2d 607, 608-09 (3d Cir. 1984).

83. 129 CONG. REC. S17,018 (daily ed. Nov. 18, 1983). The Senate had conducted hearings on the issue of age discrimination against overseas Americans before Senator Grassley introduced S.2167. See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 29-30 (1983) [hereinafter Hearing on Overseas Americans]. The Senate, however, did not hold hearings on Senate Bill No. 2167 or issue a report on this bill.

84. 130 CONG. REC. S4962 (daily ed. Apr. 26, 1984).
adopted the Conference Report. On October 9, 1984, the President signed Senate Bill No. 2603 into law as Public Law No. 98-459.

The amendments enacted by Congress and signed by President Reagan add the following language to the ADEA definition of employee: "The 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 ADEA amendment covers two classes of employers: U.S. citizens or entities incorporated in the United States, and foreign nationals or corporations controlled by U.S. interests.

B. The ADEA Amendment as a Legislative Mistake

Strong evidence indicates that the 1984 ADEA amendment was a legislative mistake. First, the amendment's sponsor, Senator Grassley, apparently misled Congress as to the legislative and judicial background of the perceived problem. Senator Grassley argued that, for economic reasons inapplicable to the ADEA, the FLSA had been restricted to domestic application. This argument strongly mischaracterized the FLSA's legislative history. The Senator also misconstrued judicial holdings regarding extraterritorial application of Title VII, thereby suggesting an anomalous disparity between the two laws. Second, the Equal Employment Opportunity Commission (the EEOC) has failed to issue regulations under the ADEA, suggesting that expanding the ADEA's application extraterritorially was unnecessary to remedy the potential problem concerning Congress.

1. Misrepresentation of Prior Congressional Intent

Senator Grassley misrepresented the congressional intent of the FLSA when he introduced the 1984 ADEA amendment. Grassley argued that, although "Congress specified that the FLSA should not apply abroad for economic reasons . . . [the] same economic considerations do not apply to the Age Discrimination in Employment Act." This contention is incorrect. As outlined in a Senate report on the 1957 amendment to the FLSA, Congress had much broader reasons than Grassley indicated for not extending the FLSA. The Committee on Labor and Public Welfare

89. 130 Cong. Rec. S11,858-66, H10340-52 (daily ed. Sept. 26, 1984) (Senate agreed to the conference report by voice vote, with the House agreeing to the conference report by a 393 to 2 vote).
90. 20 Weekly Comp. Pres. Doc. 1476-77 (Oct. 9, 1984). Interestingly, when President Reagan signed the bill, he did not mention anything about the extraterritorial coverage of the amendment.
92. Implied by 29 U.S.C. §§ 630 (a), (b), and (h) when read together.
94. 129 Cong. Rec. S17,018 (daily ed. Nov. 18, 1983) (statement of Senator Grassley). Senator Grassley further argued that "[i]t would be incongruous to require companies operating abroad to pay higher American wage scales in countries where local workers are paid pennies an hour." Id.
noted that, in addition to disrupting foreign local economies, extraterritorial application of the FLSA would raise delicate questions of international relations, affect U.S. treaties and executive agreements, and expose defense contractors to dual legal standards.\textsuperscript{95} The report reflected the opinion of Congress that extraterritorial application of U.S. labor laws “tends to raise difficult questions of sovereignty and offends the political sensitivities of the foreign governments concerned.”\textsuperscript{96} The economic factors cited by Senator Grassley, therefore, appear peripheral at best.\textsuperscript{97}

2. Misrepresentation of Judicial Authority

Senator Grassley incorrectly contended that an undesirable discrepancy existed between the substantive rights granted by Title VII and the ADEA. He said that “the substantive prohibitions of the Age Discrimination in Employment Act are worded nearly exactly as those in Title VII, which at least two district courts have held does apply abroad.”\textsuperscript{98} Grassley, therefore, believed the ADEA should follow Title VII in being applied extraterritorially. Grassley, however, based his argument on two judicial opinions with little precedential value, \textit{Love v. Pullman Co.}\textsuperscript{99} and \textit{Bryant v. International Schools Services, Inc.}\textsuperscript{100} \textit{Love v. Pullman}, for instance, is not even officially reported.\textsuperscript{101} \textit{Bryant}’s credibility is even more seriously diminished since the Third Circuit questioned its reasoning in \textit{Cleary v. United States Lines}.\textsuperscript{102} There the court refused to read language into the ADEA by inference, following instead the Supreme Court’s lead in using the FLSA, not Title VII, as the basis for construing Congress’ intent.\textsuperscript{103}

