The Practical Effects on Labor of Repealing American Cabotage Laws

C. Todd Jones*

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I. INTRODUCTION

American cabotage laws are part of a protectionist shelter for the U.S. sea transport industry. In spite of subsidies, ownership restrictions,

* LL.M. (International and Comparative Law) Candidate, Georgetown University Law Center; J.D., B.S.B.A., University of Denver. The author practices law in Washington, D.C. The author would like to thank Allen Mendelsohn and Warren Dean for their comments and suggestions.

flag requirements, and construction standards, American-flag merchant marine and domestic coastwise trade has withered over this century. These government measures, which were originally designed to promote and support a merchant marine for military purposes, have failed to create the thriving private sea carriage business which they sought. In fact, the industrial policy goal of supporting this U.S. industry has also clearly failed, with little intercoastal sea trade actually occurring at this time.

Assuming that there is an appropriate way to meet the defense needs of this country without resorting to economic protectionism, cabotage laws and shipbuilding subsidies have no more place in this economy than colonial land grants and Marxist management techniques. Unfortunately, they have become such an integral part of the transportation sector that they cannot be swept away by a simple repeal without doing great damage to parts of the country's economy. To eliminate the pre-industrial relic that is the American cabotage regime requires considering in advance the effects of doing so. The laws which generally guide commerce and enterprise in this nation must also be assessed.

This paper shall outline the American cabotage laws and briefly consider their limits on U.S. shipping. It will then analyze how their repeal would affect five American legal regimes: the Fair Labor Standards Act of 1938, the National Labor Relations Act of 1947, the Longshoreman and Harborworkers Act, Section 33 of the Jones Act, and United States immigration laws. With each, it recommends legislative amendments needed to accompany the Act's repeal to ensure as smooth a transition as possible between protectionism and economic growth.

II. American Cabotage Laws

Cabotage[1] is a term used to describe government measures used to protect or foster a domestic shipping industry by reserving all or a portion of intranational sea commerce to ships which fly the national flag, are owned by local corporations or individuals, are built or repaired in local shipyards, or are staffed by the home country's seamen. The United States has historically sought to encourage growth of its merchant marine for military and economic purposes by limiting the coastwise trade to American ships. Congress sought to promote the domestic sea trade in its first session by prohibiting the states from imposing duties on U.S. vessels.[2] This was followed by measures during the next two years exact-

1. "Cabotage is a nautical term derived from Spanish, literally denoting navigating from cape to cape along the coast without going out into the open sea — i.e. in nautical waters." Ademuni-Odeke, Protectionism and the Future of International Shipping, Maritinus Nijhoff Publishers, Dordrecht, The Netherlands, at 75 (1984). *See infra* note 3.

2. Craig J. Forsyth, The American Merchant Seaman and His Industry: Struggle and Stigma 3, (1989).

ing heavy duties from foreign flag, foreign built vessels engaging in coastal trade.[3]

The first major cabotage law enacted in the United States was the Act of March 1, 1817.[4] It required ships importing goods into the country to be U.S. flagged or owned by Americans if the foreign nation from which the goods came required the same of vessels that imported to it.[5] Further, vessels engaging in the coastwise trade had to be flagged or owned in the same manner.[6] The law created a long standing policy which has been extended and expanded under our modern cabotage restrictions.

The Federal government's policy of encouraging a domestic merchant marine was succinctly expressed in the opening section of this nation's most important cabotage law, the Merchant Marine Act of 1920,[7] colloquially known as the Jones Act,[8] which stated:

> It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is the declared policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, etc.[9]

To that end, Congress has enacted several cabotage statutes, each of which is discussed below.

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3. *Id.* at 4, *quoted in* REPORT OF THE HOUSE COMMITTE ON EDUCATION AND LABOR COVERAGE OF CERTAIN LABOR LAWS TO FOREIGN FLAG SHIPS, H.R. REP. No. 984, 1022 Cong., 2d Sess., pt. 1., at 6 (1992) (hereinafter 1992 HOUSE REPORT). Cabotage laws are not the only measures nations use to support a domestic merchant marine. Other protectionist and industry support actions include: duties and levies on foreign shippers; direct subsidies to domestic shippers and ship builders; cargo preferences, both bilateral and multilateral, which require a set percentage of foreign sea trade to be on domestic carriers; and cargo preferences, requiring cargoes such as foreign aid, relief aid, and surplus agricultural commodity shipments to be on domestic carriers. *See* ADEMUNI-ODEKE at 71-86.

4. Act of March 1, 1817, ch. 31, 3 Stat. 351 (repealed 1933).

5. *Id.* § 1.

6. *Id.* § 4.

7. Pub. L. No. 66-261, 41 Stat. 988 (1920).

8. The legislation is named after its sponsor, Senator Wesley L. Jones of Washington. The term "Jones Act" is used most used to refer to section 33 of the Act, which provides for the recovery for injury to, or death of a seaman. American Maritime Ass'n v. Blumenthal, 590 F.2d 1156, 1157 n.2, *cert. denied* 441 U.S. 943 (1978). *See* section II(C). For purposes of this article, however, the term will be used to refer to section 27 of the Act.

9. Jones Act § 1, 46 U.S.C. § 861 (1993).

A. JONES ACT § 27

Section 27 of the Jones Act was designed to further the American merchant marine policy by limiting the ownership of ships engaging in coastal commerce to Americans and American corporations, reiterating the long-kept policy of excluding foreign vessels.[10] The section states:

> No merchandise . . . shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port,[11] or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . .[12]

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10. *See* Act of March 1, 1817, *supra* notes 4 - 6 and accompanying text.

11. The "via a foreign port" language was added to the predecessor statute, *see supra* note 4, after United States v. 250 Kegs of Nails, 52 F. 231 (S.D. Cal. 1892), *aff'd*, 61 F. 410 (9th Cir. 1894). The government had sought but did not obtain forfeiture of nails which had been shipped on a Belgian ship from New York to Antwerp, unloaded, reloaded to a British ship, and transported to California, because the original law did not contain the "directly or via a foreign port" language. *See* Act of Feb. 15, 1893, ch. 117, 27 Stat. 455. It is interesting to note that even a century ago the Jones Act's predecessor was burdening U.S. producers and consumers forcing them to use more expensive or less convenient domestic shippers. For a historical discussion of the case, the Act, and related issues, *see* McGeorge, *United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings With the Legislative Purpose of the Jones Act and the Demands of a Global Economy*, 11 NW. J. INT'L L. & BUS. 62 (1990).

12. 46 U.S.C. Sec. 883 (1993). The Act, less than a model of legislative drafting, is a single section amended by modifying provisos tacked on to the end of the original legislation. The most important portions of the law are quoted in the text above. Because of the amendments to the legislation, bracketed numbers have been added to distinguish provisos within the Act for purposes of this discussion but are not part of the Act. As amended, the remainder of the Act states:

> [o]r vessels to which the privilege of engaging in the coastwise trade is extended by section 808 of this Appendix or section 22 of this Act; [2] *Provided*, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade: [3] *Provided further*, That no vessel which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including Trust Territories), or its possessions: [4] *Provided further*, That this section shall not apply to merchandise transported between points within the continental United States, including Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said Commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: [5] *Provided*

further, That this section shall not become effective upon the Yukon River until the Alaska Railroad shall be completed and the Secretary of Transportation shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic: [6] *Provided further*, That this section shall not apply to the transportation of merchandise loaded on railroad cars or to motor vehicles with or without trailers, and with their passengers or contents when accompanied by the operator thereof, when such railroad cars or motor vehicles are transported in any railroad car ferry operated between fixed termini on the Great Lakes as a part of a rail route, if such car ferry is owned by a common carrier by water and operated as part of a rail route with the approval of the Interstate Commerce Commission . . ., now owned or controlled by any common carrier by rail and if such car ferry is built in and documented under the laws of the United States: [7] *Provided further*, That upon such terms and conditions as the Secretary of the Treasury by regulation may prescribe, and, if the transporting vessel is of foreign registry, upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that the government of the nation of registry extends reciprocal privileges to the vessels of the United States, this section shall not apply to the transportation by vessels of the United States not qualified to engage in the coastwise trade, or by vessels of foreign registry, of (a) empty cargo vans, empty lift vans, and empty shipping tanks, (b) equipment for the use with the cargo vans, lift vans, or shipping tanks, (c) empty barges specifically designed for carriage aboard a vessel and equipment, excluding propulsion equipment, for use with such barges, and (d) any empty instrument for international traffic exempted from application of the customs laws of the Secretary of the Treasury pursuant to the provisions of section 1322(a) of Title 19, if the articles described in clauses (a) through (d) are owned or leased by the owner or operator of the transporting vessel and are transported for his use in handling cargo in foreign trade; and (e) stevedoring equipment and material, if such equipment and material is owned or leased by the owner or operator of the transporting vessel, or is owned or leased by the stevedoring company contracting for the lading or unlading of that vessel, and is transported without charge for use in the handling of cargo in foreign trade: [8] *Provided further*, That upon such terms and conditions as the Secretary of the Treasury by regulation may prescribe, and, if the transporting vessel is of foreign registry, upon his finding, pursuant to information furnished by the Secretary of State, that the government of the nation of registry extends reciprocal privileges to vessels of the United States, the Secretary of the Treasury may suspend the application of this section to the transportation of merchandise between points in the United States (excluding transportation between the continental United States and noncontiguous states, districts, territories, and possessions embraced within the coastwise laws) which, while moving in the foreign trade of the United States, is transferred from a non-self-propelled barge certified by the owner or operator to be specifically designed for carriage aboard a vessel and regularly carried aboard a vessel in foreign trade to another such barge owned or leased by the same owner or operator, without regard to whether any such barge is under foreign registry or qualified to engage in the coastwise trade: [9] *Provided further*, That until April 1, 1984, and notwithstanding any other provisions of this section, any vessel documented under the laws of the United States . . . may, when operated upon a voyage in foreign trade, transport merchandise in cargo vans, lift vans, and shipping-tanks between points embraced within the coastwise laws for transfer to or when transferred from another vessel or vessels, so documented and owned, of the same operator when the merchandise movement has either a foreign origin or a foreign destination; but this proviso (1) shall apply only to vessels which that same operator owned, chartered or contracted for the construction of prior to November 16, 1979, and (2) shall not apply to movements between points in the contiguous United States and points in Hawaii, Alaska, the Commonwealth of Puerto Rico and United States territories and possessions. For the purposes of this section, after December 31, 1983, or after such time as an appropriate vessel has been constructed and documented as a vessel of the United States, the transportation of hazardous waste, as defined in section 6903(5) of title 42, from a point in the United States for the purpose of the incineration at sea of that waste shall be deemed to be transportation by water of merchandise between points in the United States: [10] *Provided, however*, That the provisions of this sentence shall not

Aside from the ownership and construction requirements, ships engaging in U.S. intercoastal trade must also never have been:

1) Foreign owned at any time;[13]
2) Ever under a foreign flag;[14] or
3) Rebuilt abroad.[15]

Any cargo shipped in violation of the Jones Act can be seized by the United States government,[16] although an injunction prior to shipment can be obtained by parties with appropriate standing.[17]

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apply to this transportation when performed by a foreign-flag ocean incineration vessel, owned by or under construction on May 1, 1982, for a corporation wholly owned by a citizen of the United States; the term "citizen of the United States", as used in this proviso, means a corporation as defined in section 802(a) and (b) of this appendix. The incineration equipment on these vessels shall meet all current United States Coast Guard and Environmental Protection Agency Standards . . . including drydock inspections and internal examinations of tanks and void spaces, as would be required of a vessel of the United States. Satisfactory inspection shall be certified in writing by the Secretary of Transportation. Such inspections may occur concurrently with any inspections required by the flag state or subsequent to but no more than one year after the initial issuance or the next scheduled issuance of the Safety of Life at Sea Safety Construction Certificate. In making such inspections, the Coast Guard shall refer to the conditions established by the initial flag state certification as the basis for evaluating the current condition of the hull and superstructure. The Coast Guard shall allow the substitution of an equivalent fitting, material, appliance, apparatus, or equipment other than that required for vessels of the United States if the Coast Guard has been satisfied that fitting, material, appliance, apparatus, or equipment is at least as effective as that required for vessels of the United States: [11] Provided further, That for the purposes of this section, supplies aboard United States documented fish processing vessels, which are necessary and used for the processing or assembling of fishery products aboard such vessels, shall be considered ship's equipment and not merchandise: [12] *Provided further*, That for purposes of this section, the term "merchandise" includes valueless material: [13] *Provided further*, That this section applies to the transportation of valueless material or any dredged material regardless of whether it has commercial value, from a point or place in the United States or a point or place on the high seas within the Exclusive Economic Zone as defined in the Presidential Proclamation of March 10, 1983, to another point or place in the United States or a point or place on the high seas within that Exclusive Economic Zone: [14] *Provided further*, That the transportation of any platform jacket in or on a launch barge between two points in the United States, at one of which there is an installation or other device within the meaning of section 1333(a) of Title 43, shall not be deemed transportation subject to this section if the launch barge has a launch capacity of 12,000 long tons or more, was built as of June 7, 1988, and is documented under the laws of the United States, and the platform jacket cannot be transported on and launched from a launch barge of lesser launch capacity that is identified by the Secretary of Transportation and is available for such transportation.

46 U.S.C. § 883 (1988 and Supp. 1992).

13. *See* Jones Act § 27, proviso [2], *supra* note 12.

14. *Id.*

15. *Id.*, at proviso [3]. Pub. L. No. 92-163, § 1, 85 Stat. 486 (1971).

16. *See* Jones Act § 27, proviso [1], *supra* note 12.

17. American Maritime Association v. Blumenthal, 458 F. Supp. 849, *aff'd* Blumenthal, Pennsylvania R.R. Co. v. Dillon, 335 F.2d 292 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964). In the latter case, Judge Berger upheld the dismissal of the complaints alleging that Customs' certification for Jones Act trade of a vessel whose midsection had been built overseas. The Act,

The Act is of broad application. It has been tailored through amendments and construed through judicial interpretation to include almost every conceivable type of coastal sea commerce. Going beyond the simple transportation of bulk goods and merchandise, the law includes the transportation of sludge dredged from shipping channels,[18] waste to be incinerated at sea,[19] and valueless materials.[20] The phrase "between points in the United States" has been construed to have equal breadth. Aside from including transportation between two ports,[21] it also includes off-shore ship-to-ship loading and lightering,[22] but only within the three mile territorial limit.[23] The Outer Continental Shelf Lands Act[24] extended points in the U.S. to include drilling rigs and production platforms

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according to the decision, did not create a legal right of the plaintiff railroad company and shippers to be protected, and in fact was intended to stimulate domestic shipbuilding, not to insulate coastwise carriers from competition. *Id.* at 294-95.

18. *See* Jones Act §27, proviso [13], *supra* note 12, Pub. L. No. 100-329, § 1(a), 102 Stat. 588 (1988).

19. *Id.* at proviso [10].

