

2010

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Recommended Citation

Marsha Chien, *When Two Laws are Better than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L LAW. 15 (2010).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol28/iss1/2>

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When Two Laws are Better than One: Protecting the Rights of Migrant Workers

Marsha Chien*

Does the force of one country's laws stop at its own borders? Mexican nationals working in the United States routinely shuffle between their country of origin and their country of employment. With their families in Mexico and limited paths to U.S. citizenship, Mexican guest workers and unauthorized workers have no choice but to continually migrate across the border for work.¹ However, in forging "transnational identities" without regard to political borders, migrant workers traveling between Mexico and the U.S. are left vulnerable to exploitation by employers in search of a source of cheap labor.

This Article seeks to explore the question of whether Mexico has the power to protect its citizens when they travel to the U.S. for work. Stated in different terms, this Article considers whether U.S. employers must abide by Mexican law when recruiting Mexican nationals to work in the U.S. While it is relatively well-settled that employers must abide by U.S. laws when foreign workers are working in the U.S.,² the question of which country's laws apply to the time before and after actual employment, that is, when foreign workers are in transit, remains uncertain. The answer to this relatively straightforward question has a significant impact on the rights of foreign workers who migrate to the U.S. every year.

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1. Indeed, under H2-A and H2-B programs, Mexican guest workers are legally required to return to Mexico during the off-season. See 8 C.F.R. § 214.2(h)(5)(viii)(C) (2009) ("[A]n alien's stay as an H-2A nonimmigrant is limited by the term of an approved [employment] petition.").

2. Notably, even when U.S. laws apply to the employment relationship there is a concern that migrant workers are not adequately protected. U.S. lobbying groups, whose interests do not include the protection of foreign workers, largely shape U.S. laws. To the extent that protections exist for foreign workers, their primary purpose is to protect the domestic labor force from "cheap" foreign labor. See *infra* Part I.

The precarious existence of workers migrating between the U.S. and Mexico stems from the fact that it is unclear *when* workers are protected by U.S. laws, when they are protected by the laws of their country of origin, and when they are covered by both. Given the transnational identity of migrant workers, it is important for legal advocates to be familiar with all the rights migrant workers may assert in U.S. courts. There may be reasons why a migrant worker prefers the law of their country of origin.

For instance, a U.S. law may be ambiguous or silent as to whether U.S. employers should pay social security or relocation costs for a worker that it recruits in Mexico. This state of flux may be because U.S. laws do not directly address the issue, or it may be that circuits differ in their interpretation of the protections afforded under U.S. law. In fact, circuits are currently divided with respect to the latter question of who bears the cost of migrant workers who relocate from their country of origin to the U.S. While the Eleventh Circuit finds the employer bears the burden under the Fair Labor Standards Act (FLSA), the Fifth Circuit finds the employee is responsible for relocation costs.³

Regardless which FLSA interpretation the Supreme Court ultimately agrees with, this Article examines the potential for migrant workers recruited to work in the U.S. while living in their home country to assert a claim in U.S. courts under their home country's law. Although migrant workers have brought supplemental claims under foreign law, the courts have not directly addressed the extent to which a home country's laws protect migrant workers.⁴ This Article presents the argument that the employment relationship between a migrant worker and his/her employer is regulated by *both* U.S. employment law *and* the employment law of the worker's country of origin. As such, migrant workers may bring a cause of action in U.S. federal courts under U.S. federal law as well as a cause of action under a foreign law based on supplemental jurisdiction.⁵

Part I provides a background on the general condition of migrant workers' rights under U.S. federal and state law and identifies several deficiencies in the protections afforded to migrant workers. Part II introduces a particular circumstance where Mexican law may address deficiencies in U.S. law—that is, when recruited migrant workers from Mexico incur “relocation costs” in traveling from Mexico to their final place of employment. While U.S.

3. Compare *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228, 1242-43 (11th Cir. 2002) with *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 284 (5th Cir. 2009).

4. See, e.g., Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment at 15, *Arriaga v. Florida Pacific Farms*, No. 99-1726 (M.D.F.L. 2002); Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment at 13, *Arriaga v. Florida Pacific Farms*, (M.D.F.L. 2002) (raising Article 28 in conjunction with a FLSA claim).

5. This Article considers suits brought in federal court only. It should be noted, however, that the choice of law analysis discussed below may also apply in state court.

regulations are largely silent on the issue,⁶ Article 28 of Mexico's Federal Labor Law places the burden of these costs on employers. However, in identifying the relevant provision, Part II begs the question – can migrant workers bring a cause of action in U.S. courts under Mexican law in the first place?