\begin{itemize}
  \item 96. Id. at 1757.
  \item 97. One spokesman described the economic concerns this way: “The wages to be paid foreign nationals, hours of employment, and all such related matters are arrived at through negotiations with the host government ... It has been the practice of foreign governments to insist that local standards of employment shall govern.” Letter of R.Y. McElroy, Captain, USN, Deputy Chief, Office of Legislative Liaison, to Committee on Education and Labor, House of Representatives, July 15, 1957, \textit{reprinted in} 103 \textsc{Cong. Rec.} 11,730 (1957).
  \item 98. 129 \textsc{Cong. Rec.} S17,018 (daily ed. Nov. 18, 1983) (statement of Senator Grassley).
  \item 99. 15 \textsc{F.E.P. Cases} 423, 12 \textsc{E.P.D.} § 11,225 (D. Colo. 1976).
  \item 100. 502 \textsc{F.Supp.} 472 (D. N.J. 1980), \textit{rev’d on other grounds}, 675 \textsc{F.2d} 562 (3d Cir. 1982) (construing Title VII as protecting Americans working outside the United States from discrimination on the basis of race, color, religion, sex or national origin).
  \item 101. \textit{See} Kirscher, \textit{supra} note 76, at 399. The author notes that “[t]he Bryant court bolstered this assertion of extraterritoriality with dicta from \textit{Love v. Pullman}, an unofficially reported federal district court case.” Id. at 399.
  \item 102. 728 \textsc{F.2d} 607, 609 (3d Cir. 1984).
  \item 103. Id. at 609-10. The Supreme Court in \textit{Espinoza v. Farah Mfg. Co.}, 414 \textsc{U.S.} 86 (1973), drew a different inference from the identical Title VII language. The Court reasoned that by exempting “aliens outside of any state,” congressional intent was to include aliens inside the United States within the Act’s coverage. \textit{Id.} at 95. The
Senator Grassley also believed that the Cleary and Zahourek v. Arthur Young and Co. decisions created a loophole in the ADEA. Grassley quoted the Cleary opinion to argue that “deny[ing] extraterritorial effect to the age discrimination laws would invite an employer to transfer an older employee to a foreign subsidiary or branch as a subterfuge and then terminate his services in violation of the statute.” In other words, Grassley contended that the two decisions permitted U.S.-based multinational corporations to “ship and fire.” This contention is without merit, for the EEOC has noted that such a scheme would violate the ADEA, even in its unamended form. Mr. Clarence Thomas, the Chairman of the Equal Employment Opportunity Commission, told the Senate Subcommittee on Aging that “[The EEOC] believe[s] that if an employer intentionally transfers an employee to a foreign operation for the purpose of evading the provisions of ADEA, we would consider that kind of activity a violation of the Act as it is presently written.”

Finally, the ADEA as amended contains an inconsistency that suggests Congress drafted the amendment either carelessly or in haste. The 1984 amendment refers to provisions in the FLSA prohibiting extraterritorial coverage. The amendment, however, did not repeal the FLSA’s geographic limitation provision, used by the Cleary and Zahourek courts.

3. Lack of Regulatory Activity

The EEOC is the agency charged with issuing and monitoring compliance with the ADEA. Three years after the amendment’s effective date, the EEOC has neither promulgated nor proposed rules to regulate over-

Cleary court, however, cited the guidelines for interpretation of legislation set forth by the Supreme Court in Lorillard v. Pons, 434 U.S. 575, 580-82 (1978), which held that Congress clearly intended to incorporate the FLSA provisions against extraterritoriality into the ADEA because it had been selective about the provisions that would not be incorporated. See supra note 87.

104. 750 F.2d 827 (10th Cir. 1984) (the ADEA held not to apply to the termination of employment of an American citizen by an American employer where the “work place” was Honduras).