20. *Id.* at proviso [13]. The Act has been construed to exclude logs swept by a foreign tug into a towing boom. See United States v. 1500 Cords, More or Less, Jackpine, 204 F.2d 760 (7th Cir. 1953). The Court in that case found that, "the sweeping, drawing or bunting of the logs into the space between the towing booms . . . was not transportation . . . . [M]ovement did not begin indeed could not have begun, until the [foreign flagged] tug had sealed the [end of the towing boom attached to shore]." *Id.* at 764.

21. Point-to-point shipment of merchandise does not include, however, merchandise which has been transported in one form, off-loaded, processed into another form, reloaded, and shipped, such as when oil is transported from Alaska, shipped to the U.S. Virgin Islands, processed at a plant there, and shipped in its new form to American mainland ports. *See* Blumenthal, 379 U.S. 945. The Customs Service has apparently not applied the processing distinction with any level of uniformity in light of the original purpose of the Jones Act. *See* McGeorge, *supra* note 11, at 71-74 (comparing the Customs Service's treatment of processed crabs, which are not considered processed for purposes of the Act); Blumenthal, 379 U.S. 945.

22. Lightering is the process of off-loading oil from large tankers to smaller ones. Very large and ultra large crude carriers transport oil from overseas to the United States coast. Because they draw 70 to 90 feet of draft when fully laden, the tankers are unable to enter U.S. harbors, which cannot accommodate vessels drawing more than 40 feet of draft (Corpus Christi, Texas being able to handle 45 feet). Smaller tankers, independently contracted for individual jobs between longer voyages, load crude from the larger vessels for transport to shore. United States Congress, Office of Technology Assessment, COMPETITION IN COASTAL SEAS, 17-18 (1989) (hereinafter "OTA, COMPETITION").

23. For that reason, most lightering is excluded. Most lightering near the United States occurs forty to sixty miles off shore. While the United States has claimed jurisdiction over a 200-mile Exclusive Economic Zone (EEZ) extending from American shores, the zone is not considered subject to cabotage laws to the extent that it lays outside of the three mile limit. *Id.* at 7. See Executive Proclamation No. 5030, 3 C.F.R. 22 (1984), *reprinted in* 16 U.S.C. §1453 (1988). *See also infra* note 24.

The loading of goods onto a larger ship in U.S. territorial waters is also subject to the cabotage laws. *See* Michael S. Cessna, *Coal Top-Offs: A Case History of the Failure of U.S. Maritime Policy*, 17 J. MAR. L. & COM. 211 (1986) (discussing the U.S. Customs Service's rejection of the application of a Canadian company to use its technologically advanced ship which, while anchored off shore, loaded coal from smaller ships for more economical transport to foreign

that are anchored to the seabed.[25]

Although sweeping in its mission and goals, the Jones Act has been amended with legislative carve-outs to meet particular market and national security demands, with the former seeming to have greater importance than the latter. Permanent amendments have been created to:

1) Limit application of the Act on the Yukon River;[26]
2) Allow Canadian transportation of merchandise between southeastern Alaska and other states where no U.S. flag carrier is available;[27]
3) Where a foreign nation likewise permits, allow the transportation of empty cargo containers, shipping tanks, LASH and Seabee barges, and similar equipment;[28]
4) Permit merchandise in foreign commerce to be transported on foreign-flag barges to foreign-flag ships where other nations permit reciprocal privileges;[29] and
5) Exempt certain foreign built, American owned, ocean-going incinerators.[30]

Congress has also created temporary exemptions to meet particular short term needs. These have included enactments to:

1) Permit the shipment of lumber to Puerto Rico for one year;[31]
2) Allow the transportation of coal from Ogdensburg, New York, iron ore from U.S. ports, and grain on the Great Lakes in Canadian vessels;[32] and

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countries. The company had sought an exemption from the Jones Act for the smaller loading ships.)

24. Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (1953), *codified as amended* at 43 U.S.C. §§ 1331-43 (1988 and Supp. 1993). The Act extended United States government jurisdiction to:

> the subsoil and seabed of the Outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .

43 U.S.C. § 1333(a)(1) (1988).

25. The Act does not include points where there is presently no contact with the seabed, such as when drilling rigs or other structures are first shipped to the point on the sea above their ultimate destination. OTA, COMPETITION, at 20.

26. Jones Act § 27, proviso [5], *supra* note 12.

27. 46 U.S.C. App.§ 289b (1988).

28. Jones Act § 27, proviso [7], *supra* note 12; Pub. L. No. 89-194, 79 Stat. 823 (1965); Pub. L. No. 90-474, 82 Stat. 700 (1968). *See* EARNEST G. FRANKEL, REGULATION AND POLICIES OF AMERICAN SHIPPING 59 (1982).

29. Jones Act § 27, proviso [8], *supra* note 12.

30. *Id.*, at proviso [10], Pub. L. No. 97-389, § 502, 96 Stat. 1954 (1982).

31. Merchant Marine Act Amendments of 1962, Pub. L. No. 87-877, § 4, 76 Stat. 1200, 1201 (1962).

32. Act of Aug. 7, 1956, Pub. L. No. 1019, 70 Stat. 1090, ch. 1028 (1956); *see, e.g.*, Act of

3) Test for a five year period the use of hovercraft between Alaskan ports.[33]

Congress had enacted another, separate cabotage law for dredge operators, less restrictive than the Jones Act, as the Foreign-Built Dredge Act of 1906,[34] which required all foreign built dredges working in American waters to be under U.S. flag.[35] That legislation was subsumed into the Jones Act through Subtitle V of the Coast Guard Authorization Act of 1992.[36] The new law extended the requirements of Section 27 to dredge operations, stating:

> [A] vessel may engage in dredging in the navigable waters of the United States only if (1) the vessel meets the requirements of [Jones Act § 27] and [the Shipping Act of 1916] for engaging in the coastwise trade; [and] (2) when chartered, the charterer of the vessel is a citizen of the United States under [the Shipping Act of 1916] for engaging in the coastwise trade . . . .[37]

Similar to the Jones Act, the penalty section of the law states: When a vessel is operated in knowing violation of this section, that vessel and its equipment are liable to seizure by and forfeiture to the United States Government.[38]

The protectionist and security effects of the Jones Act are accentuated by American citizenship and Naval Reserve requirements. All licensed seamen on U.S. flagged vessels as well as all masters, chief engineers, radio officers, officers in charge of a deck watch or engineering watch must be U.S. citizens or lawfully admitted aliens. Further, seventy-five percent of all unlicensed seamen must also meet such requirements.[39] For vessels whose construction costs were subsidized, the seamen must all

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June 24, 1952, Pub. L. No. 409, 66 Stat. 156, ch.458 (1952); Act of Oct. 10, 1951, Pub. L. No. 162, 65 Stat. 371, 65, ch. 459 (1951).

33. Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 146(a), 92 Stat. 2689, 2714 (1978).

34. Foreign-built Dredge Act of 1906, Pub. L. No. 185, § 1, 34 Stat. 204, ch. 2566 (1906). As originally drafted and codified until last year, the law read: "[A] foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States."

35. The law was originally passed in response to the use of several foreign unitsin the repair of damage done in Galveston, Texas by the hurricane of 1900. Mark D. Aspinwall, *Coastwise Trade Policy in the United States: Does it Make Sense Today?*, 18 J. MAR. L. & COM. 243, 245 (1987).

36. Coast Guard Authorization Act of 1992, Pub. L. No. 102-587, § 5501(a)(1), 106 Stat. 5084 (amending 46 U.S.C app. § 292 (1988 & Supp. IV 1992)) (hereinafter CGAA 92).

37. 46 U.S.C. §§ 292(a)(1), (2) (1988 & Supp. IV 1992). Exceptions were enacted for documented vessels with registry endorsements dredging for gold in Alaska and certain specific ships. *See* 46 U.S.C. § 292(b) (1988 & Supp. IV 1992); *see also* CGAA 92, supra *note 35 at* § 5501(a)(2) (exempting certain specific vessels from the law).

38. 46 U.S.C. app. § 292(c) (1988 & Supp. IV 1992).

39. 46 U.S.C. §§ 8103(a), (b)(1) (1988 & Supp. IV 1992). Exempted from this law are yachts, vessels that fish for migratory species, and fishing vessels outside of the EEZ. 46 U.S.C. § 8103(b)(2) (1988 and Supp. IV 1992).

be U.S. citizens. For passenger vessels, 90% of the total complement must be citizens.[40] Finally, deck or engineer officers employed on U.S. owned vessels or those for which an operating differential subsidy is paid must be members of the Naval Reserve.[41] The penalty for violation of any of these provisions is $500 per individual, although the President is allowed to waive these provisions in the interests of national defense or commerce.[42]

B. The Passenger Ship Act of 1886

Passenger transportation vessels have been under cabotage restrictions for more than a century. The Act of June 19, 1886, referred to in this article at the Passenger Ship Act of 1886 ("PSA"),[43] has remained essentially unchanged since its enactment. It currently states: "No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed."[44] There are three statutory exemptions to the law for particular routes: one for travel between Rochester and Alexandria Bay, New York, which can be authorized on a yearly basis by the Customs Service for Canadian vessels until an American carrier enters the market;[45] a second for transport between southern Alaska and other U.S. states for Canadians until a U.S. vessel creates the service;[46] and a third between Puerto Rico and the mainland which allows any nation's vessel to engage in the passenger trade between those points so long as the route is not served by a U.S. carrier.[47]

One important distinction between the PSA and Section 27 of the

40. 46 U.S.C. §§ 8103(c), (d)(1) (1988 and Supp. IV 1992).

41. 46 U.S.C. § 8103(g) (1988 and Supp. IV 1992).

42. 46 U.S.C. §§ 8103(f), (h) (1988 and Supp. IV 1992). The commerce waiver is limited to officers listed in subsection (a). *Id.* at § 8103(a). The intersts of national security are also fairly broad. See, e.g., National Marine Engineers Beneficial Ass'n., AFL-CIO v. Burnley, 684 F. Supp. 6 (D.D.C. 1988).

43. Act of June 19, 1886, ch. 421, § 8, 24 Stat. 79, 81, (1886) (codified as amended at 46 U.S.C. §289 (1988)).

44. The fine was raised from $2 to $200 in 1898. Act of Feb. 17, 1898, ch. 26 § 2, 30 Stat. 223 (codified at 46 U.S.C. § 289 (1988)).

45. Act of April 26, 1993, ch. 174, 52 Stat. 223 (codified with some differences in language at 46 U.S.C. § 289a (1988)).

46. Act of June 30, 1961, Pub. L. No. 87-77, 75 Stat. 196 (codified at 46 U.S.C. § 289b (1988). *See*, H.R. Rep. No. 538, 87th Cong., 1st Sess. 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2048-2050 (discussing similar legislation that was enacted a number of times after the Second World War and which allowed such service on a temporary basis.

47. Act of Oct. 30, 1984, Pub. L. No. 98-563, 98 Stat. 2916 (codified at 46 U.S.C. § 289c (1988).

Jones Act is "directly or by a foreign port" language of the PSA.[48] While the Jones Act's "transportation . . . between points in the United States . . . either directly or via a foreign port" language was added to correct a defect in the predecessor statute which allowed goods to be sailed to a foreign port, transferred to another ship, and then sent to another American port,[49] PSA's similar terms do not restrict the transportation of passengers from a U.S. city to a foreign location for ultimate transportation to another United States locale. The D.C. Circuit in *Autolog Corp. v. Regan*[50] considered the case of a Bahamian-flag vessel owned by Scandinavian World Cruises, Ltd. ("SWC") which transported passengers and their cars from New York to Freeport, Grand Bahama for transfer to other SWC ships for ultimate transport to Florida.[51] Plaintiffs, U.S.-flag carriers and the Seafarers International Union, sought an injunction to prohibit SWC's carriage.[52] The court determined that the law applied only to the transport of individuals on a single vessel on a continuous voyage, and not on separate ships hubbing through a foreign port.[53] Following the historic interpretation of the PSA by the U.S. Attorney General and Customs Department, and the legislative history of the Act, the decision refused to reject the position of the Federal government and construe the statute as having its plain meaning.[54]

C. The Towing Act of 1940

Congress extended the principles of the Jones Act's predecessor to the tug trade in the mid-Nineteenth Century, and reenacted them with the Act of June 4, 1940 (referred to in this paper as the Towing Act of 1940).[55] Essentially encompassing all towing within the territorial waters of the United States, the Act in its relevant part states:

> It shall be unlawful for any vessel not wholly owned by a person who is a citizen of the United States within the meaning of the laws respecting the documentation of vessels and not having in force a certificate of documentation . . . to tow any vessel other than a vessel in distress, from any port or

48. 46 U.S.C. § 289 (1988); *Compare with*, 46 U.S.C. § 883 (1988 and Supp. IV 1992).

49. Act of March 1, 1817, ch. 31, 3 Stat. 351 (codified as amended at 46 U.S.C. §883 (1988 & Supp. IV 1992)). *See also supra* text accompanying note 11.

50. Autolog Corp. v. Regan, 731 F.2d 25, 31-33 (D.C. Cir. 1984).

51. *Id.* at 31. Its interesting to note that a larger operation in a similar form would bear a striking resemblance to the hub-and-spoke system utilized by airlines today.

52. *Id.* at 26-27.

53. *Id.* at 32.

54. *Id.* at 33. Obviously another circuit could reach the opposite conclusion; doing so, however, would not have any effect on the issues ultimately considered in this paper.

55. The Act of June 11, 1940, ch. 324, 54 Stat. 304 (codified as amended at 46 U.S.C. app. § 316 (1988)); *see* Act of July 18, 1866, ch. 201, § 21, 14 Stat. 178, 183 (1866) (Act Further to Prevent Smuggling and For Other Purposes), *amended by* Act of Feb. 25, 1867, ch. 78, 14 Stat. 410 (1867).

> place in the United States, its Territories or possessions, embraced within the coastwise laws of the United States, to any other port or place within the same, either directly or by way of a foreign port or place, . . . or to tow any vessel transporting valueless material or any dredged material . . . from a point in the United States or a point or place on the high seas within the [EEZ][56] to another point or place in the United States or any point on the high seas within that [EEZ].[57]

If the owner or master of any vessel violates this section, each shall be liable for, "a fine of not less than $250 nor more than $1,000, which fines shall constitute liens upon the offending vessel enforceable through the district court of the United States."[58] The vessel shall be further liable for a penalty of "$50 per ton on the measurement of every vessel towed in violation of this section, which sum may be recovered by way of libel or suit."[59]

Limited in its exemptions, the Towing Act of 1940 contains special provisions to allow foreign railroads to transport their cars and the goods aboard them to the U.S., and to permit salvage operations off of American coasts.[60]

Congress would not necessarily be obligated to repeal each of the cabotage laws or to eliminate all of their provisions. There are a number of policy options and combinations which would be available if the government sought to reduce the damage caused by the cabotage laws without wholly eliminating them, including:

1. Limiting the coastwise trade to U.S. owned ships;
2. Limiting the coastwise trade to U.S.-flag ships;
3. Limiting the coastwise trade to U.S. built ships;
4. Allowing Canadian owned, flagged, or built ships to engage in all Great Lakes trade;
5. Applying any or all of the first three cabotage restrictions to internal waterways only;
6. Applying any or all of the first three restrictions to passenger shipping, or dredging, or towing, or cargo transportation only;
7. Creating route preferences for ships meeting any or all of the first three cabotage requirements;
8. Allowing exceptions to the cabotage laws for ships which agree to abide by particular U.S. labor laws;
9. Requiring American crewmen for specific positions, such as master and pilot; or
10. Providing tax incentives to organizations contracting with vessels meeting any or all of the first three cabotage restrictions.

