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The Clay Bill: Testing the Limits of Port State Sovereignty

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THE CLAY BILL: TESTING THE LIMITS OF PORT STATE SOVEREIGNTY

H.R. 1517 (The Clay Bill),[1] introduced by Representative William Clay of Missouri on March 30, 1993, amends the jurisdictional scope of the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA). Specifically, the Clay Bill extends these labor laws to a limited class of foreign flag vessels that regularly trade with the United States.[2] Presently, foreign flagged vessels are generally

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1. H.R. 1517, 103d Cong., 1st Sess. (1993). Versions of the Bill have previously been introduced before the House and Senate. *See* S. 3235, 102d Cong., 2d Sess. (1992); H.R. 1126, 102d Cong., 1st Sess. (1991); H.R. 3238, 101st Cong., 1st Sess. (1989). *See also Supporters Say Clay Bill Would Bolster US Flag*, LLOYD'S LIST (London), May 17, 1993. The version of the Clay Bill before the 102d Congress would have extended FLSA and NLRA for a trial period of five years, created a group to study the effects of the legislation on industry, and created a number of exclusions from the requirements of NLRA and FLSA. H.R. 1126, 102d Cong., 1st Sess. (1991). Although the Bill passed in the House, the Bush administration's hostility toward the measure prevented a hearing before the Senate. *See Supporters Say Clay Bill Would Bolster US Flag*, LLOYD'S LIST (London), May 17, 1993. For a brief history of the Clay Bill see *Hearing on H.R. 1517, Foreign Flag Ships: Hearing before the Subcommittee on Labor Standards, Occupational Health and Safety of the Committee on Education and Labor, House of Representatives*, 103d Cong., 1st Sess. 43 (1993) [hereinafter *Hearings on H.R. 1517*] (prepared statement of Thomas J. Schneider, Esq.).

2. H.R. 1517, 103d Cong., 1st Sess. (1993). Nearly identical language extends the coverage of FLSA and NLRA. Under the Clay Bill covered employers would include:

> (I) a foreign documented vessel, if such vessel is regularly engaged in transporting passengers from and to a port or place in the United States, with or without an intervening stop or stops at a foreign port or ports, and such term also includes a foreign documented vessel that is regularly engaged in transporting passengers only from or to a port or place in the United States if

outside the jurisdiction of both NLRA and FLSA.[3]

Throughout recent committee hearings on the Clay Bill, various interest groups and national governments have questioned the legality of the Bill's provisions. Specifically, the Bill's opponents charge that the extension of U.S. labor laws to foreign flagged ships violates international law.[4] These opponents have offered several arguments based on treaties and other sources of the law of nations. Specifically, some as-

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the Secretary ["Board" for NLRA] determines that such transport is so arranged for the purposes of avoiding being considered an employer for purposes of this Act;

(II) a foreign documented nonliner vessel regularly engaged in transporting cargo in the foreign trade of the United States; and

(III) a foreign documented vessel on which occurs the production or processing of goods or services for sale or distribution in the United States, and a foreign documented vessel that engages in transporting cargo between vessels in international waters and a vessel, port, or place in the United States regardless of the ownership or control of the vessel.

Id. at 2.

The Clay Bill excludes from its coverage certain of these vessels. In relevant part, the Bill reads:

[This act shall not apply to] any foreign documented vessel that can demonstrate -

(I) that at least 50 percent of its crew is composed of citizens of the country of registry; and

(II) that legal title to such vessel is held by citizens of the country of registry, and beneficial ownership and control, direct or indirect, are held by citizens of the country of registry. . . .

As used in this subparagraph, the term 'citizen' shall include -

(I) natural persons who are citizens of the country of registry;

(II) a corporation, if its equity is at least 51 percent owned and controlled by citizens of the country of registry;

(III) a partnership, if all the general partners are citizens of the country of registry and at least 51 percent of the partnership is owned and controlled by citizens of the country of registry.

Id. at 3.

3. *See infra* notes 10 and 151 and accompanying text.

4. *Hearing on H.R. 1517*, *supra* note 1, at 14 (Department of State, letter to, from 14 foreign governments). The governments of Belgium, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom "are gravely concerned by [the Clay Bill] which would not be permissible under customary international law and practice." *Id. See also id.* at 69 (prepared statement of John Estes, President, International Council of Cruise Lines) (listing governments that have protested against the passage of the Clay Bill). In addition to international law concerns, some interested parties have voiced concern over international retaliation against U.S. flagged ships and U.S. markets abroad. *See House Subcommittee Revives Bogey of Maritime Labour Law*, LLOYD'S LIST (London), Oct. 10, 1992.

sert that there exists a "customary" legal obligation that the port state should regard a visiting vessel's flag state as the sovereign over its internal affairs.[5] Embodying a traditional deference to the flag state, this so-called "internal economy rule" has developed into an obligation of international law that limits a territorial sovereign's jurisdiction to regulate the domestic affairs of a visiting foreign ship.[6]

This comment considers whether the Clay Bill is a violation of U.S. obligations under the internal economy rule. Part I examines the provisions of the Clay Bill and its legislative purpose. Part II describes the internal economy rule and establishes that the United States accepts the rule as a principle of international law. Finally, Part III, through analyzing U.S. judicial interpretations of the internal economy rule, concludes that the Clay Bill exceeds the bounds of sovereign jurisdiction.

I. THE CLAY BILL

The Clay Bill's amendments to FLSA and NLRA would extend U.S. laws to the employment relationship between a shipowner and crew — matters within a ship's internal economy.[7] Most relevant to the employment of seamen, FLSA establishes a minimum wage.[8] In its present form, the minimum wage provision does not apply to "any employee employed as a seaman on a vessel other than an American vessel."[9] Similarly affecting the internal economy of vessels, NLRA guar-

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5. *Hearing on H.R. 1517*, *supra* note 1, at 14 (Department of State, letter to, from 14 foreign governments). *See also id.* at 113 (prepared statement of Philip J. Loree, Chairman, Federation of American Controlled Shipping) (asserting that the Clay Bill would violate the rule of international law that reserves to the flag state jurisdiction over matters of internal order).

6. T. KOCHU THOMMEN, LEGAL STATUS OF GOVERNMENT MERCHANT SHIPS IN INTERNATIONAL LAW 49-50 (1962).

7. *See* McCulloch v. Sociedad Nacional, 372 U.S. 10, 20 (1963) (characterizing the challenged application of the Labor Management Relations Act as invading the internal management of a vessel). *See also* Wildenhus's Case, 120 U.S. 1, 12 (1887) (referring to discipline aboard ship as a matter of internal affairs); 1 Steven F. Friedell, BENEDICT ON ADMIRALTY § 129 (1992) (regarding wages as a matter of internal economy).

8. 29 U.S.C. § 206(b) (1988). In addition to minimum wages, FLSA establishes maximum working hours for employees. *Id.* § 207. However, seamen of all nations are expressly exempted from the maximum hour requirement. *Id.* § 213(b)(6). FLSA also contains provisions regarding child labor. *Id.* § 212 (1988). The minimum wage is currently $4.25 per hour. *Id.* § 206(a)(1) (amended Nov. 17, 1989).

9. *Id.* § 213(a)(12). FLSA defines "American Vessel" as including "any vessel which is documented or numbered under the laws of the United States." *Id.* § 203¶. The Department of Labor interprets the definition of "American Vessel" as apparently

antees employees the right to organize and collectively bargain.[10] Among its other provisions, the NLRA defines and prohibits unfair labor practices.[11]

The Clay Bill's amendments to FLSA and NLRA would broaden the jurisdiction of these statutes to include foreign flagged vessels that are regularly engaged in transporting passengers or cargo in the foreign trade of the United States.[12] Of these vessels, only those that can prove that at least half the vessel's crew are citizens of the country of registry[13] and whose owners hold both legal title to and beneficial ownership and control of the vessel are excluded.[14] These amendments would apply the substantive provisions of FLSA and NLRA equally to U.S. shipowners operating under a foreign flag and foreign shipowners operating under a third nation's flag.[15]

By excluding vessels that are predominantly owned and crewed by nationals of the country of registry, the Clay Bill targets the owners and operators of what is commonly referred to as "flag of convenience" or "open registry" vessels.[16] Countries permitting open registry allow ships to fly their national flag regardless of the shipowner or crew's nationality.[17] Operated primarily by developing countries, open registries can generate registration fees for the flag state amounting to a

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signifying "a vessel of the United States as distinguished from a foreign vessel." 29 C.F.R. § 783.38 (1992). This seems to preclude the argument that FLSA, in its present form, could be construed to extend to foreign vessels owned or controlled by American citizens. However, the mere flying of the U.S. flag is alone apparently not sufficient for the vessel to fall within the jurisdiction of FLSA. *See* Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 231 (3d Cir. 1991) (holding that FLSA does not apply to certain U.S. flagged vessels).