105. Hearings on Overseas Americans, supra note 83, at 1-2.

106. Id. at 1.

107. Id. at 2. Dennis Dowdell, counsel for American Can Company, responded to Senator Grassley’s claim of the newly created “ship and fire” scheme. He stated that “American Can Company does not intend to transfer older employees to foreign countries as a pretext for discharging them. The economic, social, and legal realities of operating a business preclude such pretextual personnel policies and practices.” Id. at 33-37.

108. Id. at 6.

109. Id.

110. See supra notes 83-87 and accompanying text.

seas conduct pursuant to the ADEA. The Chairman of the EEOC wanted the amendment to "indicate under what circumstances we are to become involved in the area of discriminatory termination of older employees." One can therefore infer that the EEOC has not been given a clear enough statement of Congress' policy to begin to fix the perceived problem.

III. International Implications

A. Reactions of the World Community to the Extraterritorial Application of U.S. Laws

Prior U.S. attempts to assert extraterritorial jurisdiction have created international tension and diplomatic embarrassment stemming from other nations' retaliatory actions. Extraterritorial application of the ADEA may subject the United States to similar international criticism. Other countries have resisted the export of U.S. regulatory requirements in three ways: political and economic retaliation, statutory measures, and diplomatic protest.

1. Political and Economic Retaliation

Other nations' political and economic retaliation consists primarily of threats to U.S. corporations. The United States often triggers these threats by imposing sanctions upon its major trading partners. For example, the United States threatened Italy with sanctions as part of U.S. opposition to the Soviet trans-Siberian pipeline. Italy, in turn, premised Alitalia's purchase of thirty McDonnell-Douglas DC-9 jets on the recision of the U.S. sanctions. Similar threats may arise if American multinational corporations try to comply with the ADEA Amendment despite contrary foreign local provisions.

2. Statutory Foiling of Extraterritorial Application

Foreign nations employ three types of retaliatory statutes to oppose U.S. legislation applied abroad. "Blocking" statutes prohibit cooperating...
with U.S. legal proceedings and discovery orders.\textsuperscript{118} Tax havens\textsuperscript{119} often employ "secrecy" statutes to cancel violations of U.S. securities regulations by foreign intermediates of U.S. actors.\textsuperscript{120} Finally, "drawback" statutes deny national recognition of certain foreign judgments.\textsuperscript{121} In 1980, for instance, the United Kingdom passed a drawback statute targeted at the extraterritorial application of U.S. antitrust laws.\textsuperscript{122} It permits British defendants to recover the multiple portions of foreign multiple-damage judgments in British courts.\textsuperscript{123}

Similar foreign statutes may hinder the extraterritorial application of the ADEA amendment. To obtain the protection of the ADEA, a claimant must file a charge with the EEOC.\textsuperscript{124} The administrative scheme vests the EEOC with the exclusive responsibility to investigate and collect data, and no individual may bypass this requirement for ADEA protection.\textsuperscript{125} An action brought by the EEOC pre-empts any individual’s right to commence a suit.\textsuperscript{126} The FLSA grants the EEOC broad power to: "(1) investigate and gather data; (2) enter and inspect

\begin{footnotes}
\item[118] See J. Atwood & K. Brewster, supra note 44, at § 4.17; see also Cira, supra note 117.
\item[120] Swiss law, for example, forbids disclosure of any information about bank accounts, preventing U.S. authorities from detecting certain illegal U.S. transactions like insider trading. United States parties may use Swiss intermediaries to conceal their activities, because Swiss law prevents these intermediaries from disclosing the illegal activity. Note, supra note 119, at 606.
\item[124] 29 U.S.C. § 626(d) (1982). A private claimant must first file an age discrimination charge with the EEOC. In states with statutory prohibition of age discrimination in employment, a claimant must first file with the state authorities. \textit{Id.} § 633(b).
\item[126] 29 U.S.C. § 626(c)(1) (1982). "[T]he right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the rights of such employee. . . ." \textit{Id.}
establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate record keeping and reporting requirements; (5) advise employers . . . [and] (6) subpoena witnesses and require the production of documents and other evidence. . . ."127 The EEOC may "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matters under investigation."128

If the EEOC extended the FLSA enforcement provisions beyond the territorial limits of the United States, however, the provisions would conflict with the discovery laws of several nations.129 A number of countries have enacted blocking statutes that virtually outlaw foreign discovery proceedings in Federal Trade Commission antitrust investigations.130 A French statute, for example, forbids the communication of economic, commercial, industrial, financial, or technical documents to aliens "if such communication is harmful to France."131 France passed this law in response to a federal district court's order requiring a French corporation to produce documents pursuant to the Federal Trade Act.132 This statute also subjects foreign government agencies, such as

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129. See, e.g., infra notes 130-33 and accompanying text.