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56. *See supra* note 23.
57. 46 U.S.C. § 316(a) (1988).
58. *Id.*
59. *Id.*
60. 46 U.S.C. §§ 316(c-e) (1988).

For ease of discussion, however, the changes in the various legal regimes discussed in this paper are predicated on the full repeal of Section 33 of the Jones Act, the Foreign-Built Dredge Act of 1906, as amended, the Passenger Ship Act of 1886, the Towing Act of 1940, and directly related statutory provisions.[61]

III. Legal Regimes Affected by Repeal of the Jones Act

A. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA")[62] is the central American statute regulating general labor conditions in the workplace. For purposes of this discussion, the Act contains two important substantive provisions; Section 6 establishes the national minimum hourly wage and Section 7 establishes the maximum hourly work week after which overtime wages must be paid.[63]
Section 6 states:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages [of] not less than $4.25 an hour . . . .[64]

Section 7 declares:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[65]

With both sections, as with most federal labor laws,[66] Congress drew

61. More specifically, this piece is premised on the repeal of 46 U.S.C. app. §§ 289, 289a, 289b, 289c (1988 and Supp. IV 1992) (the Passenger Ship Act of 1886); 46 U.S.C. app. § 292 (1988 and Supp. IV 1992) (the former Foreign-Built Dredge Act *amended by* Subtitle V of the Coast Guard Authorization Act of 1992); 46 U.S.C. app. § 316 (1988 and Supp. IV 1992) (the Towing Act of 1940); 46 U.S.C. app. §§ 883, 883-1, 883a, 883b, and 885 (1988 and Supp. IV 1992) (the Jones Act).

62. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-219 (1988 and Supp. V 1993)).

63. Fair Labor Standards Act, §§ 6,7, 29 U.S.C. §§ 206, 207 (1988). Other important provisions such as those on child labor, 29 U.S.C. § 212 (1988), are not relevant to this discussion and are not considered here.

64. Fair Labor Standards Act, § 6(a), 29 U.S.C. § 206(a) (1988).

65. Fair Labor Standards Act, § (7)(a)(1), 29 U.S.C. § 207(a)(1) (1988).

66. *See, e.g., infra* notes 117 and 170.

upon its powers under the Commerce Clause of the Constitution[67] to enable it to regulate this aspect of American life. Yet within that power, Congress has the liberty of exercising only as much power as it deems necessary. In the case of FLSA, the legislature defined "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[68] Thus defined, Congress clearly intended to implicate trade with foreign nations with the Act, and include within the law's general subject matter jurisdiction all ships engaging in domestic or foreign trade.

As discussed in greater length below, the original FLSA excluded all seamen, with later amendments including only sailors on U.S. vessels. For that reason, cabotage trade in the modern era always meets the "in commerce" requirement of the Act.[69] Although the "commerce" issue would seem to become more complicated in a post-cabotage environment, foreign owned and flagged vessels will be sufficiently in commerce to implicate the Act. While this would be a moot point if Congress follows this article's suggestions,[70] the issue could easily be clarified should Congress chose to fall short of those recommendations.

Cruz v. Chesapeake Shipping, Inc. [71] considered the case of Philippine seamen employed aboard Kuwaiti tankers that were reflagged by the United States during 1987. The plaintiffs claimed that they were entitled to minimum wages and benefits under the FLSA while employed aboard those ships. In considering whether the tankers, which never docked in the U.S., were owned and controlled by Kuwaitis, and only were connected to American commerce in that an isolated cargo of oil carried on board was eventually transshipped to the States, the Third Circuit rejected the sailors' claim.[72] The Court stated that, "[a]lthough there is no de minimis requirement for application of the FLSA, the contact with interstate commerce must be regular and not an isolated incident."[73]

Although any foreign vessel regularly working American ports would certainly meet the *Cruz* definition of "in commerce," a ship irregularly contracting in the spot market for single trips might not. Further, such a vessel would also probably not meet the "enterprise engaged in commerce or in the production of goods for commerce" (enterprise liabil-

67. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art I, § 8, cl. 3.

68. Fair Labor Standards Act, § 3(b), 29 U.S.C. § 203(b) (1988).

69. *Id.*

70. *See infra* note 103 and accompanying text.

71. Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218 (3d Cir. 1991).

72. *Id.* at 228.

73. *Id.* at 228. *But see, id.* at 235-39 (Alito, J., dissenting) (stating Congress intended for the FLSA's minimum wage provisions to apply to all seamen on all American-flag ships and that the literal language of the Act made trade among the several States subject to the FLSA).

ity) requirement either.[74] A solution to this dilemma is discussed later in this paper.[75]

Aside from general commerce considerations, the definition of "employ" under the Act established which employers and employees are subject to the FLSA. The Act defined "employ" as: "to suffer or permit to work."[76] This constitutes an economic reality test, effectively subjecting seamen to the terms of the Act.[77]

From its passage in 1938, the FLSA has included a number of specific statutory exclusions. Section 13 limited the reach of various provisions of the Act, allowing the market to determine the appropriate conditions of work in those areas.[78] Among the many exemptions, the Act originally excluded all seamen both from Sections 6 and 7.[79] That provision was modified, however, by the FLSA Amendments of 1961 ("FLSA 61").[80] As amended, sailors on foreign vessels continued to be exempt from both sections, but those on American vessels had to be paid the minimum wage under Section 6.[81] Presently, "any employee employed as a seaman

74. In an attempt to include certain groups of individuals in the retail trade within the terms of the Act, Congress amended the FLSA in 1961 by adding "enterprise liability." *See*, Fair Labor Standards Act Amendments of 1961, Sec. 2, § 3(r), 75 Stat. 1067 (1961) (codified as 29 U.S.C. § 203(r) (1988 and Supp. V. 1993). In *Cruz*, the panel considered whether the tanker reflagging operation led to enterprise liability. This was rejected in that case and would probably also be rejected in a post-cabotage environment. *See, Cruz*, 932 F.2d at 229-32. The *Cruz* panel stated that "seamen employed on vessels engaged in foreign operations entirely outside of the United States, its waters and territories do not become [FLSA] seamen [through reflagging]. . ." *Id.* at 232. That statement left the question of the operation of such ships in U. S. waters open to debate, though a discussion here would require more space than this author is willing to spare.

75. *See infra* note 107 and text accompanying note 107.

76. Fair Labor Standards Act, § 3(g), 29 U.S.C. § 203(g) (1988).

77. See Armour v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944).

78. The Act has or presently excludes people employed in the following manors from coverage: bona fide executive, administrative, or professional capacity, outside salesmen, persons at a seasonal amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, those in the fishing industry, family members engaged in seasonal agricultural work, persons with disabilities and others employed under a special Department of Labor certificate, switchboard operators, telegraph employees, loggers, tobacco growers and harvesters, and casual babysitters, railway and airline employees, buyers of farm products, hotel and motel workers, announcers, news editors, and engineers in small market television stations, auto salesmen, delivery drivers, agricultural waterway and storage maintenance personnel, grain elevator employees, maple syrup processors, produce transporters, cabbies, restaurant employees, bowling alley workers, firemen, law enforcement personnel, live-in domestics, foster parents, workers engaging in ginning cotton or sugar processing, and movie theater employees. Fair Labor Standards Act, §§ 13(a)(1)-(15), 13(b)(1)-(29), 29 U.S.C. §§ 213(a)(1)-(15), 13(b)(1)-(29) (1988 & Supp. V 1993).

79. Fair Labor Standards Act, § 3(a)(14), 29 U.S.C. § 213(a)(14).

80. FLSA Amendments of 1961, sec. 9, § 13(a)(b), 75 Stat. 65, 72-72 (1961) (codified as amended at 29 U.S.C. § 213(a)(14), 213(b)(6) (1988)).

81. FLSA Amendments of 1961, Sec. 9, § 13(a)(b), 75 Stat. 65, 72-73 (1961) (codified as amended at 29 U.S.C. §§ 213(a)(14), 213 (b)(6) (1988)). It should be noted, however, that the

on a vessel other than an American vessel" is exempt from the minimum wage law.[82] The Act defines the term "American vessel" as "any vessel which is documented or numbered under the laws of the United States."[83] Thus, any individual employed as a seaman on an American flagged ship must be paid according to the provisions of FLSA Section 6.[84] As more specifically applied, the amended Act includes seamen employed on Jones Act ships engaging in the coastwise trade and those American flagged ships, passenger and cargo, sailing to foreign lands.

FLSA 61 was adopted after the Conference Committee failed to agree on a suitable bill for passage during the previous sessions.[85] Most of the provisions of the previous years' legislation remained the same, including the modification of the Section 6 seaman exemption. The final Conference Committee report settled on an interpretation of hours worked as allowing an employer to include only hours actually worked while the employee was on duty.[86] The law has remained unchanged since passage of FLSA 61.

FLSA 61 was an attempt by the Congress and the Department of Labor to ensure that all American employees receive compensation commensurate with maintaining the minimum living standards necessary for their health, efficiency and general well-being.[87] In 1959, when the Congress took up the question of amending the Act to close the exemption "loopholes," the Senate bill contained a provision which would extend both Sections 6 and 7 to seamen for all periods spent on duty aboard ship;[88] a similar provision was contained in the two House bills in 1960.[89]

Most of the witness testimony during the 1959 and 1960 hearings fo-

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exemption from Federal maximum hours laws does not preempt state application of maximum hour laws, and, presumably, from stricter minimum wage laws. *See* Pacific Merchant Shipping Assoc. v. Aubry, 918 F.2d 518 (9th Cir. 1990), *cert. denied,* 112 S.Ct. 2956 (1992) (California overtime laws at issue in the case).

82. Federal Labor Standards Act, § 13(a)(12), 29 U.S.C. § 213 (a)(12) (1988).

83. Federal Labor Standards Act § (3)(p), 29 U.S.C. § 203(p) (1988).

84. Seaman is defined in the regulations as employees who perform "service which is rendered primarily as an aid in the operation of such vessel as a means of transportation." 29 C.F.R. § 783.31 (1993). *See also Cruz,* 932 F.2d 218 (recognizing and applying the two prong "commerce"/"American vessel" test).

85. Fair Labor Standards Amendments of 1961, S. Rep. No. 145, 87th Cong., 1st sess. (1961), reprinted in 1961 U.S.C.C.A.N. 1621.

86. Conf. Rep. No. 327, 87th Cong., 1st Sess. (1961); *reprinted in* 1961 U.S.C.C.A.N. 1706, 1710.

87. *Minimum Wage-Hour Legislation, Hearing Before the House Subcommittee on Labor Standards of the Committee on Education and Labor,* 86th Cong., 2nd Sess. 925, 926 (1960) (hereinafter *1960 House hearings*) (statement of Braxton B. Carr, President, American Waterways Operators, Inc.).

88. *To Amend the Fair Labor Standards Act, Hearings on S. 1046 Before the Subcomm. on Labor of the Committee on Labor and Public Welfare,* 86th Cong, 1st Sess. 2, 6 (1959) (hereinafter *1959 Senate Hearings*).

cused on the overtime provisions of the bills. Of the two union representatives who testified, one favored elimination of both exemptions,[90] the other only opposed the overtime amendment.[91] L. Dale Hilton, president of the Maritime Employees Union, stated that while he had no quarrel with striking the minimum wage exception, he believed that the unique vacation and leave structure of the maritime trade would make imposition of a forty-hour workweek detrimental to his members.[92]

Business representatives opposed both on economic grounds.[93] They stated that a four-watch system, proposed by the unions advocating the repeal of the Section 6 exemption,[94] would be impossible to operate aboard ships and would be unduly burdensome on the industry. The final bill in 1961, presumably on the basis of the industry and union opposition, kept the overtime exemption.

While comments on the minimum wage change were few, they were enlightening as to the parties' positions. The union advocate who supported the repeal and pressed Congress for passage of the legislation[95] stated that he believed the amendment would "eliminate the threat to the seamen caused by the runaway American operators who register their ships in Liberia, Honduras, and Panama; the sole purpose of which is to lower the now existing working conditions of American seaman."[96] The amendments would help non-union labor, who the witness claimed earned less than the minimum wage.[97] The ship operators offered little resistance to it because those who testified generally employed seamen who earned more than the minimum wage, and viewed the legislation as unnecessary or superfluous.[98] Statements that the adverse financial burden on small businessmen from operating and administrative costs caused by the measure would be the difference between operation or closure[99]

89. *1960 House Hearings, supra* note 87, at 660 (statement of James P. Mitchell, Secretary of Labor).

90. *1959 Senate Hearings, supra,* note 88 at 700-09 (statement of Hoyt S. Haddock, Executive Secretary, United Maritime Unions' Legislative Committee).

91. *1960 House Hearings, supra* note 87, at 938-42 (statement of L. Dale Hilton, President, Maritime Employees Union).

92. *Id.*

93. *1959 Senate Hearings, supra* note 88 at 691-700; *1960 House Hearings, supra* note 87 at 921-38, 942-48.

94. *1959 Senate Hearings, supra* note 88, at 704 (statement of Hoyt S. Haddock).

95. *1960 House Hearings, supra* note 87 at 947 (statement of L. Dale Hilton).

96. *1959 Senate Hearings, supra* note 88, at 704 (statement of Hoyt S. Haddock).

97. *Id.* at 703.

98. *1960 House Hearings, supra* note 87 at 942 (statement of George A. Peterkin, Jr., President, Dixie Carriers, Inc.).

99. *Id.* at 927 (statement of Braxton B. Carr). Another witness, Ralph E. Casey, President of the American Merchant Marine Institute, Inc., a trade association, made a particularly insightful comment about the future of the industry: "[T]he American merchant marine is today in a life-or-death struggle for survival. It is struggling with a wage structure that is four to five

were apparently dismissed, in light of the bill's ultimate passage.

The FLSA exemptions for foreign and domestic seamen clearly must be unified if the cabotage laws are repealed. Failure to do so would require ships engaged in American coastwise transportation to pay or not pay the American minimum wage, and to be subject to the administrative costs of Department of Labor oversight, based solely on the ship's registry. This would create a clear competitive advantage for foreign shippers which must be rectified either by eliminating the exemption for foreign flagged ships or reviving it for their American competitors. Although the amendment of the federal wage and hour law would certainly be a heated topic of debate in Congress during consideration of the cabotage laws discussed here, the best solution would be to take the FLSA back to the pre-1961 Amendment form, excepting all seamen from Sections 6 and 7 of the Act.