Part III presents the legal framework for analyzing when a supplemental foreign law cause of action may be brought in U.S. federal court. The first step is to consider whether the foreign law claims arise from the same case or controversy as the U.S. federal law claim. If this threshold step is met, the federal court will secondly apply a choice of law analysis in considering whether the foreign law is meant to apply extraterritorially. Finally, the third step is to consider whether a conflict exists between the foreign law and any relevant state law. If these three steps are satisfied, U.S. federal courts have discretion to hear a foreign law cause of action in conjunction with a U.S. law cause of action under its supplemental jurisdiction.⁷

Part IV applies the legal framework to the particular circumstance presented in Part II. First, Article 28 of the Mexican Federal Labor Law arises out of the same case or controversy as a U.S. federal law claim such that a U.S. court may exercise supplemental jurisdiction. Second, Article 28 is meant to apply extraterritorially given the language of the provision and given the effects of the employment relationship in Mexico. Third, there is a strong argument that no conflict exists between Article 28 and relevant U.S. state laws. Since the Article 28 claim and the U.S. federal law claim arise out of the same case or controversy, and none of the discretionary exceptions apply, this Article concludes that migrant workers may bring a supplemental claim under Article 28 of the Mexican Federal Labor Law.

I.

INTRODUCTION: MIGRANT WORKERS AND U.S. LAWS

A. *Who are Migrant Workers?*

The United Nations defines a “migrant worker” as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁸ Notably, it does not consider whether the person is undocumented or documented, unauthorized or authorized to work. Thus, under the U.N. definition, a foreigner working in the U.S. as a professional with a work visa would be deemed a “migrant worker.” For the purposes of this Article, however, I will use the term narrowly to refer only to

6. A limited exception exists with respect to the relocation costs of H2-A guest workers. See *infra* note 87 and accompanying text.

7. See 28 U.S.C. § 1367.

8. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Art. 2, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

people who are recruited in Mexico for *low-wage* positions in the U.S.⁹ Within this context, a “migrant worker” may be one recruited in Mexico and either 1) a guest worker, that is, one who is legally hired under H2-A and H2-B temporary programs, or 2) an unauthorized worker, as in one who possesses no legal proof of any right to be present in the U.S.¹⁰ This Part will consider each status in turn.

1. Guest Workers

The development of U.S. guest worker programs is intricately entwined with U.S. history. The program was an example of immigration policy’s long historical connection with the labor demands of U.S. agribusiness. The first Mexican guest worker program was established in 1917 in response to the Immigration Act of 1917. The Act, itself a response to xenophobia, barred the immigration of non-whites in an effort to stem the influx of workers from Asian countries.¹¹ In an effort to address the resulting labor shortage in the agricultural industry, the 1917 guest worker program carefully classified Mexican nationals as “white”¹² and paved the way for an average of 162,000 workers from Mexico to enter annually.¹³

Throughout the 20th century, the guest worker programs waxed and waned in response to the needs of the U.S. when it was at war, at peace, and undergoing economic growth as well as depression. By 1931, a different kind of labor crisis emerged and Mexican nationals faced a similar fate as their Asian predecessors. The Great Depression led to rampant unemployment and resentment of Mexican “interlopers” led to the forcible removal of thousands of Mexican workers.¹⁴ It was not until World War II that the trend reversed. The Emergency Farm Labor Program, infamously known as the Bracero program, originated from fear that

9. While migrant workers are recruited from a variety of other countries, including Guatemala and El Salvador, the focus of this Article will be on migrant workers from Mexico who make up the bulk of the migrant worker population. In the future, it may be worthwhile to consider a similar analysis based on Guatemala’s and El Salvador’s labor provisions.

10. Temporary work visas for professionals and other specialty work are outside the scope of this Article. Non-laborers, such as physicians and nurses, are also permitted to enter the U.S. on temporary work visas. However, this Article focuses on low-wage, low-skilled occupations.

11. See Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426 (2005) (detailing the origins of the temporary guest worker program).

12. *Id.*

13. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL’Y 79, 83 (2004).