10. 29 U.S.C. § 157 (1988). NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ." *Id.*

11. *Id.* § 158. NLRA also establishes a form of recourse for employees who suspect unfair labor practices. *Id.* § 160.

12. H.R. 1517, 103d Cong., 1st Sess. § 1 (1993).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id. See Supporters Say Clay Bill Would Bolster the US Flag*, LLOYDS LIST (London), May 17, 1993.

17. Eric Pace, *Uncertain Crosswinds for 'Flags of Convenience'*, N.Y. TIMES, May 16, 1982, at sec. 4 p. 3. Liberia and Panama operate some of the world's largest "open registries." The ships registered with these and other "flag of convenience" countries comprise over one quarter of total world tonnage, the majority of which is owned by U.S., Japanese, Greek, and Hong Kong companies. *Id.*

significant portion of national revenue.[18] In exchange for these fees, shipowners, who would otherwise register their ships in their country of citizenship or domicile, enjoy relatively lax tax, labor, and safety laws.[19]

The purpose of the Clay Bill is twofold. First, the extension of FLSA and NLRA would improve the working conditions of seamen aboard open registry vessels.[20] Proponents of the Bill allege that seamen aboard "flag of convenience" vessels, predominately citizen's of developing nations, suffer exploitative wages and other mistreatment.[21] Under FLSA's protection, these seamen would enjoy the same minimum working conditions established for American workers.[22] Second, commentators on the Bill see it as a catalyst to enlarge U.S. labor union membership and increase the competitiveness of U.S. flagged carriers.[23] The increased cost of operating these vessels in compliance

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18. *Id.* Reportedly, Liberia derives 12% of its foreign exchange from registration fees. *Id.* A private company operates Liberia's registering authority from an office in Reston, Virginia. *See Hearing on H.R. 1126: Hearing before the Subcommittee on Labor Standards of the Committee on Education and Labor House of Representatives*, 102d Cong. 1st Sess. 27 (1991) (statement of Alexander C. Cullison).

19. Pace, *supra* note 17. For example, a Filipino crew, by one estimate, is four times less expensive to employ than its American counterpart. *Id.*

20. *See House Subcommittee Revives Bogey of Maritime Labour Law*, LLOYD'S LIST (London), Oct. 10, 1992. In reference to the reportedly poor working conditions presently endured by foreign seamen, Mr. Clay stated, "Clearly, this nation not only has the right but the moral duty to ensure that where [foreign seamen] are engaged primarily in the commerce of the U.S. such vestiges of 19th century servitude are eradicated." *Id.* A representative of the AFL-CIO testified before the House Committee on Education and Labor:

> The exclusion of foreign flag vessels from the jurisdiction of the National Labor Relations Act denies foreign flag crew members the guaranteed right to engage in concerted activities for their mutual aid or protection. These activities are often necessary to enable foreign crews to successfully avail themselves of existing U.S. laws, such as those which protect foreign seamen from being cheated of their rightful wages. . . .

Hearing on H.R. 1517, *supra* note 1, at 42 (prepared statement of Thomas J. Schneider, Esq.).

21. *See Hearing on H.R. 1517*, *supra* note 1, at 43 (prepared statement of Thomas J. Schneider, Esq.). Comparing American seamen to their foreign counterparts, Mr. Schneider stated that "[f]oreign crewmen, on the other hand, are subject to many types of mistreatment, including extremely low pay for long hours of work." *Id.*

22. *See Hearing on H.R. 1517*, *supra* note 1, at 114 (1993) (prepared statement of Philip J. Loree, Chairman, Federation of American Controlled Shipping) (arguing that the application of U.S. labor laws to foreign workers would conflict with the labor laws of most other nations).

23. *See Supporters Say Bill Would Bolster the US Flag*, LLOYD'S LIST, May 17, 1993. The Chairman of House subcommittee on Labor Standards, Occupational

with FLSA and NLRA would bring "flag of convenience" carriers' crewing expenses closer to those of U.S. flagged vessels.[24] Additionally, NLRA's provisions regarding organization rights would provide U.S. labor unions with the leverage necessary to pressure foreign shipowners to employ organized labor.[25]

II. JURISDICTION TO PRESCRIBE

Before examining the components of the internal economy rule, it is useful to survey relevant general principles of sovereign jurisdiction. The Clay Bill presents the issue of whether Congress has "jurisdiction to prescribe" labor laws applicable to open registry vessels.[26] Jurisdiction to prescribe in the international context is the power "to make [a nation's] laws applicable to the activities, relations, or status of persons . . . by legislation." [27] States generally derive their authority to pre-

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Health and Safety, Austin Murphy, commented that the Bill "is not strictly aimed at correcting numerous labor abuses." He added that "America needs to regain its stature as the world's foremost economic power." This Bill would increase foreign flag shipowner's overhead costs and presumably bring their freight rates closer in line to that of U.S. flagged ship owners. *See id.* Introducing this Bill, Representative Clay claimed that U.S. flagged carriers are "increasingly being run off the high seas by vessels that are not subject to enforceable labor standards and do not provide either a living wage or humane conditions to those who have the misfortune to crew them." *Clay Bill Filed with Strong Support*, LLOYD'S LIST (London), Apr. 3, 1993. According to Chairman Philip Loree of the Federation of American-Controlled Shipping, a foreign flag shipowners' lobbying group, foreign flagged ships are involved in about 80% of the U.S. liner trade, 90% of the U.S. bulk cargo trade, and 100% of the U.S. passenger trade. *House Subcommittee Revives Bogey of Maritime Labour Law*, LLOYD'S LIST (London), Oct. 10, 1992.

24. *See Supporters Say Bill Would Bolster the US Flag*, LLOYD'S LIST (London), May 17, 1993.

25. *See* McCulloch v. Sociedad Nacional, 372 U.S. 10, 13 (1963) (describing a U.S. labor union's attempt to use the NLRA to support its picketing of a flag of convenience ship in order to persuade the shipowner to allow the organization of its crew).

26. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT].

27. *Id.* The Restatement differentiates between three types of jurisdiction under international law:

> (a) jurisdiction to prescribe, *i.e.*, to make its laws applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
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> (b) jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceeding;
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> (c) jurisdiction to enforce, *i.e.*, to induce or compel compliance or to pun-

scribe laws from the jurisdictional concepts of territoriality and nationality.[28] Sovereigns normally may rely on territoriality as a basis of jurisdiction where the regulated conduct occurs or has effect in whole or in part within a sovereign's geographic boundaries. Emanating from a sovereign's necessary control over conduct or persons within its borders,[29] territoriality is the most common and widely accepted basis for jurisdiction.[30] Of a more modern genesis, nationality supports jurisdiction where the regulated activity is that of a citizen or resident of the regulating state. Nationality is the primary basis of prescription in matters of status or other private law.[31]

Alone, the fact that a state is governing conduct on the basis of territorial or national sovereignty is insufficient under international law; the jurisdictional scope of the regulation in question must also be reasonable.[32] The Restatement sets forth several criteria to evaluate

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ish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

Id.

The Restatement's three categories of jurisdiction are a recent invention, not readily discernable in older court decisions and other sources of international law. *Id.* pt. IV introductory note. Although the criteria for evaluation of each category are in some ways discrete and can lead to different results, the three jurisdictional distinctions are interdependent and influenced by similar considerations. *Id.* Consequently, courts have applied principles regarding "jurisdiction to adjudicate" in cases concerning "jurisdiction to prescribe" and vise versa. Particularly when applying the ancient precepts of maritime law, courts have spoken of the jurisdiction of laws generally. *See, e.g.*, The Belgenland, 114 U.S. 355, 369 (1885) (referring to the jurisdiction of maritime law common to all nations).