In 1992, Representative William Ford introduced language to expand the reach of the FLSA to foreign ships engaged in the foreign trade from U.S. ports.[100] The bill would have subjected vessels lightering in international waters and passenger vessels which are found to be arranging their transport to avoid the Act (conceivably including cruises catering to Americans in the Caribbean which never enter U.S. waters, and ships sailing around Alaskan shores from Vancouver) to the jurisdiction of the FLSA.[101] The minority portion of the House Education and Labor report on the legislation pointed out two problems with the bill which also

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times higher than that of any competing maritime nation in the world . . . Our messboys make more than the captains of some foreign freighters. Responsible leaders of maritime labor recognize this fact and realize all too well that any further spread in this labor differential could destroy the very jobs that they are obligated to protect. I am somewhat surprised, therefore, that labor itself, in good conscience, can support the portion of this bill which would remove the seaman exemption." *Id.* at 932.

100. H.R. 1126, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 HOUSE REPORT, *supra* note 2, at 2.

101. *Id.* The bill would have added to the definition of "employer" the following:

"Effective [for 5 years from enactment of the bill, employer] includes:

(A) a foreign vessel if the 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 shall include a vessel which is regularly engaged in transporting passengers only from or to a port or place in the United States if the Board determines that such transport is so arranged for the purposes of avoiding the consequences that would otherwise result under this sentence;

(B) a foreign vessel regularly engaged in transporting liquid or dry bulk cargo in the foreign trade of the United States if such vessel is owned or controlled, directly or indirectly, by a United States corporation; and

(C) a foreign vessel on which occurs the production or producing of goods or services for sale or distribution in the United States, and a 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 12-13.

would serve as criticisms for extending the FLSA in a post-cabotage environment.

The minority said that the extension of the FLSA to foreign ships would offend our trading partners.[102] This would seem at first glance to be less of a problem with ships engaging in the coastwise trade, but the likely scenario for such commerce after the Jones Act is not necessarily vessels on continuous interstate voyages. While this might be true in some cases, especially with passenger ships, cargo and bulk vessels in intra-U.S. trade would probably be part of a spot market, contracting for shorter coastal trade trips between longer foreign work, as is the case now with most tankers engaged in American lightering operations.[103] For that reason, extension of the FLSA to foreign ships after repeal of the cabotage laws would still cause concern among our trading partners.

The minority report noted further the practical difficulties associated with attempting to complete a Department of Labor investigation on ships which engage in foreign trade. "Since employees tend to be as transient as the vessels on which they are employed, . . . labor would have to locate workers both in foreign countries and on the high sea for [any] investigations or if a worker [were] owed back wages."[104] These arguments would apply with equal force for ships only transiently sailing between U.S. ports and in U.S. commerce.[105]

One of the basic reasons for repealing the cabotage laws would be to bring the cost of American sea transport in line with world market prices. Because labor costs[106] constitute such a significant part of sea transport costs, raising the foreign flag seamens' minimum wage will retard the end sought in changing the law.[107] In light of the costs of extending the minimum wage and the issues raised in the 1992 bill minority report, returning to the pre-1961 exemption of seamen from the FLSA would be the best solution. Section 13(a)(12) of the Act would be amended to read as fol-

102. 1992 HOUSE REPORT, *supra* note 3 at 14.

103. OTA, COMPETITION, at 17.

104. H.R. REP. NO. 984, 102d Cong., 2d Sess., 15 (1992).

105. The report also noted the difficulty in creating interpretive rules for the bill, such as how to treat the number of hours worked and whether employers could charge for room and board. For the coastwise trade, these are less severe problems because of the length of voyages but they could conceivably be avoided through careful legislative drafting, which H.R. 1126 lacked. *Id.* at 15. The minority favored greater enforcement of the International Labor Organization's document on minimum standards for seafarers, ILO 147, to which the United States is a signatory. *Id.*

106. Labor costs include seamen, longshoremen, and stevedores.

107. In response to a bill introduced in 1993 by Representative Bill Clay, D-Mo., H.R. 1517, which would apply American labor laws to foreign flagged vessels, Alberto Gonzalez-Pita, a Miami admiralty attorney, stated that, "I do not believe any cruise line operating today will be able to make a reasonable return on investment if the labor provisions of the Clay bill were passed .... It is simply not possible for the cruise industry to raise its fares to a level that would offset the increased expenses mandated," by the Clay bill. J. Comm., Mar. 22, 1993.

lows: "The provisions of Sections 6 . . . and 7 shall not apply with respect to any employee employed as a seaman."[108] This language would return the Act to its original form and ensure that the wage and hour laws do not disadvantage American carriers in a post-cabotage environment.

B. The National Labor Relations Act

The National Labor Relations Act ("NLRA")[109] is the legal foundation of labor-management relations in the United States. Its provisions are colloquially known by the acts which created them. The original law, known as the National Labor Relations Act of 1935 (known as the Wagner Act),[110] guaranteed employees the right to organize and collectively bargain through representatives of their own choosing.[111] Wagner also created a list of unfair labor practices in which employers could not engage,[112] and the National Labor Relations Board ("NLRB"), to which the Congress delegated administrative powers.[113] A later amendment, known colloquially as the Taft-Hartley Act,[114] redesignated the law as the Labor Management Relations Act, and added a group of unfair practices for unions.[115]

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108. Federal Labor Standards Act § 13(a)(12), 29 U.S.C. § 213(a)(12) (1988). The present section exempting all seamen from section 7, Federal Labor Standards Act § 13(b)(6), 29 U.S.C. § 213(b)(6) (1988), would then need to be eliminated as superfluous.

109. 29 U.S.C. §§ 141-187 (1988 and Supp. 1993).

110. National Labor Relations (Wagner) Act, Pub L. No. 74-198, ch. 372, 49 Stat. 449, 452 (1935) (NLRA) *amended and reenacted* in Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, 61 Stat. 136, 140 (1947). This article will use the commonly used reference "NLRA" although the Act by its terms is known by its 1947 reenacted name and the section dedicated to the NLRB and unfair labor practices is declared in the legislation to be the NLRA.

111. National Labor Relations Act § 7, 29 U.S.C. § 157 (1988).

112. National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1988). The Act's list of unfair labor practices by employers may be summarized as follows: interference, restraint, or coercion of employees; assistance to or domination of a union; discrimination in hire, terms, or conditions of employment; discrimination for filing charges or giving testimony to the National Labor Relations Board (NLRB) under the Act; and refusal to bargain. 1 Nat'l Lab. Rel. Act: Law & Prac., Matthew Bender, §§ 1.01-1.07, § 1.04[2], at 1-11 (1994) (NLRA Law and Prac.) (hereinafter NLRA Law and Practice). Some common employer unfair labor practices include: discrimination based on concerted activities for purpose of collectively bargaining, National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1988); discrimination based on union support or based on involvement in NLRB procedures, National Labor Relations Act §§ 8(a)(3)-(4), 29 U.S.C. §§ 158(a)(3)-(4) (1988); and failure of an employer to bargain in good faith, National Labor Relations Act §§ 8(a)(5), 29 U.S.C. § 158(a)(5) (1988). NLRA Law and Practice, § 1.04[2], at 1-11 to 1-17.

113. National Labor Relations Act § 3, 29 U.S.C. § 153 (1988).

114. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, 61 Stat. 136 (1947).

115. *Id.* The Act's list of unfair labor practices by unions may be summarized as follows: coercing or restraining of employees or employers; coercing or attempting to coerce discrimination against an employee under union-shop contracts for reasons other than nonpayment of

Section 10 of the NLRA states that the NLRB is "empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[116] As used in that and other sections of the NLRA, "commerce" means "trade, traffic, commerce, transportation, or communication among the several States, [Territories, and the District of Columbia], or between any foreign country and any State, Territory, or the District of Columbia," and thus includes both domestic and foreign commerce.[117] To be "affecting commerce," the unfair labor practice must affect that which is, "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[118] The Supreme Court decided three decades ago, however, that Congress did not intend to extend the NLRA to relations between foreign seamen and the owners of their employing foreign flag ships who are engaged in activities "affecting commerce" in the United States despite the apparent intent of the law's language.

In the determining precursor to its broad holding in *McCulloch v. Sociedad Nacional de Marineros de Honduras ("McCulloch")*,[119] the high court explored the legislative history of the Act in *Benz v. Compania Naviera Hidalgo, S.A. ("Benz")*.[120] In *Benz*, the German and British crew of a Liberian ship owned by a Panamanian corporation struck their vessel while it was docked in Portland, Oregon. The ship had originally sailed from Bremen, Germany under a British form of articles, which incorporated the conditions prescribed by the British Maritime Board into its terms, including the pay issues on which the crew struck.[121]

In the fall of 1952, the sailors refused both to work and to leave the ship. After a court ordered them to do so, picket lines were erected by a

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uniform dues or membership fees; refusing to bargain in good faith; engaging in unlawful strikes or boycotts; requiring excessive or discriminatory initiation fees or fines; engaging in "featherbedding" activities; engaging in unlawful organizational or recognitional picketing; and executing "hot cargo" agreements. NLRA LAW AND PRACTICE, *supra* note 112, § 1.04[3], at 1-18. Some common union unfair labor practices include: restraint or coercion of employees in the exercise of rights guaranteed by the NLRA; union inducement of an employer to discriminate against an employee based on lack of union membership, National Labor Relations Act § 8(b)(2), 29 U.S.C. § 158(b)(2) (1988); failure of a union to bargain in good faith, National Labor Relations Act § 8(b)(3), 29 U.S.C. §§ 158(b)(3) (1988); and certain forms of picketing, National Labor Relations Act §§ 8(b)(4), (7), 29 U.S.C. §§ 158(b)(4), (7) (1988). NLRA LAW AND PRACTICE, § 1.04[3], at 1-18 to 1-22.

116. National Labor Relations Act § 10(a), 29 U.S.C. § 160(a) (1988). For a summary of unfair labor practices under section 158, *see supra* notes 106, 109.

117. National Labor Relations Act § 2(6), 29 U.S.C. § 152(6) (1988).

118. National Labor Relations Act § 2(7), 29 U.S.C. § 152(7) (1988).

119. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

120. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957).

121. *Id.* at 139.

local union. When that group was enjoined, a second union formed a new picket line. A third union took its place shortly after the second was enjoined by a local court; the third group of picketers were later ordered to stop as well. The ship's owner, Naviera Hidalgo, sued the individual non-crew strikers, including Benz, under a common-law theory that the picketing was for an unlawful purpose under Oregon law. The trial court rejected the defendant's claim that the Taft-Hartley amendments had pre-empted these claims, a decision with which the Supreme Court agreed.[122]

The Court concluded that, "[o]ur study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws."[123] Quoting the House Committee report presented by the bill's co-author Chairman Hartley, the High Court noted that the bill was, "formulated as a bill of rights both for *American* workingmen and for their employers."[124] Citing previous amendments to the Seamen's Act of 1915,[125] the Court noted that if Congress had intended to apply Taft-Hartley to foreign seamen on foreign ships under foreign articles, it certainly could have done as it had done in previous legislation and created, "a 'sweeping provision' as to foreign applicability," in the amended NLRA.[126]

Benz, unfortunately, did not state specifically whether it was through the NLRA's definition of "commerce" and "affecting commerce," or "employee," or "employer" which prevented the Act's application in the case.[127] It merely noted that the law did not apply to foreign seamen on

122. *Id.* at 139-41, 147.

123. *Id.* at 143.

124. *Id.* at 144 (emphasis in the original), *quoted in McCulloch*, 372 U.S. at 20; Windward Shipping (London) Ltd. v. American Radio Ass'n, 415 U.S. 104, 110 (1974).

125. Seamen's Act of 1915, ch. 153, 38 Stat. 1164 (1915), *amended by* The Jones Act § 31, ch. 250, 41 Stat. 1006 (1920).

126. *Benz*, 353 U.S. at 146, *citing* Jackson v. S.S. Archimedes, 275 U.S. 463 (1928), which concerned payments under the Seamen's Act amendments. The concept "that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" was reaffirmed recently in EEOC v. Arabian Am. Oil, 499 U.S. 244, 248 (1992); *Cruz*, 932 F.2d at 224-26; Jose v. M/V FIR GROVE, 801 F. Supp. 349, 355 (D. Or. 1991).

127. *Benz*, 353 U.S. at 142-44. The Court made a number of references to the foreign nature of the dispute but did not specifically state what foreign aspect of the case placed it outside of the jurisdiction of the NLRA. "The parties point to nothing in the Act itself or its legislative history that indicates in any way that Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does not 'cover a dispute between a foreign ship and its foreign crew.'" *Id.* at 142-43. "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. In fact, no discussion in either House of Congress has been called to our attention from the . . . legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here." *Id.* at 143-44.

foreign ships.[128] That important issue was clarified in *McCulloch*, which expanded the rationale of *Benz* to union organizing activities and the entire NLRA.[129]

McCulloch arose from a group of suits by the NLRB against the foreign holding companies owned by United Fruit Company, an American corporation, and by the Honduran union "representing" Honduran seamen against the NLRB. The National Maritime Union of America, AFL-CIO ("NMU"), filed a petition with the NLRB seeking certification under the Act as representatives of sailors aboard vessels owned by Empressa Hondurena de Vapores, S.A. ("Empressa"), a Honduran corporation owned by United Fruit.[130] The seamen at issue were at the time represented by a Honduran union, Sociedad Nacional de Marineros de Honduras ("SNMH"). Agreeing with the petitioning NMU, the Board found that United Fruit's sea operations constituted a single, integrated maritime operation, and that in light of the company's substantial United States contacts (the test used at that time by the Board in such cases), Empressa was engaging in commerce under the Act. The NLRB ordered that an election be held to determine if the workers wished to be represented by the NMU.[131]

SNMH and Empressa filed suit to prevent implementation of the Board's order and their claim was upheld by the Court in *McCulloch*. The Supreme Court, recognizing that Congress has the Constitutional power to apply the NLRA to foreign-flag ships with foreign workers in American waters,[132] determined that it had not done so in the case of the Act. In its proceedings, the NLRB had determined that the foreign flagged ships' activities had affected "commerce" under the Act based on the number of contacts which the operation had with the U.S.[133] Justice Clark's decision rejected the NLRB's "ad hoc" substantial contacts method of determining which cases would come under the Act and which would not.[134] Instead, the opinion reaffirmed its rationale in *Benz* that

128. *Id.* at 144.

129. *McCulloch*, 372 U.S. 10. During the interim between the cases, the Court reached a fact specific decision in Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365 (1960), regarding the Norris-LaGuardia Act, Pub. L. No. 72-65, ch. 90, 47 Stat. 70 (1932), which the Court in McCulloch determined sought to a achieve a different end than the Taft-Hartley and Wagner Acts. The Norris-LaGuardia Act is a pre-NLRA statute designed to limit the jurisdiction of Federal courts in issuing injunctions, except in accordance with the provisions of the Act.