The international conflict involving American extraterritorial discovery practices results from two facts. First, the procedural system in the United States acquires information through means which tend to be more intrusive and less carefully supervised than their foreign counterparts. And, second, the U.S. seeks to utilize its domestic information gathering techniques with regard to information located outside the U.S. and in so doing often violates fundamental concepts of justice in the country in which the information is sought to be compelled.

Id. at 784.
132. Article 1 of French Law No. 80-538 provides:

Without prejudice to international treaties or agreements, a natural person of French nationality or customarily residing on French territory, or director, representative, agent or official of an artificial person with headquarters or an establishment on French territory, shall not communicate in writing, orally, or in any other form, regardless of place, to the public authorities of another country documents or information of an economic, commercial, industrial, financial or technical nature where such communication is liable to threaten France’s sovereignty, security or basic economic interests or the public order, as defined by the administering authority when necessary.

Id. art. 1.
the EEOC, to potential criminal liability and penalties merely for "ask[ing] for . . . information . . . that may constitute proof with a view to legal or administrative proceedings in another country." Such a statute renders extraterritorial enforcement of the ADEA impossible. Other countries may conceivably follow suit.

3. Diplomatic Protest

Governments also have responded to U.S. extraterritorial legislation with diplomatic protest. For instance, the Civil Aeronautics Board's attempt to abrogate transnational airlines' antitrust immunity has made objections to U.S. actions an "automatic agenda item in diplomatic meetings." In addition, several governments have intervened in U.S. courts as amici curiae to protest the extraterritorial application of U.S. antitrust laws.

Labor legislation can provoke equally strong reactions. One prior attempt, though considerably more intrusive than the ADEA, illustrates the potential problem. The Seamen's Act of March 4, 1915 declared it unlawful to pay a seaman wages in advance and specifically declared the prohibition applicable "to foreign vessels while in waters of the United States, as to vessels of the United States." On January 31, 1928, Senator Robert M. LaFollette, Jr., introduced in Congress a bill extending to foreign vessels in foreign ports the American rule prohibiting the advancement of wages. Senator LaFollette said that the bill was

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133. Id. Article 1(a) of French Law No. 80-538 states:
Without prejudice to international treaties or agreements and to current laws and regulations, a person shall not ask for, seek or communicate in writing, orally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature that may constitute proof with a view to legal or administrative proceedings in another country or in the framework of such proceedings.


136. 1 J. ATWOOD & K. BREWSTER, supra note 44, at § 4.15.


139. Id. § 11, 38 Stat. at 1168 (codified at 46 U.S.C. § 599(e) (1982)). The Supreme Court construed the Act not to cover advancements "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment. . . ." Sandberg v. McDonald, 248 U.S. 185 (1918). The Court reasoned that "such [a] sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments a few words would have stated that intention . . . ." Id. at 195.

designed to make effective the equalization features of the so-called LaFollette Seamen's Act, which [had] been frustrated by the decisions of the Supreme Court, which [had] not made the payment of advanced wages made by foreign vessels outside of territorial waters of the United States illegal in the deduction of the advanced wages of seamen.141

The bill's purpose was to raise to the American level the wage standard for crews of foreign vessels.

Mere introduction of this bill produced a strongly negative international response.142 Canada,143 Denmark,144 Germany,145 Great Britain,146 Italy,147 the Netherlands,148 Norway,149 and Sweden150 vigorously denounced Senator LaFollette's proposal. The British Embassy contended that the bill was contrary to the generally accepted principles of international law [and that the bill] appeared to seek to vary forcibly the provisions of a contract made within British jurisdiction, and in many cases between British subjects, which was perfectly valid under British law, and apparently purported to regulate the manner in which the master of a British ship may engage a British crew in a British port.151

Although introduced and re-introduced over a four-year period, the bill failed to attain sufficient congressional support.152

B. Conflict with FCN Treaties

The exportation of labor standards is also inconsistent with the spirit of U.S. bilateral treaties of friendship, commerce, and navigation (FCN treaties).153 FCN treaties ensure U.S. citizens and entities treatment equal to that afforded nationals of the host country or at least treatment equal to citizens and enterprises of other nations located within the host