28. RESTATEMENT, *supra* note 26, § 402. *See id.* § 402 cmt. a. Links of nationality or territoriality alone may be insufficient for the exercise of jurisdiction. *Id.* Because both bases of jurisdiction are discrete, two nations may exercise jurisdiction over the same matter. *Id.* § 402 cmt. b. When two states can reasonably exercise jurisdiction, the state with lesser interest in the matter should defer to the state with greater interest. *Id.* § 402 cmt. c.

29. *See* Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1922) (applying prohibition laws of the United States to British passenger ships in U.S. territorial waters in order to prevent frustration of Congressional intent).

30. *See* RESTATEMENT, *supra* note 26, § 402 cmt. c.

31. *See id.* § 402 cmt. e. *See also id.* § 402 reporters' note 1.

The Clay Bill purports to apply equally to foreign and U.S. shipowners and crew. *See* H.R. 1517, 103rd Cong., 1st Sess. (1993). Therefore, Congress cannot justify its jurisdiction to extend FLSA and NLRA based on nationality. Accordingly, the validity of the Bill must depend upon the territoriality principle. Seeming to exercise sovereign rights of territorial jurisdiction, the Clay Bill extends FLSA and NLRA only to vessels regularly trading with the United States, implying that such vessels are regularly present within territory of the United States. *See id.*

32. RESTATEMENT, *supra* note 27, § 403(1). Even when a state can justify juris-

whether an exercise of jurisdiction is reasonable.[33] Primary evidence that a law's jurisdictional scope is reasonable includes the strength of the relationship of the regulated matter to territoriality or nationality, the degree to which other nations regulate the matter, the consistency of the regulation with international law, and the extent of another state's interest in regulating that activity or person.[34] If the aggregate weight of these factors suggests that a sovereign's jurisdiction over a person or activity is reasonable, then the regulation's scope of authority is valid under international law.[35] For example, a state's exercise of jurisdiction to regulate persons or activities wholly within its borders is generally considered reasonable.[36]

Despite the usefulness of this balancing test in most contexts, it

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diction on the basis of nationality or territoriality, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when exercise of such jurisdiction is unreasonable." *Id.*

33. *Id.* § 403(2). The relevant factors to consider when determining whether an exercise of jurisdiction is unreasonable include:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
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> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
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> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
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> (e) the importance of the regulation to the international political, legal, or economic system;
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> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
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> (h) the likelihood of conflict with regulation by another state.

Id.

34. *Id. See generally* 1 Steven F. Friedell, BENEDICT ON ADMIRALTY § 129 (1992).

35. RESTATEMENT, *supra* note 26, § 403(1).

36. *See, e.g.*, The Queen v. Jameson, 2 Q.B. 425, 430 (1896) (holding that it is reasonable under international law to extend the Queen's laws to the activity of foreign seamen temporarily within the territory of the United Kingdom).

has not fared well in the maritime setting.[37] Because of the transitory nature of ships and shipping, vessels engaged in international trade necessarily travel through many territorial jurisdictions. If every state attempted to impose its full territorial sovereignty upon each visiting vessel, ships engaged in foreign trade would navigate through an untenable regulatory patchwork. Likewise, if each registering state could claim exclusive national jurisdiction over its vessels, port states would be powerless to regulate hazardous or otherwise menacing shipboard conduct. Consequently, international law has endeavored to devise jurisdictional concepts that grant shipowners a degree of legal stability and predictability, while allowing port states to control some aspects of visiting vessels' conduct.[38]

As an initial attempt to create a suitable jurisdictional theory, a legal fiction developed among the community of nations that a ship is a "floating piece" of the territory of the nation whose flag it flies.[39] This principle has adequately explained the flag state's jurisdiction over its own vessels on the high seas.[40] However, such a strict nationality-based theory appeared to provide a visiting ship complete immunity from the laws of the territorial sovereign.[41] Reacting to this perceived inadequacy, the major seafaring nations have adopted the more flexible "internal economy rule."[42]

A. The Internal Economy Rule

The "internal economy rule" states that:

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37. *See* RESTATEMENT, *supra* note 26, § 402 cmt. h. The Restatement suggests that jurisdiction over vessels is best viewed as a basis independent of territoriality or nationality. *Id.*

38. *See* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953). International maritime law "aims at stability and order through usages which considerations of comity, reciprocity, and long-range interest have developed to define the domain which each nation will claim as its own." *Id.*

39. *See* RESTATEMENT § 402 reporters' note 4. *See also* Scharrenberg v. Dollar S.S. Co., 245 U.S. 122, 126 (1917) (applying U.S. laws on the basis of the "floating piece of territory" principle); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923) (distinguishing nationality of ship from territoriality as a basis for jurisdiction, stating that nationality is adequate basis where ship is on high seas and outside the territorial reach of any nation). *But see* Cunard, 262 U.S. at 132 (McReynolds, J., dissenting) (stating that nationality is also a sufficient basis for regulation of the internal affairs of a vessel even while it rests within territorial waters of another sovereign).

40. *See* Cunard, 262 U.S. at 123 (1922).

41. *See* Wildenhus's Case, 120 U.S. 1 (1887).

42. *See* THOMMEN, *supra* note 6, at 49-50 (1962).

> [A] foreign merchant ship is not subject to the jurisdiction of the coastal state in matters touching only the internal order and discipline of the ship. . . . [However, port states will] assume jurisdiction when, in their opinion, the peace or tranquility of the port is disturbed. . . .[43]

An examination of the legal practices of the United States, the United Kingdom, France, and other traditionally maritime nations reveals that the internal economy rule has gained international acceptance.[44] In an effort to comply with this doctrine, these port states have relinquished their jurisdiction over visiting vessels in matters such as wages,[45] collective bargaining,[46] necessary discipline,[47] crimes committed on board,[48] and other matters not affecting the peace or security of the port state.[49]

The French and British judiciaries have each developed theories to explain the internal economy rule. The French theory assumes that the port state lacks competence to extend its laws to the internal economy of foreign vessels, although these vessels may lay within a sovereign's territorial waters.[50] This doctrine emerged from two cases involving assaults committed by American seamen while aboard the American flag vessels *Newton* and *Sally*. In both cases, the defendants had physically disciplined subordinate American crew members while in French ports. On a consolidated appeal, the highest administrative court in France, the Conseil d'Etat, maintained that French courts did not have the authority to hear these cases as a matter of international law. It held that claims arising on foreign ships, unless affecting the peace or tranquility of the port state, are properly within the sole jurisdiction of the flag

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43. *Id.* at 50 (footnotes omitted).

44. *See generally* THOMMEN, *supra* note 6, at 49-50 (1962).

45. *See* Su v. Southern Aster, 978 F.2d 462 (9th Cir. 1992) (refusing to apply Seamen's Wage Act to foreign seamen discharged overseas).

46. *See* McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) (enjoining the National Labor Relations Board from holding organizational elections among foreign ship's crew).

47. *See* A.H. Charteris, THE LEGAL POSITION OF MERCHANTMEN IN FOREIGN PORTS AND NATIONAL WATERS, 1920-21 Brit. Y.B. Int'l L. 45, 50. For example, in two famous French cases, *The Newton* and *The Sally*, French courts withheld their jurisdiction over American seamen charged with causing injury and death in the course of administering discipline aboard ship. *Id.*

48. *Id.*

49. *See* Lauritzen v. Larsen, 345 U.S. 571 (1953) (holding that Jones Act provisions for recovery in personal injury cases did not apply to a foreign seamen).