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

131. *Id.* at 13-15.

132. *Id.* at 17, *citing* The Exchange, 7 Cranch 116, 143 (1812).

133. *Id.* at 17-18.

134. The federal district court which heard *McCulloch*, described the action of the NLRB as follows:

> The comprehensive and exhaustive opinion of the [NLRB] was substantially predicated on the propositions that the flag or nationality of the vessels should play no role in its

Congress did not intend for the NLRA to apply foreign workers on foreign flagged ships, even though the latter were effectively owned by American interests.[135] The opinion explained that the U.S. had not intended to exert, "jurisdiction over and apply its laws to the internal management and affairs of [foreign] vessels."[136]

The Court went further, however, and cited, "the well established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship,"[137] in explaining its further unwillingness to read into the statute an intent to regulate foreign vessels and their crews. In light of the custom and the "highly charged international circumstances" of the case, as well as the lack of expressed Congressional will, the Court found for the Honduran union and corporation, and upheld the injunction.[138]

The companion case to *McCulloch, Incres Steamship Co. v. International Maritime Workers Union*[139] ("*Incres*") reaffirmed the *Benz* and *McCulloch* principle in a case similar to *Benz*. In the decision upholding an injunction against union picketing, Justice Clark stated that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of [the NLRA's definition of the term]."[140]

The jurisdictional principle enunciated in these cases is clear. NLRA will not govern the relationship between seamen and their employer on foreign-flag ships, regardless of the nationality of the seamen or the owners. The Court's hesitancy to violate the law of the flag and to intrude into the internal management of the foreign-flag ship prevented the application of the Act to the cases. While the activities at issue in these cases clearly constituted commerce within any reasonable definition of the word, they were not "commerce" within the definition of the NLRA.[141]

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determination; that the ships were actually controlled by United Fruit Company as a charterer; that the bulk of the trade conducted by the ships was between Central and South American countries and the United States; and that, consequently, this shipping was essentially that of this nation, and an adjunct of the operations of a domestic corporation in international trade of the United States.

Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F. Supp. 82, 84 (D.D.C. 1962).

135. *McCulloch*, 371 U.S. at 19-20; *See also supra* note 124 and accompanying text.

136. *McCulloch*, 372 U.S. at 20, *quoted in* International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 199 (1970).

137. *Id.* at 21 (*citing* Wildenhus's Case, 120 U.S. 1, 12 (1887)).

138. *Id.* at 678.

139. Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963).

140. *Id.* at 27.

141. Dowd v. International Longshoremen's Ass'n, 975 F.2d 779, 788 (11th Cir. 1992), *citing Windward*, 415 U.S. at 112-13. Ironically, the ILA union in Dowd was attempting to claim that the *Benz* line excluded the activities at issue in *Dowd*, the opposite of the position in most of the *Benz* cases. *But see* International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).

The Court defined what was not "maritime operations" under the *Benz-McCulloch-Incres* line seven years later in *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*[142] In that case, it was found that union longshoremen protesting the use of American non-union longshoremen was within the NLRA and was outside the *Benz-McCulloch-Incres* exception because the picketing was directed at on-shore employment (i.e., of longshoremen) and commerce within the meaning of the NLRA.[143]

Unions changed their tactics between the early sixties, when they attempted to organize foreign seamen, and the early seventies, when they tried to convince shippers to pay foreign workers at American rates (and presumably, to increase the number of Americans seamen hired) by picketing foreign-flag ships docked in the U.S. Because dockworkers would not cross the seafarers' picket lines to unload the vessels, the ships would be effectively prevented from unloading unless they agreed to pay American rates. Suits by those adversely affected led to a new round of cases before the High Court.

A pair of cases reached the Supreme Court in 1974. In the first, *Windward Shipping (London) Ltd. v. American Radio Ass'n ("Windward")*,[144] the ship owner and managing agent sought injunctive relief for tortious picketing under Texas state law. The decision rejected the local court's view that the NLRA pre-empted Texas law, finding that the claim could proceed because *Benz-McCulloch-Incres* placed labor relations between foreign ships and their crews outside of the federal law. Because the picketing placed "more than a negligible impact on the 'maritime operations' of these foreign ships", the unions were found to be engaging in conduct unprotected by the law.[145] The same principle applied in *Ameri-*

142. Internation Longshoremen's Local 1416 v. Adriadne Shipping Co., 397 U.S. 195 (1970).

143. *Id.* at 199-200; *See Windward*, 415 U.S. at 112.

144. *Windward*, 415 U.S. 104.

145. *Id.* at 114, *quoted in Allied*, 456 U.S. at 220-21. A District Court decision in 1990 stated *Windward's* conclusion that the NLRA did not apply to vessels engaged in foreign commerce dictated that the FLSA's "in commerce" requirement did not apply to foreign commerce. Cruz v. Chesapeake Shipping, Inc., 738 F. Supp. 809, 820-21 (D.Del. 1990), *aff'd on other grounds*, 932 F.2d 218 (3d Cir. 1991). While that District Court's ultimate conclusion in the case was correct, its determination that the breadth of the FLSA is necessarily less than the NLRA was incorrect. The *Cruz* District Court cited Schroepfer v. A.S. Abell Co., 48 F. Supp. 88, 96 (D.Md. 1942), *aff'd*, 138 F.2d 111 (4th Cir. 1943), *cert. denied*, 321 U.S. 763 (1944), which stated "[A]s has often been pointed out, the expression of congressional will is more broadly stated in the [NLRA] than in the [FLSA]." While as a general proposition the NLRA may be broader than the FLSA, as noted by the Court, that generalization does not necessarily lead to the conclusion that the NLRA is always broader than the FLSA.

Without considering the issues raised in this piece, the breadth of both "in commerce" provisions could be at issue in a post-cabotage marketplace. The clear Congressional intent of NLRA, as analyzed in the *Benz* line, demonstrates that foreign vessels will not be subject to that law because of such ships' failure to meet the commerce requirement. The same conclusion is

can Radio Ass'n v. Mobile Steamship Ass'n, Inc. ("*Mobile Steamship*")[146] ten months later when the Court in a similar suit rejected on similar grounds a pre-emption claim by the union in a suit by stevedoring companies whose workers refused to cross picket lines in Alabama. The decision refused to distinguish the picketing in *Windward* and stated the "effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-shipowners or by persons seeking to service and deal with the ships."[147] By protesting "commerce" outside of the Act, the unions lost their LMRA protections and obligations.[148] Because the effect on foreign maritime commerce was more than negligible, the petitioners were unable to bring the picketing and the suit within the commerce definition of the NLRA.[149]

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not necessarily apparent from the history or the language of the FLSA. *See supra* notes 71-75 and accompanying text.

146. American Radio Ass'n v. Mobile Steamship Ass'n, Inc., 419 U.S. 215 (1974).

147. *Mobile Steamship*, 419 U.S. at 225.

148. Windward involved an attempt by the union to prove that the picketing was protected by the NLRA. In *Mobile Steamship*, the union claimed the same type of picketing was violative of the Act, and thus also within the jurisdiction of the NLRB. The Court alluded to this irony when it noted that the, "[p]etitioners' position in this respect contrasts markedly with their posture in the *Windward* litigation." *Mobile Steamship*, 419 U.S. at 230.

The Court also reaffirmed Ariadne, which Potter Stewart's four Justice dissent claimed must be reversed by *Mobile Steamship*. The majority noted specifically that the purpose of the picketing controlled the definition of "commerce," not the status of the plaintiffs or defendants. *Mobile Steamship*, 419 U.S. at 223, n.9. *See* Dowd v. International Longshoremen's Ass'n, 975 F.2d 779, 788-89 (11th Cir. 1992) (secondary boycott by Japanese unions at the request of U.S. longshoremen's union found to be "in commerce" because the actions were targeted by American unions to affect American non-union longshore companies).

149. One commentator has suggested that the rejection of the picketers claims in *Windward* and *Mobile Steamship* was in contravention of the announced policy of the United States to develop and encourage the maintenance of a merchant marine fleet in the Jones Act. Florian Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L.R. 533, 569 (1975). Bartosic believes the two cases "tip the competitive scales in favor of owners of foreign vessels, contrary to congressional policy." *Id.* "At the very least, Congress should expressly consider whether the Court was correct in divining an inferred congressional intent to create this anomaly." *Id.* While clearly not even the most casual observer would be naive enough to believe that Congress creates entirely consistent policy when it makes law, Bartosic seems to say activities which would be excluded from the protection of one stated Congressional policy (the U.S. will not attempt to regulate the labor affairs of foreign ships or protect those who tortiously harm the interests of foreign-flag vessels) should become protected when they advance another Congressional policy (fostering a U.S. merchant marine).

Congress often considers the effects its actions will have on foreign interests when it is drafting legislation and was apparently doing so when it passed the Wagner Act and Taft-Hartley Act. Fortunately, the Supreme Court did not circumvent that apparent Congressional intent through the judicial fiat in those two cases by including foreign-flag ships within the jurisdiction of the Act. Bartosic believes Congress should change the law (which, to the benefit of U.S. international relations, it has not since the article was written sixteen years ago). At the same time, she believes *Windward* and *Mobile Steamship* were wrong. In either event, Bartosic was misguided.

The Supreme Court's final interpretation of the *Benz-McCulloch-Incres* principle was *International Longshoremen's Ass'n v. Allied International, Inc.*[150] American unionized longshoremen, protesting the Soviet invasion of Afghanistan, refused to unload ships or cargo from the U.S.S.R. American importer Allied sued the union under NLRA § 8(b)(4) and the private damages remedy action for secondary boycotts under Taft-Hartley.[151] The decision declared that the NLRB had jurisdiction and that *Benz-McCulloch-Incres* trilogy and their progeny did not control. Finding that the refusal to unload the petitioner's shipments did not affect the maritime operations of the foreign vessels, the previous decisions did not apply.[152]

The legacy of these seven decisions could be confusing after the repeal of the cabotage laws. Eliminating the long standing legislation will lead to American and foreign seamen on foreign flagged ships[153] transporting goods between American ports. Such a situation will reveal one of the basic presumptions in each of these cases and in Congress' debates on the NLRA: transportation by foreign flagged ships under the Jones Act necessarily meant commerce between other nations and the U.S. because foreign-flag ships and alien companies could not engage in the coastwise trade.

Courts confronted by post-cabotage commerce law will be required to settle situations including what happens with an American owned foreign-flag ship regularly sailing between Galveston, Texas and New York with U.S. and foreign seamen under foreign articles. What happens when an American union seeks to organize the workers and during the course of their campaign, they engage in unfair labor practices (picketing), and the American company seeks redress under a Texas state law for tortious conduct?

The solutions available to these courts with an unamended NLRA will be to: 1) reject the entire *Benz* line and apply the NLRA to all sea trade with the U.S., even if conducted by foreign flag vessels; 2) reject the *Benz* line as it relates to U.S. domestic transportation; or 3) follow the *Benz* line. The third alternative would be the obvious selection.

As to the first alternative, displacing the *Benz-McCulloch-Incres* doctrine has a certain appeal, both to the judicial activist interested in

150. Allied, 456 U.S. 212 (1982).

151. 29 U.S.C. § 187 (1988).

152. *Allied*, 456 U.S. at 221-22; *See Dowd*, 975 F.2d at 788-89.

153. Although the case could also result in foreign companies sailing American flagged ships, the *Benz-McCulloch-Incres* line of cases would control and the relations between the crew and the ship companies would be subject to the jurisdiction of the NLRA and NLRB. The High Court has noted that the nationality of the owner was irrelevant in determining whether the NLRA "commerce" exception would apply. *See Mobile Steamship*, 419 U.S. at 219, n.5, (*citing McCulloch*, 372 U.S. at 19).

spreading U.S. labor law across the planet and to the judge practicing judicial restraint by applying the plain meaning of the words in light of relevant precedent.[154] Such a judge would, regardless, be well advised to follow the rationale of *Benz*. Although the U.S. has jurisdiction over any vessel voluntarily entering the territorial limits of this country,[155] that jurisdiction is discretionary. Also, Congress "alone has the facilities necessary to make fairly such an important policy decision [as applying United States law to foreign seamen and ships] where the possibilities of international discord are so evident and retaliative action so certain."[156]

The second alternative, the judicial solution of rejecting *Benz-McCulloch-Incres* as they relate to domestic sea transportation on foreign ships, would also be unacceptable. Ships regularly engaged in U.S. coastwise trade and those transporting materials and persons between U.S. ports after arriving from a foreign shore would experience an affront to traditional international maritime law. By extending the NLRA, this country would be attempting to regulate the activity of foreign nationals on what has traditionally been viewed as foreign soil: foreign-flag vessels.[157] As noted above,[158] and by the court in *McCulloch*,[159] foreign countries do not take lightly intrusions into matters that they view as solely and legitimately within their jurisdiction. This would be especially true given the international prevalence of labor laws, regulations, and unions (although their strengths obviously differ).

The Court in *Benz* recognized the great practical difficulty of attempting to engage in such regulation when it discussed the debate of proposals to extend the Seamen's Act of 1915 to prohibit advancements made by foreign vessels in foreign ports. "A storm of diplomatic protest

154. The motivation to displace the precedents by a judicial activist would be obvious. With one bold stroke of judicial arrogance, a judge could apply progressive American work rules to the great unwashed whose governments did not have the foresight to create our seamless system of laws.

There is a simple beauty in applying the NLRA to all sea trade for the individual seeking to use the plain meaning as well. The definition of "commerce" under the Act appears to apply to international commerce: "trade, traffic, commerce, transportation, or communication . . . *between any foreign country and any State*, Territory, or the District of Columbia." National Labor Relations Act § 2(6), 29 U.S.C. § 152(6) (1988) (emphasis supplied). Thus, simple analysis without consideration of precedent could result in application of the Act to trade on foreign-flag ships. Obviously, most judges with respect for precedent would attempt to apply the *Benz* line of cases as well, but that is another matter.

155. *See supra* text accompanying note 140.

156. *Benz*, 353 U.S. at 147. Today, retaliatory action could take as limited a form as diplomatic notes, but could be as broad as heavy trade sanctions by our G-7 trading partners. In this author's view, bills such as Representative Clay's, *supra* note 105, and Representative Ford's, *supra* note 100, *infra* note 163, are inviting the latter retaliation.

157. *See infra* note 181.

158. *See supra* note 107.

159. *See supra* text accompanying note 138.

resulted. Great Britain, Italy, Sweden, Norway, Denmark, the Netherlands, Germany, and Canada all joined in vigorously denouncing the proposals."[160] Given the effect on other nations when Congress acts in such a manner, such an extension of U.S. law from the bench would be an even greater affront.[161] A post-cabotage court would be well advised to heed the analysis of the *Benz* line and avoid such judicial activism.