14. See Gilbert, *supra* note 11, at 426 (“[W]ith the assistance of the U.S. Department of Labor, [west coast growers] turned to Mexican workers in 1917, believing that these workers could be recruited for temporary work and then deported to Mexico when their services were no longer needed.”).

an agricultural labor shortage would undermine U.S. national defense.¹⁵ Notably, the agreement finally reached by the U.S. and Mexican governments regarding the Bracero program explicitly recognized Article 28 as applying to the employment relationship between U.S. employers and the workers recruited in Mexico.¹⁶ Enacted in 1942 as an “emergency,” the Bracero Program “imported” some four million Mexican-nationals to perform seasonal agricultural work on U.S. farms.¹⁷ The program ended in 1964 amongst outcries of abuse of foreign workers and criticisms that it undermined the wages and working conditions of U.S. citizens.¹⁸

Yet, despite the proclaimed victory, 1964 was not the end of the guest worker program. Today’s H2-A and H2-B guest worker programs are largely considered descendents of the Bracero program.¹⁹ Indeed, at times, the guest worker programs have expanded under the pretext of an “emergency” just like its predecessor.²⁰ In 2002, 102,615 laborers legally entered the U.S. under the H2-A and H2-B visa programs.²¹ Finalized under the Immigration Reform and Control Act of 1986 (IRCA), the H2-A visa program applies to temporary agricultural workers and the H2-B visa program applies to non-agricultural workers.²² The programs permit employers who anticipate a shortage of U.S. workers to bring nonimmigrant workers to the U.S. for up to one year to perform work of a temporary or seasonal nature.²³

Like the Bracero program, the H2 visa programs are often criticized. For some, the visa programs undercut the demand for domestic workers and rendering foreign workers vulnerable to exploitation.²⁴ For others, the visa

15. Baker, *supra* note 13, at 84.

16. See *infra* note 232-237 and accompanying text.

17. OXFAM AM., LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 42 (2004).

18. Baker, *supra* note 13, at 84.

19. *Id.* at 87.

20. See, e.g., Rona Kobell & Chris Guy, *House passes extension for visas: Md. Seafood processors hope foreign workers can begin arriving in weeks*, BALT. SUN, May 6, 2005, available at <http://www.baltimoresun.com/news/maryland/bal-crabs0506,0,235665.story> (reporting on a bill that allowed the H2-B cap to be waived with respect to returning H2-B workers due to a labor shortage emergency in the seafood industry).

21. See Immigration and Naturalization Service, 2002 Yearbook of Immigration Statistics 118-119 tbl.26 (2003), available at <http://uscis.gov/graphics/shared/aboutus/statistics/TEMP02yrbk/Temp2002.pdf> (tracking the non-immigrants admitted to the U.S. from 1985 to 2002).

22. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

23. See OXFAM AM, *supra* note 17.

24. For a more detailed discussion on the latter argument, see generally Andrew Scott Kosegi, *The H2-A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of the Domestic Migrant Farm Workers*, 35 IND. L. REV. 269 (2001).

programs encourage exploitative business practices.²⁵ By barring guest workers from switching employers, guest workers endure dangerous work conditions and low wages in the hopes that their employers will hire them again and petition for a new visa for them in the following season.²⁶ Excluded from safety net programs,²⁷ guest workers, often in need of jobs, are unwilling to assert the limited employment rights that they are afforded. Given this, there may be reasons for the Mexican government to believe its law extends to protect its citizens recruited to work in the U.S. much like it argued Article 28 applied under the Bracero program.

2. Unauthorized Workers

For many reasons, the story of unauthorized workers is harder to tell. Often living in fear of deportation, unauthorized workers have always had an incentive to hide and avoid government attention.²⁸ As such, even the most basic question—how many unauthorized workers are there?—is riddled with empirical problems.²⁹ While this Article focuses on a subset of unauthorized workers, that is those actually recruited in Mexico to work in the U.S., much of the discussion below applies to unauthorized workers generally.

Much like the modern guest worker program, the rise of unauthorized workers in the U.S. can be linked to the Bracero program.³⁰ As many more people sought to enter the U.S. than were legally permitted under the Bracero program, an illegal population quickly emerged.³¹ Workers seeking jobs in the U.S. learned to bypass the bribes demanded by Bracero recruiters by simply crossing the border illegally.³² The trend was facilitated by haphazard policies by the Immigration and Naturalization Service (INS), which in some cases granted on-the-spot legalization of Mexican farmworkers.³³

25. For in-depth coverage on the guest worker program from recruitment to employment, see Felicia Mello, *Coming to America*, THE NATION, June 7, 2007.

26. OXFAM AM, *supra* note 17, at 43.

27. Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 523 (2002) (noting the exclusion of H2-A workers from safety net programs).

28. See Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 484 (2002) (commenting on the difficulties of “[c]ounting the invisible”).

29. *Id.* at 485 n.4.

30. See Cristina M. Rodriguez, *Guest Workers and Integration: Toward A Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 274 (2007) (describing the emergence of a large undocumented population as one of the primary legacies of the Bracero experiment).

31. Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFF. 117, 123 (2001) (“Today, scholars largely agree that the 22 years of bracero employment created the conditions for the subsequent boom of unauthorized Mexican migration.”).