50. Charteris, *supra* note 47, at 46.

state.[51]

Later, a similar case came before French courts in which an American seaman murdered a fellow crewmember aboard the American vessel *Tempest*.[52] A French court found that under these circumstances it could exercise jurisdiction. The court distinguished this case from *The Newton* and *The Sally* on the basis that, among other factors relating to the order of the port, the ship's master had requested the assistance of local authorities to quell disturbances arising out of the American seaman's offense.[53] The principle developed by these decisions is that a port state *cannot* exercise jurisdiction unless it finds that the illegal conduct has sufficiently disturbed the port state's interests.[54]

The British system, on the other hand, acknowledges the port state's potential jurisdiction over all the internal affairs of a foreign ship.[55] In *Forbes v. Cochrane*,[56] for example, an English court considered the status of slaves that had escaped from America aboard a British ship.[57] The court held that the slaves were free once the ship left the territorial waters of the United States. At that point, the laws of the United States no longer permeated the ship, hence the law of the ship's flag, which forbade slavery, regained its supremacy.[58]

In *The Queen v. Keyn*,[59] the English further refined their interpretation of the internal economy rule. In this case, the court heard a criminal charge that a foreign national aboard a foreign ship had collided with and sank a British ship in British territorial waters.[60] Reasoning that any criminal conduct that may have occurred took place aboard the foreign vessel, the court dismissed the case by holding that

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51. *Id.* at 51. For a translation of the decision see *id.* at 50. *See* PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 145-46 (1927) (explaining the significance of the French cases *The Newton* and *The Sally*).

52. Charteris, *supra* note 47, at 53.

53. *See id.* at 53. *See also* JESSUP, *supra* note 1, at 147 (explaining the court's decision in the case of *The Tempest*).

54. A significant number of seafaring nations have adopted some form of the French system, including Italy, Belgium, Germany, The Netherlands, Norway, Portugal, Russia, Mexico, Brazil, Chile, Ecuador, and Peru. *See* JESSUP, *supra* note 51, at 154-68.

55. *See* Charteris, *supra* note 47, at 65.

56. Forbes v. Cochrane, K.B. 2 B. & C. 448, 467 (1824).

57. *Id.*

58. *Id. See also* JESSUP, *supra* note 51, at 169 (noting that the British vessel concerned was a warship and therefore was more likely to have been immune from local jurisdiction than a merchant vessel).

59. The Queen v. Keyn, 2 Ex.D. 63, 64 (1876).

60. *Id.*

the law of the flag controlled.[61] Explaining this result, Sir Phillimore recognized that the port state, "influenced by considerations of public policy or by treaty, [may] choose to forego the exercise of her law over the foreign vessel and crew, or exercise it only when they disturb the peace and good order of the port."[62] Through these cases, the British version of the internal economy rule has come to mean that while the port state retains authority to extend its laws to the internal affairs of a foreign vessel, it should *not* exercise this authority unless the conduct has sufficiently affected the port state's interest.

The French and the English interpretations diverge, therefore, only on the issue of whether the internal economy rule, as a doctrine of international law, can remove a sovereign's jurisdiction or merely influence against its exercise.[63] Although this conceptual difference exists, both systems leave to the port state the common threshold decision of whether the shipboard conduct is sufficiently disturbing to the port state as to justify intrusion into a vessel's internal affairs. Consequently, in practice both theories lead to the same general principle:[64] Port states should not exercise jurisdiction over the internal economy of a foreign vessel unless, by a determination of the port state, special circumstances suggest that the exercise is reasonable.[65]

The community of nations has accepted the general principle of the internal economy rule as an obligation under international law.[66]

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61. *Id.* at 86.

62. *Id.* at 82. Sir Phillimore regarded this position as consistent with the French practice, if not the theory. *Id.*

63. *See* Charteris, *supra* note 47, at 64-65 (noting dicta in English cases which suggests that matters of the internal economy of a foreign vessel while in English ports are to be left to the jurisdiction of the flag ship so long as these matters do not affect the port state).

64. *See* THOMMEN, *supra* note 6, at 49-50. Regarding the differences between the two theories, Thommen commented:

> Despite the theoretical distinctions, there is hardly any substantial difference between the French system and the British system. Under both systems, the sovereignty of the coastal state is recognized over its internal waters. There is also a general agreement among nations following either system that the local sovereign is free to exercise jurisdiction over foreign ships in respect of matters, the consequences of which extend beyond the ship.

Id. (footnote omitted). *See also* JESSUP, *supra* note 51, at 191-192 (comparing the practical outcomes of the French and British theories).

65. THOMMEN, *supra* note 6, at 50.

66. International law may develop from generally accepted and followed practices of states, international agreements, and, as a supplementary source, "derivation[s] from general principles common to the major legal systems of the world." RESTATEMENT, *supra* note 26. Section 102 of the Restatement reads:

Accordingly, the practical differences among nations is not to which theoretical interpretation each adheres, but rather what each territorial sovereign considers sufficiently consequential shipboard conduct to support the port state's invasion into a visiting vessel's internal affairs.

B. The Internal Economy Rule in the United States

The United States, credited as a subscriber to the British theory, has accepted the internal economy doctrine as an obligation imposed by international law.[67] In the tradition of British interpretation, the Supreme Court of the United States has long held that when a foreign

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Sources of International Law

(1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law;

(b) by international agreement; or

(c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreements, may be invoked as supplementary rules of international law where appropriate.

See Article 38 of Statute of the International Court of Justice. Article 38 reads, in part:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations.

Id.

Customary law develops where nations follow a rule consistently and with a sense of legal obligation. *Restatement*, *supra* note 26, § 102(2). *See id.* cmt. b; *id.* cmt. c. The "best evidence" that a rule has developed into customary international law is evidence of consistent state practice. *Id.* § 103 cmt. a.

67. *See* Alexander M. Bickel, *Strathearn S.S. Co. v. Dillon -An Unpublished Opinion by Mr. Justice Brandeis*, 69 HARV. L. REV. 1177, 1185 (1956) (describing generally the U.S. theory regarding the application of domestic laws to foreign ships). *See also* Charteris, *supra* note 47, at 45-46 (considering the United States as adhering to the British system except in instances where jurisdictional relationships are governed by treaty).

merchant ship voluntarily enters the territorial waters of another country, the vessel subjects itself to the jurisdiction of that country.[68] The Court has viewed the foreign ship's acceptance of local jurisdiction as a condition of entry.[69] Recognizing that international comity may curtail an exercise of this jurisdiction, it has further stated that a port state's application of domestic law to conduct aboard a foreign vessel should comply with the internal economy rule.[70] Through the numerous applications of the internal economy rule, the United States judiciary has developed principles defining the limits of port state jurisdiction.[71] In so doing, United States courts have characterized their decisions as consistent with international law.[72]

The Supreme Court explained the United States' adherence to the internal economy rule over a century ago.[73] In *Wildenhus's Case*,[74] the

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68. *See* The Belgenland, 114 U.S. 355, 364 (1885) (noting that treaty obligations regarding waiving jurisdiction "should be fairly and faithfully observed"). The Court will observe treaties that relinquish domestic authority of foreign vessels. *See* The Schooner Exchange v. M'Faddon (The Exchange), 7 Cranch 114 (1812). Chief Justice Marshall stated that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Id.* at 133. *See also* Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923). The *Cunard* Court reiterated this principle, stating that "[d]uring [a foreign flagged vessel's] stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them." *Id.* at 124.

69. *See* Strathearn S.S. Co. v. Dillon, 252 U.S. 607 (1920) (explaining the application of the Seamen's Wage Act); Patterson v. Bark Eudora, 190 U.S. 169 (1903) (explaining the application of Seamen's Act of 1884 to foreign flagged vessels); The Belgenland, 114 U.S. 355, 364 (1885); The Epsom, 227 F. 158 (W.D. Wash. 1915) (explaining the application of the Seamen's Wage Act of 1915 to foreign flagged vessels); The Ester, 190 F. 216 (E.D.S.C. 1911). However, this jurisdiction may endure even if the cause of action arose on the high seas. *Id.* at 221.

70. *See* The Belgenland, 114 U.S. 355, 364 (1885); The Exchange, 7 Cranch 114, 136 (1812). *See generally*, 1 Steven F. Friedell, BENEDICT ON ADMIRALTY § 129 (1992).

71. *See* The Ester, 190 F. 216 (E.D.S.C. 1911) (setting forth a comprehensive list of elements to consider when deciding whether to exercise jurisdiction). *See generally* Martin J. Norris, THE LAW OF SEAMEN § 4.5 (4th ed. 1985).