As to the third alternative, a court facing an unamended NLRA case could also support the proposition that foreign ship, coastwise trade does not constitute "commerce," uphold the *Benz* line, and maintain the integrity of the principle that the law of the flag will be respected unless specifically rejected by Congress. In the hypothetical case outlined above, a court would reject the union's claim that this constituted "commerce" within the jurisdiction of the NLRB. The essential holding of the *Benz* line is that the internal management of a foreign ship's labor relations will not receive interference from U.S. law unless specifically directed by Congress.[162] That principle would not change simply because a vessel is engaging in the coastwise trade. Although U.S. domestic sea commerce appears to be "commerce" within the literal terms of the Act, *Benz* made clear that the plain meaning of the words is not the meaning to which courts should give effect. Thus, post-Jones Act coastwise commerce on foreign-flag ships, though appearing to be within the literal meaning of the words, would not be "commerce" under the Act.

The 1992 proposal to extend the American FLSA to foreign-flag ships also sought to extend the NLRA in the same manner.[163] The mi-

160. *Benz*, 353 U.S. at 146.

161. *See Cruz*, 932 F.2d at 231. "The purpose behind Congress' explicit exclusion of ships flying foreign flags [in the 1961 FLSA amendments] was presumably to avoid interference in the delicate field of international relations by imposing domestic labor law on foreign ships employing foreign nationals at foreign wages. . . . 'For [this court] to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress explained.'" *Id.* (*quoting Benz*, 353 U.S. at 147).

162. *See supra* note 137.

163. The bill would have amended the definition of the term "employer," found in National Labor Relations Act § 2(2), to include:

> (A) a foreign vessel if the vessel is regularly engaged in the United States, with or without an intervening stop or stops at a foreign port or ports, and such term shall include a vessel which is regularly engaged in transporting passengers only from or to a port or place in the United States if the Board determines that such transport is so arranged for the purpose of avoiding the consequences that would otherwise result under this sentence;
>
> (B) a foreign vessel regularly engaged in transport ing liquid or dry bulk cargo in the foreign trade of the United States if such vessel is owned or controlled, directly or indirectly, by a United States corporation; and
>
> (C) a foreign vessel on which occurs the production and processing of goods or services for sale or distribution in the United States, and a 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.

nority arguments for the NLRA provisions also were persuasive. The arguments would apply to a post-cabotage situation as well as to an extension of the FLSA. The concerns of our trading partners would weigh heavily against labor relations regulation.[164] The minority also noted problems with the bill could arise with foreign workers striking at sea, with balloting in a transient workforce, and with the NLRB conducting an investigation.[165]

The same problem would exist for ships that take on single, coastwise contracts for transport between long haul jobs. Unions would attempt to organize foreign seamen or protest against their work, as they did in the *Benz* line of cases, and would prevent any foreign competition from penetrating the coastal trade, defeating a major reason for permitting foreign competition. The NLRB would also be forced to conduct investigations from all points on the globe, wasting taxpayer dollars to support the activities of domestic unions abroad.

Congress would have several options to address the NLRA questions raised by repeal of the cabotage laws to keep courts from having to face the three alternatives outlined above. The first would be to accept foreign legal regimes covering labor relations aboard ships, only giving the protections of the NLRA where the foreign law does not provide any regulation of labor relations. Because every nation has some sort of labor relations law,[166] this solution would have no effect.

A second option would be to extend NLRB jurisdiction over foreign ships while engaging in domestic sea commerce. Amending NLRA Section 2(6), which defines "commerce" under the Act, the law could read (with additions in italics):

> trade, traffic, commerce, transportation, or communication among the several States, [territories, and the District of Columbia] *(including water borne trade, traffic, commerce, or transportation)*, or between any foreign country and any State, Territory, or the District of Columbia.

This option, at best, is inadequate. The cost of applying the NLRA to employers is certainly a major part of the labor costs which encourages the use of foreign-flag ships. This amendment would no more than maintain the NLRA for all coastwise trade and would not address the underly-

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HOUSE COMM. ON EDUCATION AND LABOR, COVERAGE OF CERTAIN FEDERAL LABOR LAWS TO FOREIGN FLAG SHIPS, H.R. REP. NO. 984, 102d Cong., 2d Sess. 12-13 (1992).

164. *Id.* at 14; *See also supra* note 156.

165. H.R. REP. NO. 984, *supra* note 161, at 15-16.

166. *See, e.g.*, Brooks v. Hess Oil V.I. Corp., 809 F.2d 206 (3d Cir. 1987) (discussing a claim that an American company violated Liberian labor law in paying overtime wages to a merchant seaman on one of its ships engaged in lightering off of St. Croix, Virgin Islands.); *Cruz*, 738 F.Supp. at 814-15 (discussing regulations promulgated by the Philippine Overseas Employment Administration controlling the overseas employment of Philippine citizens).

ing issue of the cost of American seamens' labor inflated by collective bargaining.

The final option would be to leave the NLRA unamended. The implications of that solution are clearly represented in the third hypothetical judicial alternative discussed above. Congress would be well advised, however, to avoid amending the NLRA for the same reasons the *Benz* court refused to extend the Act without specific authority from the legislature—international outrage.[167] Extending the NLRA to foreign ships in coastwise trade would create a second body of law purportedly over that created by the flag nation, which would lead to the same difficulties noted in *Benz*. It would also lead to the difficulties discussed above in the 1992 minority report. In the Congressional report of the bill repealing the cabotage laws, Congress should reaffirm that the *Benz* line is to be read as continuing to prevent application of the law to foreign ships.

Obviously, to believe that the cabotage laws could ever be repealed without consideration of its effects on the NLRA is folly. Organized labor would certainly pressure Congress to amend NLRA if the three flagging and ownership laws were to be repealed. Shippers and shipowners would similarly advocate maintaining the principles expressed in *Benz*. For those reasons, the NLRA will ultimately be one of the key stumbling blocks to repealing the cabotage laws, and with the exception of the one noted above, no alternative amendment to the Act which supports competition will be available.

C. Section 33 of Jones Act

The Merchant Marine Act of 1920 established another enduring piece of American law. Section 33 of the Act[168] created a statutory right of recovery for seamen against their employer for injuries arising in the course of their employment, stating:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees [i.e., the Federal Employers' Liability Act of 1908 (FELA)] shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action [FELA] shall be applicable.[169]

167. *See supra* notes 105, 18-125 and accompanying text.

168. The Merchant Marine Act of 1920, § 33, ch. 250, 41 Stat. 1007, June 5, 1920, (codified as amended at 46 U.S.C. app. § 688(a) (1988)).

169. 46 U.S.C. app. § 688(a) (1988). The rights and remedies available to railway employees were incorporated by reference into the Act. *See* Federal Employers' Liability Act of 1908, ch.

As incorporated by Section 33, FELA allows a seaman or his survivors to recover damages from his employer, who is a "common carrier . . . engaging in commerce between [American states, districts, and territories] while [the seaman] is employed by such carrier in such commerce," for personal injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its . . . appliances, machinery, . . . boats, wharves, or other equipment."[170]

The terms used in the law did narrow the law's breadth. As to the seafarers, although the term "seaman" was not defined in the Act, courts have construed it as having its ordinary common law meaning, which has no regard to seaman nationality.[171] While as a general rule employers can not withhold benefits under Section 33 from foreign seamen strictly on the basis of their citizenship,[172] the 1982 amendments to the section made clear that aliens who are not permanent residents of the United States may not maintain an action under the Act where they are engaged in service aboard a foreign ship in foreign waters.[173] Therefore, unless they are engaging in the work described in the 1982 amendments, foreign nationals can not be excluded from Section 33 simply because of their citizenship. Ship ownership or nationality are also not wholly determinative of the breadth of the Act through the law's "employer" definition. The apparent breadth of the term, based on its plain language, would

149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1988)); *see also* Buzynski v. Luckenbach Steamship Co., 277 U.S. 226 (1928).

170. 45 U.S.C. § 51 (1988). The practical effect of incorporating FELA into section 33 was to eliminate the defense of the fellow-servant rule and to give seamen a cause of action based on negligence of a fellow-servant. *See* Martin J. NORRIS, THE LAW OF SEAMEN, § 30:4, at 333 (4th ed. 1985) (hereinafter NORRIS, SEAMEN).

171. The test to be applied is whether the vessel in question was 1) in navigation, 2) whether there was a more or less permanent connection with the vessel, and 3) whether the individual was aboard primarily to aid in navigation. *See* NORRIS, SEAMEN, *supra* note 168, § 2:3 at 43. The first question goes to whether vessel is engaged in the process of sea transportation, which includes such activities loading and unloading of cargo, as distinguished from a ship in drydock or on land. The second issue is intended to distinguish seamen from visitors or passengers, while the third is given broad meaning, essentially including anyone hired to serve on board a ship during its voyage. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952), *reh'g denied*, 342 U.S. 934 (1952). Some courts have gone as far as to read out the third requirement because "the test has been watered down until the words have lost their meaning." *Cf.* Barrett v. Chevron, 781 F.2d 1067, 1072 (5th Cir. 1986) (en banc) (*quoting* Offshore Co. v. Robinson, 266 F.2d 769, 780 (5th Cir. 1959); Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984) (cases reaffirming a two prong test for purposes of determining non-seaman status under LHWCA). For a description of the wide variety of tasks found to give rise to seaman status, *see* NORRIS, SEAMEN, *supra* note 168, §§ 23, 30:13.

172. Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945).

173. 46 U.S.C. § 688(b)(1) (1988). An exception is made where the laws of a nation asserting jurisdiction over the waters where the injury or death occurred provide no remedy. 46 U.S.C. § 688(b)(2) (1988).

include all sailors on all vessels, worldwide. The Supreme Court has determined, however, that is not the case.

In the landmark decision of *Lauritzen v. Larsen* ("*Lauritzen*"),[174] the Supreme Court listed seven factors to be considered in determining whether there a nexus exists between U.S. law and a seaman's claim, and whether the significance of that nexus, in light of the competing interests of other nations regulating the same conduct, warrants a United States courts' taking jurisdiction over the case.[175] In *Lauritzen*, a Danish seaman sought redress through Section 33 of the Jones Act for injuries suffered aboard a Danish flagged and owned vessel in Cuba. While the case is most often cited for its list of contacts relevant to the general determination of prescriptive jurisdiction,[176] the factors in *Lauritzen* were used to decide whether an American court could specifically apply Section 33 to a foreign shipowner as an "employer." Those factors are the:

1) place of the wrongful act;
2) law of the flag;
3) allegiance or domicile of the injured seaman;
4) allegiance of the defendant shipowner;
5) place where the contract of employment was made;
6) inaccessibility of a foreign forum; and
7) law of the forum.[177]

In analyzing the seven points, the place of the act and the employment contract factors are of limited consequence, according to the Court in *Lauritzen*. The former is generally unfit for use in an enterprise such as shipping which occurs in the territory of so many nations.[178] The latter should have great importance in a contract case but has lesser application

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

175. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L.R. 1259, 1311 (1986).

176. *Id.* at 1312.

177. *Lauritzen*, 345 U.S. at 583-91, *cited by* Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 308 (1970), *reh'g denied*, 400 U.S. 856 (1970). In *Lauritzen*, the factors were found to be by an "overwhelming preponderance in favor of Danish law." *Lauritzen*, 345 U.S. at 592.

178. *Id.* at 583-84. "Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of legitimate interests of foreign nationals." Romero v. International Terminal Operating Co., 358 U.S. 354, 384 (1959), (rejecting the claim of a foreign sailor in circumstances similar to *Lauritzen* except that the individual was injured in U.S. waters and standing for the more general proposition that the *Lauritzen* doctrine and test extend to all federal maritime law), *reh'g denied*, 359 U.S. 962 (1959).

The "place of the act" factor will also probably have less importance for post-Jones Act commerce in any event. *See infra* note 180 and accompanying text; *see also* Carlson, *The Jones Act and Choice of Law*, 15 INT'L LAW. 49, 56 (1981).

in a Jones Act tort context.[179] According to the Court, greatest consideration should be given to the more consistent law of the flag. "The weight of the ensign overbears most other connecting events in determining applicable law," and should prevail unless some heavy counterweight appears,[180] a conclusion consistent with settled American case law and international jurisprudence.[181]

Lauritzen recognized that traditionally the allegiance or domicile of the injured and the allegiance of the defendant shipowner were the same as the flag, but that in recent times, most often they differed. The decision noted, while these two factors were not at issue in the case at hand, future courts would be forced to confront both differing personal[182] and shipowner nationalities.[183] The final two considerations, the accessibility of the foreign forum and the law of the U.S. as compared to that of another country, were only to become issues where the foreign law would severely affect the injured worker's remedy;[184] both of these factors are also generally of minor importance.[185]

As a general matter, the seven factors should be applied liberally in light of the remedial purpose of the law. The Supreme Court remarked on that goal in *Hellenic Lines, Ltd. v. Rhoditis* ("*Hellenic Lines*"),[186] where a Greek seaman signed aboard a Greek ship, owned by a Greek corporation, and was injured while his ship was docked in New Orleans. Although the plaintiff signed on board in Greece and ninety-five percent of the corporation's stock was owned by a Greek national, the owner had lived in Connecticut for twenty-five years and operated his line from New York, sailing primarily between the United States and other nations. The Court upheld the appeals decision affirming that the company was an "employer" under the Act. Discussing its philosophy on application of Section 33 to employers with foreign contacts, the majority stated:

> We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this

179. *Lauritzen*, 345 U.S. at 588-89; *See* Carlson, *supra* note 178 at 56-57.

180. *Id.* at 585-86.

181. A ship "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty." United States v. Flores, 289 U.S. 137, 155-56 (1932), *cited by Lauritzen*, 345 U.S. at 589; *See The Lotus*, P.C.I.J., Series A, No. 10 (1927).

182. Although rejected in cases where all other factors weigh in favor of a foreign nation, American courts have accepted that U.S. citizens, with at least one other *Lauritzen* factor, have enough contacts to meet the test of jurisdiction. *See* S. FRIEDELL, BENEDICT ON ADMIRALTY, JURISDICTION AND PRINCIPLES, § 128, n.5, at 8-38 to 8-40 (Matthew Bender ed. 1983); CARLSON, *supra* note 176 at 58.

183. *Lauritzen*, 345 U.S. at 586-88.

184. *Id.* at 589-92.

185. *See* Carlson, *supra* note 177, at 56-57.

186. *Hellenic Lines*, 398 U.S. at 306.