141. 69 CONG. REC. 7080-81 (Apr. 24, 1928) (statement of Sen. LaFollette) ("The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.").
142. See 1 U.S. FOREIGN REL. 830-38 (1928); 1 U.S. FOREIGN REL. 1005-09 (1929); 1 U.S. FOREIGN REL. 808-14 (1931); 1 U.S. FOREIGN REL. 959-60 (1932).
143. 1 U.S. FOREIGN REL. 808, 810 (1931) (aide-memoire).
144. 1 U.S. FOREIGN REL. 830, 836 (1928) (letter); 1 U.S. FOREIGN REL. 1005, 1008-1009 (1929) (letter).
145. 1 U.S. FOREIGN REL. 1005, 1005-1006 (1929) (memorandum); 1 U.S. FOREIGN REL. 808, 818 (1931) (memorandum).
146. 1 U.S. FOREIGN REL. 830, 832 (1928) (memorandum); 1 U.S. FOREIGN REL. 1005, 1006-1007 (1929) (letter); 1 U.S. FOREIGN REL. 808, 808-810 and 811-814 (1931) (memoranda); 1 U.S. FOREIGN REL. 959, 959-60 (1932) (letter).
147. 1 U.S. FOREIGN REL. 830, 834 (1928) (memorandum).
149. 1 U.S. FOREIGN REL. 1005, 1007-1008 (1929) (memorandum).
150. 1 U.S. FOREIGN REL. 830, 834-35 (1928) (memorandum); 1 U.S. FOREIGN REL. 959, 959 and 960 (1932) (memoranda).
151. 1 U.S. FOREIGN REL. 808, 809 (1931) (letter from the British Embassy to the United States Department of State).
country.154 "The purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."155

Applying domestic labor standards abroad undermines the premise of these treaties. The FCN treaties are "arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges."156 Any attempts by the United States to unilaterally apply domestic standards, such as these embodied in the ADEA, violates this spirit of mutuality.

C. Foreign Corporations and the U.S. Control Test

The amended ADEA's definition of a U.S. corporation also may appear imperialistic to many countries. The ADEA now provides that a U.S. citizen or entity controlling a foreign corporation is liable for the conduct of that foreign corporation. Thus, the subsidiary's country of incorporation does not matter.157

Some nations contend that "nationality" per se is properly determined by place of incorporation.158 William Knighton, Deputy Secretary of the United Kingdom's Department of Trade, characterized the issue of nationality and place of incorporation as follows: "[W]e believe that it is generally accepted internationally that the nationality of a company is determined by its place of incorporation. . . . [E]ven where nationality is a legitimate basis for extraterritorial jurisdiction, it must remain subject to the primacy of the laws and the policies of the territorial state."159 In contrast, the U.S. position embodied in the amended ADEA asserts that the U.S. entity's degree of control over the foreign corporation is the basis for liability. As in the past, conflict inevitably will result when the ADEA is thus applied, whether or not U.S. shareholders


156. FCN with Japan, supra note 154, at 2066.


wholly own the parent corporation. Such conflicts could be more severe than the particular facts would seem to warrant, for jurisdictional disputes often go to the essence of sovereignty: “One of the most sensitive nerves of a state is its territorial sovereignty. When a foreign government infringes that sovereignty by seeking to control the actions of corporations within the state, contrary to the state’s economic and foreign affairs policies, a reaction may be expected.”

IV. Conclusion

Congress recently amended the Age Discrimination in Employment Act, making its coverage extraterritorial. Although well intended, the extraterritorial labor provisions are not in the long-term best interests of U.S. policy. Extraterritorial application of other U.S. laws has caused grave foreign policy conflicts for the United States. One prior foray into extraterritorial application of labor law also was disastrous. Although the ADEA’s extraterritorial impact so far has been negligible, and may remain so, it is a dangerous precedent. Further extraterritorial applications of U.S. labor law are apt to prove far more disruptive. The United States should not use labor law to impose its values on other countries. Certainly, Congress should take any such foray only after grave consideration of all implications, not in the cavalier, slipshod fashion of the ADEA amendment.

160. Craig, supra note 158, at 597.