72. *See* McCulloch v. Sociedad Nacional, 372 U.S. 10, 21 (1963) (recognizing a "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"). *See also* Wildenhus's Case, 120 U.S. 1, 12 (1887) (stating that internal economy rule is "general public law").

73. Much of the earlier U.S. case law on port state jurisdiction over foreign flag ships involved crimes committed by crew aboard the vessel. Because serious crimes, such as murder, were considered punishable at common law (i.e., common to the laws of all civilized nations), the issue was which country had jurisdiction to punish the actor. *See* Wildenhus's Case, 120 U.S. 1 (1887). In other situations, such as collisions at sea, the court might assume jurisdiction but apply the "general maritime law" of nations. *See* The Belgenland, 114 U.S. 355, 370 (1885). As the amount of national

Court recognized that, as a principle of international law, local courts should normally decline to apply domestic law to matters internal to a foreign vessel. The Court noted an exception where the conduct affects the peace of the port state.[75] In this case, New Jersey law enforcement officers arrested a Belgian seaman for the murder of another Belgian aboard a Belgian flagged vessel docked in Jersey City. The Belgian counsel sought the seaman's release upon a writ of habeas corpus, citing a treaty between the United States and Belgium under which "consular agents shall have exclusive charge of the internal order of merchant vessels of their nation." However, the treaty did not preserve the flag state's authority in instances where the matter disturbed the "tranquillity and public order on shore or in the port."[76] Chief Justice Waite, considering many similar treaties and practices of other nations,[77] observed that:

> by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or tranquility of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require.[78]

The Court concluded that the United States did have jurisdiction over this particular shipboard conduct. Using language similar to that

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legislation in maritime law increased, U.S. courts began to make more "choice of law" decisions. *See* The Epson, 227 F. 158 (W.D. Wash. 1915) (applying British law to a wage claim brought by American and foreign seamen against a British vessel). *See also* Brooks v. Hess Oil V.I. Corp., 809 F.2d 206 (3rd Cir. 1987) (applying Liberian labor law to a wage dispute with a Liberian flagged vessel although the employer, seamen, waters, union, and collective bargaining agreement were all American).

74. 120 U.S. 1 (1887).

75. Wildenhus's Case, 120 U.S. at 13.

76. *Id.* at 18.

77. According to Chief Justice Waite, the first such treaty waiving the United States' jurisdiction over foreign flagged vessels in its territory was with France (1788). The United States later entered into similar agreements with Prussia (1828), Russia (1832), Greece (1837), Hanover (1840), Portugal (1840), Mecklenburg-Schwerin (1847), Oldenburg (1847), Austria (1848), New Grenada (1850), Hanseatic republics (1852), the Two Sicilies (1855), Denmark (1861), Dominican Republic (1867), Italy (1868), Belgium (1868), the German Empire (1871), the Netherlands (1878), Italy (1881), and Romania (1881). *See id.* at 14.

78. *Id.* at 12.

relied on by the French in deciding the *Tempest*,[79] the Supreme Court explained that murder inherently falls within the "tranquility of the port" exception, established both by the treaty with Belgium and general international law. First, the grave nature of this offense itself creates a disturbance sufficient to breach the peace of the port.[80] Secondly, the civilized nations of the world universally and severely punish persons for the crime of murder.[81] Lastly, the Court considered this approach to be consistent with the practices of other nations.[82]

The Court's characterization of the internal economy rule as one of "comity" has led to some confusion. A number of writers have understood this to mean that the internal economy rule is but a courtesy between nations, not a duty imposed by law.[83] On the contrary, legal scholars and U.S. courts regard international comity as a binding legal obligation.[84] A closer analysis of the Court's reasoning in *Wildenhus's Case* also suggests that the Court considered itself bound to adhere to the internal economy rule as a matter of international law. First, the Court chronicled the widespread proliferation of similar treaties granting consular jurisdiction over foreign vessels in territorial waters.[85] International law recognizes that such a "network" of similar treaties can lead to state practice and thus obligation under international law.[86] Second, the Court viewed its decision as consistent with the judicial and legislative practices of other nations.[87] Reinforcing the premise

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79. Charteris, *supra* note 47, at 53.

80. Wildenhus's Case, 120 U.S. at 18. The severity of some offenses are enough to "affect the community at large, and consequently to invoke the power of the local government." *Id.*

81. *Id.* at 18. Murder creates a public disturbance that "every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction." *Id.* at 17-18.

82. *Id.* In particular, the Court emphasized that considering murder a *per se* breach of the peace is consistent with practice of France. *Id.*

83. *See* 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 942 (1984). *See also* Bickel, *supra* note 67, at 1185 (concluding that the Court in Wildenhus's Case disregarded the provisions of the Belgian treaty in exercising jurisdiction over the defendant).

84. *See* RESTATEMENT, *supra* note 26, § 101 cmt. e (noting that international comity is neither a matter of pure courtesy nor of absolute legal obligation). *See also id.* § 403 cmt. a (regarding reasonableness of jurisdiction as a legal obligation as a practice of international comity).

85. Wildenhus's Case, 120 U.S. 1, 13-15. Many similar treaties exist today. *See* MARTIN J. NORRIS, THE LAW OF SEAMEN § 4.4 (1985).

86. RESTATEMENT, *supra* note 26, § 102 cmt. i.

87. Wildenhus's Case, 120 U.S. at 18 (comparing its decision to the practices of France).

that the United States has accepted this rule as law, the Supreme Court has consistently referred to the internal economy rule as an international obligation in its decisions subsequent to *Wildenhus's Case*.[88]

III. APPLICATION OF THE INTERNAL ECONOMY RULE IN THE UNITED STATES

As previously noted,[89] the internal economy rule grants discretion to the port state to determine what circumstances warrant the invasion of a foreign ship's internal economy.[90] Therefore, a survey of the instances when the United States permitted or forbade the exercise of jurisdiction over the internal affairs of foreign vessels should be used to define that threshold. Accordingly, proponents of the Clay Bill point to several statutes under which Congress has seemingly extended domestic laws to govern the internal affairs of foreign vessels visiting the United States. These writers contend that the apparent jurisdiction of these laws delineate the boundaries of the United States' prescriptive reach under the internal economy rule.[91]

Although many of these statutes contain sweeping jurisdictional language, the courts have limited their scope to conform with the internal economy doctrine where the tools of statutory construction permit. In construing these statutes, the courts have presumed that Congress does not intend to violate international law absent clear evidence to the contrary.[92] Consequently, these constrictive judicial interpretations, not

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88. *See, e.g.*, International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 199 (1970) (quoting McCulloch v. Sociedad Nacional, 372 U.S. 10, 21 (1963)) (regarding internal economy rule as well founded in international law).

89. *See supra*, note 41 and accompanying text.

90. *See* JESSUP, *supra* note 51, at 191-92. *Wildenhus's Case* implies the United States "in every case [will] determine for itself whether a particular incident has affected the peace and tranquility of the port, even though there is actually no disturbance thereof." *Id.*

91. *See Hearing on H.R. 1517*, *supra* note 1, at 44-49 (prepared statement of Thomas J. Schneider, Esq.).

92. *See* RESTATEMENT, *supra* note 27, § 155 cmt. a. *See also* EEOC v. Arabian American Oil Co., 111 S.Ct. 1227 (1991) (limiting the extra-territorial reach of U.S. civil rights legislation); Lauritzen v. Larsen, 345 U.S. 571 (1953) (limiting the jurisdictional scope of the Jones Act to exclude some seamen on foreign vessels); Su v. M/V Southern Aster, 978 F.2d 462 (9th Cir. 1992) (limiting the jurisdictional reach of the Seamen's Wage Act). *See generally* RESTATEMENT § 114. The Court follows Lord Russell of Killowen in The Queen v. Jameson, 2 Q.B. 425, 430 (1896) ("if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enact-

the statutes themselves, truly reflect the international legal obligations of the United States. Therefore, where the judiciary has reformed generous jurisdictional language in maritime statutes, it has identified the circumstances under which the United States may or may not legally intervene in the internal economy of a visiting ship.[93]

As the following examination reveals, the methods and reasoning employed by the judiciary to limit the scope of broad jurisdictional statutes reveal a common rationale: The United States will interfere with the internal economy of a foreign vessel only where the absence of port state regulation would place a direct burden on the United States or where the United States has a special duty to safeguard the welfare of the class of persons protected by the statute. Absent one or both of these purposes, U.S. courts have declined to construe statutory language to cover foreign ships or crew where, as with the Clay Bill, the purpose of regulation is to improve U.S. competitiveness or satisfy some sense of general altruism.