> country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer'. The flag, the nationality of the seaman, the fact that this employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts which this alien owner has with this country. If . . . the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States.[187]

This language effectively created a new eighth "base of operations" factor for the *Lauritzen* test, turning on the "substantial and continuing contacts" of the defendant ship owner as either the practical "domicile of the defendant shipowner" or its base of operations.[188] Given the general lack of importance of four of the *Lauritzen* factors,[189] the post-*Hellenic Lines* eight part test essentially became a balancing of the allegiance of the seaman and three factors (law of the flag, allegiance of the shipowner, and defendant's base of operations) which ascertain whether the defendant is sufficiently "American" to warrant jurisdiction,[190] although the Court in *Hellenic Lines* added that the list is not exhaustive "and there well may be other" factors.[191]

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187. *Id.* at 310. The dissent in the case noted that the Court had found the substantial contacts test to be inappropriate for the NLRA in McCulloch v. Sociedad Nacional, and instead opted in that case to rely heavily upon the law of the flag, as it had in *Lauritzen*, 345 U.S. 571 (1953). The dissent found *Hellenic Lines* to be an attempt to override that concept based on the fact that the flagging was for convenience and, presumably, the broad remedial purpose of section 33. *Hellenic Lines*, 398 U.S. at 312-16, (Harlan, J., dissenting). The dissent noted that one of the majority's major reasons for overriding the flag was the "competitive advantage over American-flag vessels" which might accrue by avoiding section 33 liability but that in light of insurance, the potential exposure would be limited, *Id.* at 317. The dissent found both consideration of the economics of the section 33 liability and the ultimate results of such consideration to be immaterial, *Id.* Although this author believes the dissent reached the right conclusion, the ultimate effect of *Hellenic Lines* on the *Lauritzen* test after the repeal of the Jones Act would be minimal. *See supra* notes 207-08 and accompanying text. *Contra* Cruz v. Chesapeake Shipping, Inc., 738 F. Supp. 809 (D. Del. 1990)("Congress could not have been unaware of the necessity of construction imposed upon courts by such, *see supra* note 70, generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.") (*quoting Lauritzen*, 345 U.S. at 581).

188. *Hellenic Lines*, 398 U.S. at 309; STEPHEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 128, at 8-37(7th ed. 1989); *see* Carlson, *supra* note 177, at 56, 63-65. "The *Lauritzen* factors were not rejected, but it was made quite clear that the base of operations could override any number of other factors." Note, *Interest Analysis and Maritime Choice of Law*, 13 LAW. OF THE AMS. 547, 553-54 (1981).

189. Central Am. S.S. Agency, Inc., 594 F. Supp. 735, 737 n.1 (S.D.N.Y. 1984).

190. Carlson, *supra* note 177 at 60.

191. 398 U.S. at 309. *See* Carlson, *supra* note 177, at 56 n. 39, *citing* Pavlou v. Ocean Traders

Contrary to one commentator's conclusion in 1981, the *Lauritzen-Hellenic Lines* test is the sole test in all of the Circuits except the Second.[192] In 1959's *Bartholomew v. Universal Tankships, Inc.* ("*Bartholomew*")[193], the Second Circuit stated that the substantiality of the American contact should be of greatest importance[194] with no "balancing" of foreign interests occurring.[195] Two post *Lauritzen*, Second Circuit, decisions found that *McCulloch* overruled *Bartholomew*.[196] After *Hellenic Lines*, however, the Second Circuit followed the *Bartholomew* doctrine in *Moncada v. Lemuria Shipping Corp.* ("*Moncada*").[197] *Moncada* viewed *Hellenic Lines* dicta as not only permitting *Bartholomew* but actually adopting the latter's test.[198] The decision stated that the *Lauritzen* factors should be used in determining the substantiality of the facts favoring jurisdiction instead of merely tallying the factors.[199]

The *Bartholomew* doctrine, as interpreted by *Moncada*, has a significant distinction from *Lauritzen-Hellenic Lines*: If a case had substantial U.S. contacts, such as where the nationality of the sailor and the ship's flag of convenience were American but where all other contacts were of another country, a *Bartholomew* court might find "substantial" enough U.S. contact warranting jurisdiction, while a *Lauritzen-Hellenic Lines* court might weigh the factors and find them favoring the foreign nation. The *Moncada* interpretation of *Bartholomew* has been consistently fol-

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Marine Corp., 211 F. Supp. 320, 322 (S.D.N.Y. 1962) where the plaintiff signed an employment contract naming the law of Greece as applicable, as demonstrating another factor.

192. Carlson, *supra* note 177 at 72. Carlson suggested that Bartholomew v. Universal Tankships, Inc., 263 F.2d 437, 440 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959), was the law of all of the Circuits except the Third. Later cases have clearly demonstrated that that proposition is not the case. DeMateos v. Texaco, Inc., 562 F.2d 895, 902 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); Dracos v. Hellenic Lines, Ltd., 762 F.2d 348, 350-51 (4th Cir. 1985); Coats v. Penrod Drilling Corp., No. 92-7378 (Oct. 18, 1993) (5th Cir.); Fogleman v. ARAMCO, 920 F.2d 278, 282-84 (5th Cir. 1991); Villar v. Crowley Maritime Corp., 782 F.2d 1478, 1480-82 (9th Cir. 1986); Sigalas v. Lido Maritime, Inc., 776 F.2d 1512, 1516-18 (11th Cir. 1985) (cases using the *Lauritzen-Hellenic Lines* analysis). *See* Gutierrez v. Diana Investments Corp., 946 F.2d 455, 456-57 (6th Cir. 1991) (*accepting the Lauritzen-Hellenic Lines* test).

193. *Bartholomew*, 263 F.2d at 440.

194. *Id.* at 440.

195. Carlson, *supra* note 177, at 52-53.

196. Tjonaman v. A/S Glittre, 340 F.2d 290, 292 (2d Cir. 1965), *cert. denied*, 381 U.S. 925 (1965); Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426 (2d Cir. 1966), *cert. denied*, 386 U.S. 1007 (1967).

197. Moncada v. Lemuria Shipping Corp., 491 F.2d 470 (2d Cir. 1974).

198. *Id.* at 472. Judge Hays placed undue emphasis on Hellenic Lines' footnote quote of *Bartholomew*, when he drafted *Moncada*. In citing the older Second Circuit case, *Hellenic Lines*, 398 U.S. at 309 n.4, the Supreme Court was only attempting to demonstrate that the weight or "significance" of each factor was to be considered when analyzing a fact situation under the *Lauritzen* test.

199. *Id.*

lowed by courts in the Second Circuit.[200] Thus, the Second Circuit has required a higher level of U.S. connection than Supreme Court's standard while giving no consideration to the weight or existence of competing foreign factors.[201]

Because of *Lauritzen-Hellenic Lines* and *Bartholomew*, a difference in status between two vessels' ownership and flag could presently bring different results under Section 33, varying the breadth of law's jurisdiction. After repeal of the cabotage laws, however, these differences would in all likelihood not bring different results; and Congress could insure uniformity for all coastwise trade with a minor amendment.

Without a Section 33 amendment in the cabotage repeal legislation, the *Lauritzen-Hellenic Lines* test would have an inclusive effect for any foreign owned or flagged vessel involved in U.S. intercoastal trade.[202] Any vessel regularly or irregularly sailing between American ports should have sufficient contacts by engaging in commerce between U.S. ports to fall within the jurisdiction of Section 33. First, the "base of operations" would weigh heavily in favor finding jurisdiction. *Hellenic Lines* made clear that business and operating contacts which effectively established the United States as a base of operations would merit the taking of jurisdiction.[203] Transportation between domestic ports, given its historic value as a closely guarded domestic interest, could be construed as a matter of law as being a base of operations.[204]

Second, regardless of whether the nationality and domicile of the defendant, i.e., the "allegiance," were foreign, or even whether the shipping company had absolutely no business operations in the U.S. other than the ship in commerce between U.S. ports (a fact which would nonetheless be highly unlikely), the simple fact that the vessel engaged in interstate transportation via the sea should tip the balance in favor of jurisdiction under the *Lauritzen-Hellenic Lines* test. Third, if the plaintiff was an

200. Flores v. Central Am. S.S. Agency, Inc., 594 F. Supp. at 737, Tarasenko v. Cardigan Shipping Co., Ltd., 671 F. Supp. 997, 999 (S.D.N.Y. 1987), and Gazis v. John S. Latsis (USA) Inc., 729 F. Supp. 979, 985 (S.D.N.Y. 1990) followed the *Moncada* practice of applying the *Lauritzen-Hellenic Lines* factors to the *Bartholomew* substantiality inquiry.

201. It could certainly be argued that it would be impossible to have "substantial" foreign factors outweighing "substantial" U.S. contacts, but that is a question for another article or a future case. It is sufficient here that the standards used appear to be different and could lead to differing results for cases in a post-Jones Act environment.

202. One commentator believed that *Hellenic Lines* rejected the dual "foreign" and "domestic" nexus test of *Lauritzen* which considered both foreign and domestic contacts, and instead focused on United States contacts alone. Stewart, *supra* note 174, at 1313-17.

203. *See infra* note 197.

204. In fact, this proposition is of sufficient importance that should the cabotage laws ever be repealed without amending Jones Act § 33, as discussed below, courts should consider as a 9th factor, "the domestic nature of the commerce."

American[205] or a long-term American resident,[206] as would most likely be the case for lines with extensive U.S. coastwise operations, the factor would weigh towards jurisdiction. Were the individual a foreigner, however, that fact would then weigh against the base of operations analysis.

Fourth, the law of the flag could quickly be rejected under *Hellenic Lines* as controlling under American case law if it were a mere flag of convenience.[207] Were it not a flag of convenience, however, and even if the other "minor" factors were in favor of a foreign nation, the contacts of the defendant through coastwise commerce should still be sufficient to place any employer engaging in coastwise trade within American jurisdiction under a *Lauritzen-Hellenic Lines*' interpretation of Section 33.[208]

This would be consistent with the basic policy of *Lauritzen*. There, the Court rejected the assertion that the petitioner's frequent and regular contacts and commerce with ports of the United States were sufficient, in and of themselves, to form a basis for applying American statutes aboard foreign ships.[209] The nature of international seaborne commerce would favor a foreign court's jurisdiction, according to the High Panel in that case. If every nation's courts exercised their potential jurisdiction on ships with which it had contacts or commerce, chaos would result. *Lauritzen* distinguished maritime law from domestic law, however, stating that international law "does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory."[210] This conclusion undoubtedly flowed from the fact that U.S. coastwise commerce at that time, like that of most nations, was conducted by domestic interests. The broader point, that local trade represents an area wholly within the jurisdiction of each country could also be made, with equal force, after the repeal of the cabotage laws.

The *Bartholomew* and *Lauritzen-Hellenic Lines* doctrines impose court-made jurisdictional limits, which are inherently subject to later review.[211] Therefore, any change in the laws of coastwise trade could be

205. Carlson, *supra* note 177, at 57 (*citing* Uravic v. F. Jarka Co., 282 U.S. 234 (1931)).

206. *Id.* at 57-58 (*citing* Gambera v. Bergoty, 132 F.2d 414 (2d Cir. 1942)).

207. *See supra* text accompanying note 186. Groves v. Universe Tankships, Inc., 308 F. Supp. 826, 832 (S.D.N.Y. 1970).

208. Obviously, "place of the wrongful act" would favor application of the law with a coastwise incident, as would the other "minor" factors in some cases.

209. *Lauritzen*, 345 U.S. at 581

210. *Id.* at 582.

211. Two articles have asserted that the court of appeals decisions have stripped the "domicile of the defendant" factor of meaning, favoring instead the "base of operations" factor. *See* Stephen Gliatta, Note, *Keeping Up With the Jones Act: The Effect of U.S. Based Stock Ownership on the Applicability of the Jones Act to Foreign Seamen*, 15 N.Y.U. J. INT'L L. & POL. 141, 150-67 (1982); James C. Klick, Comment, *Jurisdiction, Choice of Law, and Forum Non Conveniens in a Personal Injury Suit by a Foreign Seaman: The Application of Interest Analysis*, 5 *Mar. L.* 239, 249-53 (1980).

blunted by future court decisions. Further, regardless of whether courts actually do modify these doctrines, their existence as separate case lines and the passage of new legislation could lead to a protracted round of court cases testing their viability. To prevent dilution of the value of repealing the cabotage laws and to limit the costs of drawn out and uncertain litigation on this subject, congress should amend Section 33 when Section 27 is repealed. An amendment which could effectuate that goal would redesignate Section 33(a),[212] the Act's primary provision, as Section 33(a)(1) and insert the following:

> (2) 'Any employer engaging in the coastwise trade of the United States shall be deemed an employer for purposes of this section, regardless of a vessel's flag, the allegiance or domicile of the injured seaman, the employer's domicile, or the place where the seamen contracted for employment, or any other fact."[213]

This text would ensure that all ships sailing between U.S. ports in commerce would always be within the jurisdiction of § 33 of the Jones Act.

The amendment would not burden U.S. commerce because ships doing significant domestic or foreign American business are most likely already covered by Section 33, and without the amendment, they probably still would be so covered. Also, corporations which engage in such trade presumably insure against such risks. Further, the benefits sought from repealing the cabotage laws, particularly reduced labor costs, would be unaffected by the new amendment for the same reason. The amendment would in fact provide greater certainty for foreign owned and flagged vessels seeking to provide competitive interstate service.[214]

D. Longshore and Harborworkers' Compensation Act

The Longshore and Harbor Workers' Compensation Act ("LHWCA"),[215] originally enacted in 1927, was the final major expansion of workers' compensation laws into the American work place during that time. Because the state workers' compensation laws failed to extend jurisdiction to shipboard laboring,[216] LHWCA created a Federal regime to

212. *Supra* notes 167-68 and accompanying text.

213. Redesignating 46 U.S.C. § 688(a) as § 688 (a)(1) and inserting the recommended text as 46 U.S.C. § 688(a)(2).

214. Were costs still an issue, the only solution would be to repeal section 33. This involves a broader policy question and, in this author's view, an unwise decision.

215. Longshore and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-50 (1988) [hereinafter LHWCA].

216. Congress reacted to the famed decision in Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917), which dismissed a claim by the survivors of a stevedore killed on board a ship under New York workers' compensation law. Although the law specifically provided for longshore workers, the Supreme Court found that the statute violated the uniformity principle enunciated in *The Lottawanna*, 88 U.S. 558, 579 (1875). There the Court held that a state law must be rejected

provide generally no-fault[217] medical, disability, and death benefits for injuries to seacoast workers on the job.[218]

The Act provides that, "[e]very employer shall be liable for and shall secure the payment to his employees of the compensation payable" under the Act.[219] LHWCA defines an "employee" as, "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel" (the "status" test).[220] "Employer" means "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining [areas])" (the "situs" test).[221]

Courts have uniformly found the term "employee" to exclude "seamen" as generally defined by Section 33 of the Jones Act, finding the latter term to be synonymous with "a master or member of a crew of any vessel," who are excepted under LHWCA.[222] The construction of the laws as "mutually exclusive"[223] by courts for purposes of an individual's "status" is buttressed by LHWCA § 3(e), which requires amounts paid under Section 33 of the Jones Act to be credited against any judgment under the Longshore Act.[224] For that reason, repeal of the cabotage acts will probably not increase the number of persons who can avail themselves of the LHWCA because most of the additional foreign crewmen entering U.S. ports would be excluded under the status test.

It is possible, however, that American longshoremen could be injured while in the employ of foreign shipowners. The situs and status test would determine whether these individuals would need to utilize the remedies of the LHWCA.[225] The foreign status of the shipowner or the

where it "works material prejudice to the characteristic features of the general maritime law. . . ." *Southern Pac.*, 244 U.S. at 216. *See* MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES §§ 4:2 to 4:3, at 109-13 (1990).

217. Unlike most state workers' compensation laws, LHWCA excludes "injur[ies] occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." LHWCA, 33 U.S.C. § 903(c)(1988).

218. LHWCA §§ 8-10, 33 U.S.C. §§ 908-10 (1988).

219. *Id.* § 4(a), 33 U.S.C. § 904(a) (1988).

220. *Id.* § 2(3)(G), 33 U.S.C. § 902(3)(G) (1988).

221. *Id.* § 2(4), 33 U.S.C. § 902(4) (1988).

222. *See supra* text accompanying note 169.

223. Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243 (5th Cir. 1983), *reh'g denied*, 710 F.2d 837(W.D.La. 1983), *cert. denied*, 464 U.S. 1069 (1984).

224. LHWCA § 3(e), 33 U.S.C. § 903(e) (1988).

225. Either because the worker actually wished to use the LHWCA, or because the shipowner wished to shield itself from section 33 liability by citing its employer or the person's employee status under the Longshoremen's Act.

ship's flag should nonetheless have no effect on the outcome of the case.

Assuming that the American worker is an "employee" under the LHWCA status test, the situs of the injury could conceivably include a foreign owned or flagged ship engaging in the coastwise trade outside of the "navigable waters of the United States," i.e. on the high seas between U.S. ports.[226] The availability to the worker of the remedy of the LHWCA should remain, however, unaffected by the foreign nature of the defendant.[227] The decision of the Second Circuit in Cove Tankers Corp. v. United Ship Repair, Inc. ("*Cove Tankers*"),[228] while involving a U.S. flagged tanker, provides guidance on the future application of the LHWCA to foreign owned and flagged vessels in the interstate commerce on the high seas.

In *Cove Tankers*, two employees of defendant United Ship Repair sailed with a ship from Philadelphia to New York. During the trip, the vessel deviated to a point 135 miles offshore where the boiler on which the two were working exploded, killing one, injuring the other.[229] Although the Second Circuit refused to directly address whether the high seas can ever be considered part of the "navigable waters of the United States" for purposes of the Act.[230] They did agree with the District Court; deciding that the Act can be applied when injury occurs on the high seas.[231] The panel noted that the purpose of the original act was to prevent longshoremen from walking into and out of coverage based upon their location; instead, workers would be guaranteed coverage regardless of their location, whether on land, aboard a docked vessel, or at sea.[232] To advance that comprehensive intent, the LHWCA should be construed as including American seamen in such a situation, according to the court.

Obviously, being on a foreign ship in international waters would complicate matters. *Cove Tankers* accepted the domestic nature of the facts of the case only stating whether such a location *could* be within U.S. jurisdiction.[233] The District Court's decision in the case,[234] however, noted that Congress had clearly intended through a number of provisions to include the high seas within the definition of U.S. navigable waters.

226. A foreign ship in U.S. waters employing a longshoreman would be within the literal terms of the Act's jurisdiction. *See supra* notes 218-19 and accompanying text.

227. This dilemma is not posed by U.S. ships engaged in the coastwise trade. *See infra* notes 228-36 and accompanying text.

228. Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 41 (2d Cir. 1982).

229. *Id.* at 39.

230. *Id.* at 41.

231. *Id.*

232. *Id.* at 42.

233. *Id.*

234. Cove Tankers' Corp. v. United Ship Repair, Inc., 528 F. Supp. 101, 108-09 (S.D.N.Y. 1981).

The District Court rejected arguments supporting a three mile limit to LHWCA cases,[235] citing the Act's legislative history[236] and the evolution through reenactments of its provisions.[237] The District Court concluded that the high seas *should* be included within the definition of navigable waters under the Longshoremens' Act.

In a post-cabotage case, the fact that an American covered by the LHWCA would have been injured aboard a foreign-flag ship owned by a foreign company on the high seas would not have changed the persuasive analysis of the District Court in *Cove Tankers*. Congress' explicit and implicit intent to extend remedial coverage in this case to longshore workers in American commerce should control.[238] Thus the LHWCA would continue to apply to situations which might be implicated by repeal of the American cabotage laws, and no amendments to the Act would be necessary.

E. United States Immigration Law

Using its broad power to regulate immigration, Congress established that, "no immigrant shall be admitted into the United States unless at the time of the application for admission he (1) has a valid unexpired immigrant visa . . . , and (2) presents a valid unexpired passport or other suitable travel document . . . ."[239] The term "immigrant" is defined under the Act as meaning, "every alien[240] except an alien who is within one of the following classes of nonimmigrant aliens . . . ."[241] Among the classes of aliens excluded are ship crewmen. The INA states under subsection D that aliens shall not include,

> an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in Section 258(a) (other than a fishing vessel having its home port or operating base in the United States)[242] . . . who intends to land temporarily and solely in pursuit

235. The decision rejected the plaintiffs claim (citations omitted) that "navigable waters" and "high seas" are not mutually exclusive at a three mile limit, correctly noting that the latter is a more comprehensive term, embracing the former. *Id.* at 107, n.9.

236. *Id.* at 108.

237. *Id.* at 109-11.

238. A foreign vessel and employer would be unable to claim it was outside of the Act's "navigable waters" of the U.S. when the ship was docked in the United States, and would similarly be unable to so claim if the ship were at sea between two American ports.

239. Immigration and Nationality Act of 1952 § 211(a), 8 U.S.C. § 1181(a) (1988).

240. "Alien" is defined as "any person not a citizen or national of the United States." *Id.* § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1988).

241. *Id.* § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988).

242. The fishing vessel language was added when Congress realized that individuals seeking illegal entry into the United States were signing on as fishing vessel crewmembers, entering the U.S., and failing to leave. *See* Charles Gordon & Stanley Mailman, Immigration Law and Procedure § 16.01[2], at 16-6 (rev ed. 1993) (citations omitted).

> of his calling as a crewman and to depart from the United states with the vessel . . . on which he arrived or some other vessel . . . . [243]

For such crewmen, with the exception of those with dangerous health conditions or criminal records,[244] or those that are seeking entry to work as replacement labor during a strike,[245] "a consular officer may issue . . . a non-immigrant visa, [specifying] the classification . . . of the nonimmigrant . . . ."[246]

The definition of "crewmen" under the INA is as broad as the term "seamen" under Section 33 of the Jones Act or the LHWCA.[247] The definition of employment simply require one to have the "capacity required for normal operation and service on board." Therefore, a ship includes traditional vessel crew members as well as doctors, beauticians, waiters, sales people, electricians, mechanics, and cooks.[248] Regulations do exclude, however, individuals not required for the vessels' operation and service, or those listed on the documents submitted at the port or employed as a regular crew member in excess of the number normally required.[249]

Congress specifically excluded longshore workers from the definition of "normal operation and service" in the Immigration Act of 1990.[250] The law defined longshore work as "any activity relating to the loading or unloading of cargo, the operation of cargo-related equipment (whether or not integral to the vessel), and the handling of mooring lines on the dock when the vessel is made fast or let go . . . ."[251] Exceptions exist, however, for tankers, where established industry practice is to use foreign crewmen to perform particular activities in particular ports, and for longshore

243. Immigration and Nationality Act, § 101(a)(15)(D)(i), 8 U.S.C. § 1101(a)(15)(D)(i) (1988).

244. *Id.* § 212(a)(1)-(10), 8 U.S.C. § 1182(a)(1)-(10) (1988).

245. 8 U.S.C. § 1184(f)(1) and (3), was added in the Immigration Act of 1990, § 202, P.L. 101-649, 104 Stat. 5014 (hereinafter "1990 Act"), and states:

> (1)[N]o alien shall be entitled to nonimmigrant status described in [subsection D, excerpted above] if the alien intends to land for the purpose of performing service on board a vessel of the United States [defined in Title 46] . . . during a labor dispute where there is a strike or lockout in the bargaining unit of the employer in which the alien intends to perform such service, [unless the] (3) owner or operator of such vessel that employs the alien provides documentation that satisfies the Attorney General that the alien (A) has been an employee of such employer for a period of not less than 1 year preceding the date that a strike or lawful lockout commenced; (B) has served as a qualified crewman for such employer at least once in each of 3 months during the 12-month period preceding such date; and (C) shall continue to provide the same services that such alien provided as such a crewman.

246. *Id.* § 221(a), 8 U.S.C. § 1201(a) (1988).

247. *See supra* notes 171, 219 and accompanying text.

248. *See* GORDON & MAILMAN, *supra* note 242, at § 16.01[2], at 16-6.

249. 22 C.F.R. § 41.41(b) (1993); *see also supra* note 248.

250. Immigration Act of 1990 § 203, 8 U.S.C. 1288(a) (1993).

251. *Id.* § 258(b)(1), 8 U.S.C. § 1288(b)(1) (1993).

crewmen of ships flagged in countries that allow similar privileges for U.S. crewmen.[252]

Repeal of the American cabotage legislation will do little to change immigration practices among the coastwise fleet because the provisions of the Act presently apply to American ships engaging in the coastwise trade.[253] The only likely change with the elimination of the laws will be an increase in the number of individuals applying for D Class visas, since foreign owned and flagged ships are more likely to have foreign crewmen aboard. This upswing in applications and visa issuances would not affect the procedures or requirements of the immigration laws, and would not necessitate their change.

Foreign seamen who would seek long term but non-permanent residence in the U.S. after repeal of the cabotage laws, so as to work on ships engaging in the coastwise trade, would need to apply for an H Class temporary work visa instead of the short term, D Class crewman visa. Such crewman could only enter, however, if "seaman" became a specialty occupation under the statute, or became a skill in short supply as determined by the Department of Labor.[254] Both of these being unlike events, revision of immigration laws need not be considered after elimination of the cabotage acts.

IV. Conclusion

As noted above, the cabotage laws represent only part of the intricate structure of government supports to the American merchant marine. These statutes and appropriations are designed to protect the American sea carriage industry, and to provide the infrastructure and hardware necessary for this country to conduct a war. Assuming that the naval and military needs of this nation no longer require what the cabotage laws and Federal supports provide, and that protectionist economic practices ultimately harm domestic consumers and producers, benefiting only the select workers and companies receiving this government largess, the appropriate solution is to dismantle the system.[255]

Purging our statute books of the cabotage laws is an integral part of

252. *Id.* §§ 258(b)(2)(c), (d), 8 U.S.C. §§ 1288(b)(2)(c), (d) (1993).

253. *See* Gordon & Mailman, *supra* note 242, at § 16.01[2], at 16-6 (citations omitted).

254. Immigration and Nationality Act § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1993).

255. The need for ocean-going vessels to transport hardware and personnel during times of war or conflict is clear. What is less clear is whether those vessels are not presently under the command of the U.S. armed forces or whether the types of vessels needed are the same type as those used in the coastwise trade. This author wishes to make clear, however, that were there a clear need for additional ships of these types *and* it was determined that the most cost effective way to ensure a ready supply of these vessels was to subsidize their production and operation by American companies under American flag, subsidies would be appropriate to the extent neces-

this process. As explained above, however, other legislation is dependent on the concepts underlying these laws. Simply eliminating the protectionist provisions will not create the coherent, efficient policy sought in freeing the transportation market. Nonetheless, as is made clear from this paper's analysis, removing the Jones Act and the Foreign-Built Dredge Act, the Passenger Ship Act, and the Towing Act need not be a complicated process as it relates to our nation's labor laws. In fact, seeking a more competitive coastwise trade policy should not conflict with appropriate worker protection statutes.

American wage and hour laws, regardless of the rhetoric of Eisenhower era union officials, are burdensome to certain industries. Shipping is one of those. The elimination of the minimum wage law for seamen will not affect most seafarers, who are unionized, and will create greater job opportunities for those willing to work for small businesses that the competitive marketplace will encourage.

The repeal of the cabotage restrictions will also help correct the problems American shippers have with local unionized labor. Where market conditions support unions of U.S. workers, such as river traffic, labor will continue to take what the market appropriately bears. For routes where foreign liners might compete, such as with coastal transport, American consumers and producers will benefit from the billions of dollars in reduced transportation costs brought by competition in the water, rail, and road transport markets, just as they have with the American trucking and airline industries. Although unions will see their potential exclusion from foreign-flag ships in the coastwise trade as hurting American workers, the few American seamen left on these ships and routes today will not be excluded by necessity, but will merely lack the union muscle, strengthened by U.S. laws, to extract wages that are out of line with world norms. Congress could conceivably provide re-training funds or other supports for the seamen who lose jobs in the first few years. The temporary job dislocation of a few workers is a small price to pay for the increased commerce resulting from the reduction in shipping costs; and as importantly, the vast number of jobs created by the free market will more than offset the handful of positions lost to foreign workers and the wage reductions brought about by labor competition.

Workers' compensation acts for seamen and longshoremen which

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sary. This would not, of course, have any effect on the propriety of repealing the Jones Act and its brethren.

The author would also point out that if there were a need for personnel to man ships (if for example, there were no subsidies but the Navy held an unmanned ready-reserve fleet), that goal could also be accomplished by sponsoring such additional sailors in the Navy or by supporting the careers of American mariners, even on foreign lines. Such persons could be obligated to serve their country in a time of need in exchange for their financial or other supports.

protect the health of workers and appropriately allocate the costs of these dangerous industries to their customers, will be unaffected by the repeals if the amendment suggested above is added to the Jones Act regime. Change is also not necessary for immigration laws, as noted above.

Obviously opposition to a reduction of any sort of maritime industry protection will come from those whose interests are harmed by the change: the shipping lines who profit from the taxpayer subsidies; the ship builders who exist because of those subsidies; the maritime construction and seamens' unions whose power is derived from the concentration of high-skilled, well paying jobs in this sector; the seafarers whose hard working but extensively compensated lifestyle is preserved by the laws; and the railroads and railroad unions, and truck lines and truckers who will see a return of transportation competition.

Yet assuming that our national defense needs can still be met, the benefits will easily outweigh their interests. Tax dollars not spent supporting these enterprises will help reduce the budget deficit, and hopefully the U.S. tax burden, in their own small way. The jobs created and reduced priced products purchased by consumers and companies alike will benefit all Americans and be of far greater aggregate economic value to the country than maintaining these industries, as is always the case with subsidized jobs. Finally, the working conditions and policy goals supported by the five pieces of legislation analyzed in this paper, will still be fulfilled without offending our international neighbors and without shirking our international responsibilities and efforts.

Labor regulations do not represent a barrier to competitive sea transport. The short term political and focused but diffusable economic costs would certainly be a small price to pay for the ultimate benefit of a higher standard of living for all Americans.