A. The Jones Act

The Jones Act is perhaps the clearest example of the Supreme Court's efforts to contain Congress' apparent effort to evade the internal economy rule. Its language contains perhaps the most broad jurisdictional wording of any maritime statute.[94] According to the text of the statute, the Jones Act provides certain legal remedies to "[a]ny seaman who shall suffer personal injury in the course of his employment."[95] By liberally wording the statute, "Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in the service of watercraft of every foreign nation."[96] Because Congress used tools of statutory construction to limit the Jones Act's jurisdiction, the Court assumed that Congress would not intend to legislate in violation of international law, absent a clear indication to

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ing"). *Id.*

93. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 382 (1959). Considering the proper scope of U.S. maritime law, the Court reasoned that "in the absence of a contrary congressional direction, we must apply those principles of choice of law that are consonant with the needs of a general federal law *and with due recognition of our self regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community.*" *Id.* (emphasis added).

94. *See* 46 U.S.C. § 688 (1988).

95. *Id.*

96. Lauritzen v. Larsen, 345 U.S. 571, 577 (1953).

the contrary.[97]

Interpreting the statute so that it would comply with the United States' obligations under the internal economy rule, the Court devised a "points of contact" balancing test.[98] By the Supreme Court's decision in *Lauritzen v. Larsen*,[99] the Jones Act applies to a particular injured seaman only where the following "connecting" factors point to the Act's reasonable exercise: 1) place of the wrongful act, 2) flag of the vessel, 3) allegiance or domicile of the injured seaman, 4) allegiance of the defendant shipowner, 5) place of the contract, 6) inaccessibility of a foreign forum, 7) law of the forum, and 8) shipowner's base of operations.[100]

The Court has weighted these factors to further restrain the jurisdiction of the Jones Act to comply with international law. In formulating the balancing test, the Court accorded the law of the flag the most weight.[101] This reflects the rule of international law that the flag state has the primary responsibility for the welfare of the seamen onboard its vessels.[102] Likewise, the balancing test considers the residence of the

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97. *Id.* at 577. Congress passed the Jones Act "with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations." *Id.*

98. *Id.* at 582. The Court has used the principles of that case to guide the United States in the application of maritime law generally. Romero v. International Operating Co., 358 U.S. 354, 382 (1959).

99. 345 U.S. 571 (1953).

100. Lauritzen v. Larsen, 345 U.S. 571, 583-84, 586-89 (1953). The Court added the last factor, base of the shipowner's operations, in 1970. *See* Hellenic Lines v. Rhoditis, 398 U.S. 319 (1970). These criteria are to guide in the application of maritime law generally. Romero v. International Terminal Operating Co., 358 U.S. 354, 382 (1959).

101. Lauritzen, 345 U.S. at 585 (noting that "the weight given to the ensign overbears most other connecting events in determining applicable law").

102. *See id.* at 584. *See also* ILO Convention (No. 147) Concerning Minimum Standards in Merchant Ships, Oct. 29, 1976, art 2. This multilateral treaty assigns the responsibility for the welfare of seamen to the flag state. ILO 147 reads in pertinent part:

> Each Member which ratifies this Convention undertakes -
>
> (a) to have laws or regulations laying down, for ships registered in its territory -
>
> (i) safety standards, including . . . hours of work and manning . . . ;
>
> (ii) appropriate social security measure; and
>
> (iii) shipboard conditions of employment . . . ;
>
> (b) to exercise effective jurisdiction or control over ships which are registered in its territory in respect of -
>
> (i) safety standards, including . . . hours of work and manning, *pre-*

injured seaman an important consideration because "each nation has a legitimate interest that its nationals and permanent inhabitants be not [sic] maimed or disabled from self-support."[103] Otherwise, an injured American seaman would necessarily rely on the resources of the United States for support without an adequate remedy against his employer.[104] Therefore, the balancing test's two most influential factors support the Act's jurisdiction where the United States has a special duty to protect a particular injured seaman or the unavailability of redress for an injured seaman would burden the United States.[105]

To assure a bona fide connection between the injured seaman and the United States, the balancing test indicates that a seaman should not benefit from the protection of the Jones Act simply because the ship on which he is injured happens to trade with the United States. For example, although the *lex loci* is the primary jurisdictional consideration in a normal tort action, the Jones Act test accords the factor little weight.[106] The Court reasoned that, because ships travel in and out of numerous territorial jurisdictions, the place of the wrongful act is a fortuitous factor.[107] It would be manifestly unreasonable to justify interference with the internal affairs of a ship based on such a fortuitous factor.[108] Further explaining this valuation, Justice Jackson observed that "[a] seaman takes his employment, like his fun, where he finds it . . ."[109] Accordingly, the place of the wrongful act "is modified by the more constant law of the flag."[110]

The balancing test also indicates that the Jones Act should not extend to foreign seamen solely as a subsidy for U.S. flagged carriers. First, although the shipowner's U.S. citizenship or base of operations may weigh in favor of applying the Act, the Court has intimated that

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scribed by national laws or regulations;
(ii) social security measures *prescribed by national laws or regulations*;
(iii) shipboard conditions of employment . . . *prescribed by national laws of regulations, or laid down by competent courts in a manner equally binding on the shipowners and seafarers concerned.*

Id. (emphasis added).

103. Larsen, 345 U.S. at 586.

104. *Id.*

105. Hellenic Lines Ltd. v. Rhoditas, 398 U.S. 306, 318 (1970) (Harlan, J., dissenting) (reasoning that the government which is responsible for the welfare of a particular seaman should exercise jurisdiction).

106. Lauritzen, 345 U.S. at 583.

107. *Id.*

108. *Id.* at 584.

109. *Id.* at 588.

110. *Id.* at 584.

these considerations should tip the balance only in close cases.[111] This is consistent with the principle of international law that a state may regulate the conduct of its nationals insofar as the regulation does not infringe on the sovereign rights of another state.[112] Second, the "place of the contract" factor carries little weight, because it, like the place of injury, is a fortuitous factor.[113] Discounting the value of the *lex loci contractus* removes the effect of the "increasing costs" factor for shipowners who sign on foreign seamen in U.S. ports.[114]

Other elements of the balancing test also suggest that the Jones Act should not extend to foreign vessels out of general benevolence towards seamen. For instance, the inaccessibility of a more suitable forum influences the Court's decision whether to retain jurisdiction, not whether to apply the liberal personal injury laws of the United States.[115] Similarly, the "law of the forum" factor suggests that the United States should not entitle an injured foreign seaman to a windfall under the laws of the United States simply because the shipowner is amenable to local jurisdiction.[116]

Although the Jones Act appears on the surface to extend the scope of U.S. domestic laws even farther than the Clay Bill extends it, the Supreme Court's decisions have instead narrowed the scope of the Jones Act. In so doing, the Supreme Court has effectively narrowed the

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111. *See id.* at 586. *See* Dematteos v. Texaco, 562 F.2d 895, 901 (3rd Cir. 1977) (regarding law of the flag as outweighing base of operations). *But see* Southern Cross S.S. Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960) (disregarding law of the flag where only contacts with the United States were American citizens and permanent resident stock ownership of foreign incorporated company operating foreign flag vessel).

112. Lauritzen v. Larsen, 345 U.S. 571, 586 (1953). Upon application of the Jones Act, where a showing of the other interests is strong enough to overcome the law of the flag, does not violate international law because "[a] state 'is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their national are not infringed.'" *Id.* at 587 (quoting Skiriotes v. Florida, 61 S.Ct. 924, 927 (1941)).

113. *Id.* at 588 (reasoning that to give weight to the place of the contract would "subject a ship to a multiple of systems of law, to put some of the crew in a more advantageous position than others. . . .").

114. *See id.* at 588.

115. *Id.* at 590 (reasoning that the potential expense and effort for the litigants to bring the controversy before a more suitable forum affects the court's decision whether to exercise its jurisdiction, not whether the laws of the United States should apply to the controversy).

116. *Id.* at 591 (reasoning that "[j]urisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable").

scope of U.S. domestic laws. Of course, some vessels covered by the Clay Bill may satisfy the "point-of-contacts" balancing test. However, one can easily imagine a foreign flagged vessel with a foreign crew regularly trading with the United States with fewer contacts than would subject it to the jurisdiction of the Jones Act.[117] Moreover, the Court's reasoning in restricting the Jones Act's reach reveals that the Clay Bill's dual purposes, subsidizing the U.S. fleet and creating rights for foreign seamen, do not comport with U.S. obligations under international law.[118]

B. The Seamen's Wage Act

Seamen's Wage Act cases are another instance where the judiciary has tempered the seemingly expansive jurisdiction of a maritime statute.[119] The Act requires the master of a vessel to make full and timely payment of wages after the discharge of seamen or cargo.[120] In jurisdictional language more restrictive than that of the Jones Act, the Seamen's Wage Act extends its protection "to a seaman on a foreign vessel when in a harbor of the United States."[121] Further, Congress declared "[t]he courts [of the United States] are available to [foreign seamen] for the enforcement of this section."[122]

Regarding wages as an internal affair,[123] courts have restricted the jurisdictional scope of the Seamen's Wage Act to comply with the United States' obligations under the internal economy rule.[124] As with

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117. For example, a foreign owned vessel regularly lightering offshore, the crew of which has never set foot in the U.S., would be covered by the Clay Bill, but clearly not be subject to the Jones Act.

118. The Court explicitly rejected the injured seaman's amicus-brief argument that the balancing test ought to weigh in favor of application where the extension would benefit seamen generally and increase the competitiveness of U.S. flagged carriers. Lauritzen, 345 U.S. at 593.

119. *See, e.g.*, Romero, 358 U.S. 354.

120. 46 U.S.C. § 10310 (1994).

121. *Id.* § 10313(i).

122. *Id.*

123. *See* Jose v. M/V Fir Grove, 801 F. Supp 358, 373 (D. Or. 1991), *aff'd* Su v. M/V Southern Aster, 978 F.2d 462 (9th Cir. 1992) (regarding wages as within the internal economy rule). *See also* 1 Steven F. Friedell, BENEDICT ON ADMIRALTY § 128 (1992) (characterizing wages as a function of the internal economy of a vessel).

124. *See* Su v. M/V Southern Aster, 978 F.2d 462, 470 (9th Cir. 1992) (concluding that Seamen's Wage Act fails to overcome the presumption that Congressional intent is that statutes are to be construed as consistent with concepts of international law). *See also* Matise v. American Foreign S.S. Co., 488 F.2d 469 (9th Cir. 1974), *rev'd* 423 U.S. 150 (1975) (applying the Seamen's Wage Act to American seamen discharged in a foreign port).

the judicial construction of the Jones Act,[125] the methods and reasoning the courts have employed in Seamen's Wage Act cases also reveal the outer bounds of the United States' jurisdiction over foreign vessels.[126] These limitations embrace the same rationale as the Jones Act balancing test, though adopting a less complicated inquiry. Like the Jones Act cases, the judiciary's analysis permits the domestic laws of the United States to invade a foreign ship only where a seaman's discharge would directly burden the port or where the seaman's welfare is a special responsibility of the United States.

This judicial construction of the Seamen's Wage Act jurisdiction clearly entitles American seamen to the protections of the Act regardless of the country where each may be discharged.[127] This broad coverage is consistent with the United States' duty of primary responsibility for the welfare of its nationals. Like the reasoning employed in the Jones Act test that gave heavy weight to the connecting factor of citizenship, the United States would be burdened if American seamen returned home without receiving the pay due them.

In contrast, the Seamen's Wage Act protects foreign seamen only if discharged in a U.S. port.[128] This interpretation tolerates intrusion into the internal affairs of a foreign vessel only in situations where the vessel's conduct might otherwise place a direct burden on the port state. For example, a foreign seaman discharged without his pay could be stranded in the United States and dependent upon the resources of this country to find his way home.[129]

The Clay Bill's intended reach exceeds the judicial restraints on the jurisdiction of the Seaman's Wage Act. The Bill extends FLSA's minimum wage to all foreign seamen on "flag of convenience" vessels regardless of whether a particular seaman's lower rate of pay would impose directly upon the resources of the United States.[130] Instead, unlike burdensome situations which the Seamen's Wage Act may legitimately prohibit, the Clay Bill extends its protection to foreign seamen

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125. *See supra* note 95, and accompanying text.

126. *See* Romero, 358 U.S. at 384, *supra* note 119.

127. *See* Su v. M/V Southern Aster, 767 F. Supp. 205, 210 (D. Or. 1990).

128. *See id.* at 471 (holding that the Seamen's Wage Act does not apply to foreign seamen discharged in a foreign port). A few courts, however, have held that foreign seamen discharged in a foreign port may seek redress for unpaid wages through the Seamen's Wage Act. *See* Ventiadis v. C.J. Thibodeaux & Co., 295 F. Supp. 135 (S.D. Tex. 1968).

129. *See* Jose v. M/V Fir Grove, 801 F. Supp. 358, 362 (D. Or. 1992) (explaining that the Seamen's Wage Act's limited extension to foreign seamen assures that these seamen will not be set ashore by the vessel without adequate means of support).

130. H.R. 1517, 103rd Cong., 1st Sess. (1993).

out of legislative goodwill.

An unpublished opinion by Justice Brandeis further works to distinguish the Clay Bill from the Seamen's Wage Act.[131] Justice Brandeis, considering the internal economy rule, noted that the wages subject to the Seaman's Wage Act are already earned by the seaman.[132] The Wage Act merely made due a liability previously incurred by the shipowner through his contract with the seaman.[133] The Clay Bill, on the other hand, creates new liabilities for the shipowner outside of the employment contract. For example, FLSA's minimum wage provision regulates the rate at which a shipowner shall pay its seamen despite an employment contract to the contrary.[134]

C. Prohibition Cases

At first glance, the Supreme Court's decision that prohibition laws extend to visiting foreign vessels lends support to the legality of the Clay Bill. In *Cunard S.S. Co. v. Mellon*,[135] the Supreme Court held that the 18th Amendment and related laws prohibited foreign ships in U.S. territorial waters from possessing or serving alcoholic beverages.[136] This holding appears to announce that the United States' obligations under the internal economy rule permit the U.S. to condition access to its ports on foreign ships' acceptance of all domestic laws. A closer look at the Court's reasoning, however, reveals a more restrictive approach.

There are two possible interpretations of this holding with respect to the United States' obligations under the internal economy rule. Both fall short of establishing a precedent upon which to justify the legality of the intrusions into the internal economy envisioned by the Clay Bill.

First, *Cunard* could represent another set of circumstances that justify U.S. intrusion into the internal affairs of a foreign vessel. Under this view, the decision stands for the proposition that a port state may interfere with the internal economy of a foreign vessel if the shipboard conduct would "embarrass [the domestic law's] enforcement and . . . defeat the attainment of its obvious purpose."[137] In *Cunard*, the Court was concerned that if it did not interpret the 18th Amendment to pro-

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131. *See* Bickel, *supra* note 67, at 1177.
132. *Id.* at 1186.
133. *Id.*
134. *See* H.R. 1517, 103rd Cong., 1st Sess. (1993).
135. 262 U.S. 100 (1923).
136. *Id.* at 100.
137. *Id.* at 126.

hibit the carriage of alcoholic beverages by foreign ships calling at U.S. ports, then the foreign ships' effective immunity would encourage customs violations.[138] In other words, it was concerned that the peace and order of United States ports were at stake. Acting to frustrate smuggling into the territory of the United States is certainly not analogous to the Clay Bill's exportation of American labor standards to foreign seamen onboard foreign ships.

The second interpretation is that Congress had legislated in violation of international law. It is a settled principle of U.S. law that the judiciary will follow the clearly expressed intent of Congress without regard to the mandates of international law.[139] Where the courts cannot fairly construe a statute as consistent with international law, Congress' expressed intent prevails despite the nation's contrary international obligations.[140] However, a sovereign's statutory repudiation of an obligation under international law does not relieve it from the international consequences of that violation.[141]

To further support this second interpretation of *Cunard*, it is useful to note the reaction of the community of nations to the announcement that prohibition laws would apply to their vessels. The United Kingdom stated that, although it also recognized the right to condition entry of foreign vessels, international comity restricted such conditions to matters that "relate solely to the safety and welfare of the ship, crew, and passengers."[142] The Netherlands also referred to the law as a

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138. *Id.*

139. In his dissent, Justice Sutherland maintained that Congress was not explicit in its intended application. He pointed out that the Amendment could have been construed to not apply to these foreign vessels and that international law required the court to so construe. *Id.* at 132. (Sutherland, J., dissenting). He further reasoned that "interference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress." *Id.* at 133. (Sutherland, J., dissenting).

140. RESTATEMENT, *supra* note 26, § 115 cmt. a; Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923) (holding that congressional intent is sufficiently clear to apply prohibition laws to foreign vessels in U.S. waters). The Constitution confers upon Congress the power "[t]o regulate Commerce with foreign Nations") U.S. CONST. art. I, § 8, cl. 2. *See* Cunard S.S. Co., at 262 U.S. at 133 (1923) (McReynolds, J., dissenting) (stating that the judiciary will violate international law only if that is the expressed intent of Congress). *But see* DeMateos v. Texaco, 562 F.2d 895 (3rd Cir. 1977) (reasoning that the Fifth Amendment due process requirements may preclude congressional extension of legislation in violation of international law).

141. RESTATEMENT § 115(b).

142. *See* JESSUP, *supra* note 51, at 222.

violation of "international usage and practice."[143] In particular, the Dutch complained that U.S. prohibition laws contravened their national laws that required shipowners to supply seamen with a certain ration of alcohol.[144] Belgian, Italian, Norwegian and Portuguese government statements also claimed that the United States' extension of Prohibition to their ships violated principles of international law.[145]

For the Clay Bill, the holding of *Cunard* simply means that, should Congress decide to explicitly extend FLSA and NLRA to foreign vessels, the judiciary will apply the statute without regard to the United States' obligations under international law.

D. The National Labor Relations Act

The Supreme Court has already decided that the application of the National Labor Relations Act to foreign vessels violates the United States' obligations under the internal economy rule.

In *McCulloch v. Sociedad Nacional*,[146] a Honduran shipowner sought to enjoin the National Labor Relations Board's Regional Director from conducting organizational elections among its Honduran flagged vessels' Honduran crew.[147] Examining the language of the statute, the Court found "no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels . . . contrary to the recognition long afforded them not only by our state department but also by the Congress."[148] Relying on *Wildenhus' Case* to buttress this conclusion, the Court cited "the well-established rule of international law that the law of the flag ordinarily governs the internal affairs of a ship."[149]

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143. *See id.*

144. *See id.* at 223.

145. *See id.* at 223-27.

146. 372 U.S. 10 (1963).

147. McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963).

148. *Id.* at 20 (footnotes omitted).

149. *Id.* at 21. In Benz v. Compania Naviera Hidalgo, a Panamanian shipping company sought damages from three American unions that had disrupted the operations of its Liberian flagged, European crewed vessel in Oregon. Union picketing of these vessels began in support of the ship's crew who had demanded increased wages and improved living conditions. 353 U.S. 138, 140 (1957). The unions argued that the dispute fell within the jurisdiction of the Labor Management Relations Act. *Id.* at 141. The Ninth Circuit held that the dispute was outside of the Labor Management Relations Act because the Act is solely concerned with the welfare of American workers. Accordingly, the Circuit Court found for the shipping company under an Oregon common law principle regarding picketing for unlawful purposes. The Supreme Court, holding that the Act does not apply to foreign vessels because Congress had not clearly

In *International Longshoremen's Local 1416 v. Ariadne Shipping*,[150] Panamanian and Liberian vessels registered in those countries brought an action to enjoin union picketing of their ships in Florida.[151] In this case, the unions were protesting substandard wages paid by the shipping companies to American longshoremen involved in the periodic husbanding of these foreign ships.[152] Distinguishing this case from *McCulloch* and its progeny, the Court held that the NLRA did apply to this dispute because "[t]here is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law[s]."[153] In other words, it was reasonable to expect that the labor laws of the United States should apply to domestic longshoremen.[154]

The Court further explained U.S. obligations under international law in *Windward Shipping v. American Radio Ass'n*.[155] As in the other two cases, an American union directed activity towards two foreign flagged ships docked in a U.S. port. This time, however, the union did not try to organize the crew as in *McCulloch* or increase wages for American residents as in *Ariadne*.[156] Instead, the union sought to apply pressure to the shipping companies to increase the wages of foreign seamen under contracts made outside the U.S.[157] This in turn would increase foreign shipowners' overhead costs, thereby equalizing expenditures between foreign and American ships.[158] In holding that the internal economy rule prohibited the United States from protecting such intrusive activities, the Court distinguished this case from *Ariadne*.[159]

Through these cases the Supreme Court has declared that the internal economy rule prohibits the extension of U.S. labor laws to conduct aboard foreign ships unless U.S. workers are directly concerned. Contrary to these decisions, the Clay Bill's extension of jurisdiction only requires "regular trading" with the United States. Therefore, the

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expressed such an intent, cautioned that to "run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147.

150. 397 U.S. 195 (1970).

151. *Id.* at 196.

152. *Id.*

153. *Id.* at 199.

154. *Id.* (reasoning that U.S. labor law should apply because "this dispute centered on wages to be paid [to] American residents").

155. 415 U.S. 104 (1974).

156. *Id.* at 112.

157. *Id.* at 114.

158. *Id.*

159. *Id.* at 115.

Clay Bill's extension of jurisdictional reach of the NLRA exceeds that which the judiciary has indicated.[160]

IV. CONCLUSION

The United States, as a member of the seafaring community of nations, has accepted the internal economy rule as a binding obligation under international law. By the commands of this doctrine, Congress must take special care in the exercise of its sovereign power to prescribe laws that regulate the internal conduct of visiting ships from other nations. Recognizing this obligation, the United States judiciary has denied Congress' attempted intrusion into foreign vessels' internal economy for the sole purposes of either increasing U.S. competitiveness or extending the benefits of American goodwill to the world's seamen. Instead, the United States has committed itself to apply its domestic laws only where the absence of U.S. regulation would place a direct hardship on its resources or its nationals.

The Clay Bill is precisely the sort of intrusive regulation the internal economy rule seeks to avoid. The Bill's purposes, protecting U.S. shipping and extending benefits to seamen with tenuous connections to the United States, run contrary to these time-honored principles of international maritime law. Because, as of this writing, the Clay Bill has not yet passed into law, a conflict with international law "may be [an] appropriate ground for Congress to reject a proposed statute or for the President to veto it."[161]

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160. However, courts have also addressed this issue. For example, in the recent case of *NLRB v. Dredge Operators*, 19 F.3d 206 (5th Cir. 1994), the Fifth Circuit considered the National Labor Relations Board's efforts to apply the NLRA to a U.S. flagged vessel that operated wholly within the territorial waters of Hong Kong. *Dredge Operators*, 19 F.3d at 208. Because the dredge was engaged in a long-term project in that country, the Hong Kong government insisted that the vessel comply with certain local labor laws. The vessel's U.S. based operator resisted the NLRB on the grounds of comity and extraterritoriality. Reviewing the decisions of the Supreme Court, the court declared that international comity does not prevent the application of U.S. labor laws to vessels flying the flag of the United States. Further, the court dismissed the ship operator's claim that this constituted an impermissible extraterritorial application of U.S. laws by invoking the ancient maxim that a ship is a piece of the territory of the country whose flag it flies. *Id.* at 211. Therefore, the U.S. will apply its laws to the internal affairs of its vessels - even if those laws conflict with the laws of another port state. Comity dictates that the U.S. should defer to the inconsistent laws of other nations when vessels from those nations visit a U.S. port.

161. RESTATEMENT, *supra* note 26, § 115 cmt. a.