32. *See id.*

33. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 2 (1992) (noting that, by 1950, the number of Mexicans “legalized” and “paroled” to growers

When the Bracero program finally ended, the precedent was entrenched. Given the lack of job opportunities in Mexico and the promise of better pay in the U.S., the illegal flows continued. Today, unauthorized workers from around the world are recruited as farmworkers, day laborers, domestic workers, and construction workers.³⁴ While the U.S. Census Bureau admitted to not knowing how many unauthorized migrants were unaccounted for in its 2000 census,³⁵ the U.S. Department of Homeland Security (DHS) calculates 11.8 million unauthorized immigrants lived in the United States in January 2007.³⁶ From 2000 to 2007, 470,000 people entered the United States each year without documentation.³⁷

The majority of unauthorized workers are Mexican-nationals.³⁸ In fact, the American Immigrant Law Foundation reported that, since the 1990s, nearly every industry has seen a “dramatic increase in [the U.S.’s] reliance on Mexican workers.”³⁹ Of the 11.8 million unauthorized immigrants living in the U.S. in January 2007, seven million were Mexican-nationals. Of the 470,000 in flows, approximately 330,000 were from Mexico.⁴⁰

Thus, it is widely understood that the U.S. maintains a large population of

as braceros was five times higher than the number actually recruited from Mexico).

34. Interestingly, the distribution of the unauthorized workforce across occupations differs from that of native-born workers, Jeffrey S. Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Population in the U.S.*, ii, available at <http://pewhispanic.org/files/reports/61.pdf> (2006). For example, nearly a third of unauthorized workers were employed in service occupations compared to one-sixth of domestic workers.

35. See Kevin E. Deardorff & Lisa M. Blumerman, *Evaluating Components of International Migration: Estimates of the Foreign-Born Population by Migrant Status in 2000*, 3 (U.S. Census Bureau Population Division, Working Paper No. 58, 2001), available at <http://www.census.gov/population/www/documentation/twps0058.html> (assuming a 15% undercount for the foreign-born population given that “[r]esearches have not agreed on how many unauthorized migrants were missed in the census”).

36. U.S. Dep’t of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Population Residing in the United States: January 2007*, 1 (Sept. 2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf. For other estimation of the size of the unauthorized worker population, see B. Lindsey Lowell & Roberto Suro, Pew Hispanic Center, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks 5* (2002) available at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf>.

37. *Id.*

38. For a more detailed discussion on the demographics of immigrant workers, see Analiz Deleon-Vargas, *The Plight of Immigrant Workers and the Fifth Amendment*, 10 SCHOLAR 241 (2008). For more information of where Mexican migrant workers are living and working, see Adam Brower, *Rethinking NAFTA’S NAALC Provision: The Effectiveness of its Dispute Resolution System on the Protection of Mexican Migrant Workers in the United States*, 18 IND. INT’L & COMP. L. REV. 153, 162 (2008).

39. American Immigration Law Foundation, *Mexican Immigrant Workers and the U.S. Economy: An Increasingly Vital Role* 1, 7, Immigration Policy Focus, Sept. 2002, available at <http://www.immigrationpolicy.org/images/File/infocus/Mex%20Imm%20Workers%20&%20US%20Economy.pdf>.

40. *Id.*

unauthorized workers from Mexico. This Article, however, focuses specifically on those unauthorized workers first recruited in Mexico to work in the U.S. It considers the extent to which those recruited in Mexico may assert a claim under Mexican law for the period when traveling to his or her place of employment. While U.S. law has attempted to provide the same protections to migrant workers in the U.S. as it provides to U.S. workers, there may be an argument that an additional protection is needed for those recruited to work thousands of miles from their home and in another country.

B. How are Migrant Workers Protected (or Not Protected) under U.S. and State Laws?

“You only have the right to work, not to anything else.”

—Luisa Fernandez, a tomato picker from Immokalee, Florida⁴¹

Whether explicitly excluded from employment protections by federal statutory language or effectively excluded due to inadequate government enforcement, migrant workers are routinely subject to poor work conditions and abuse by employers. This stems from the fact that many migrant workers are farmworkers who are uniquely exempt from a host of federal labor protections.⁴² Additionally, unauthorized workers are barred from a variety of public benefits and government insurance programs.⁴³ For example, they are barred from receiving the earned income tax credit,⁴⁴ unemployment insurance,⁴⁵ and housing subsidies.⁴⁶ As illustrated by Luisa Fernandez’s statement, migrant workers often lack employment protections and access to

41. OXFAM AM, *supra* note 17, at 38.

42. In 1997-1998, the U.S. Department of Labor reported that 52% of all farmworkers were unauthorized workers. See Kala Mehta et. al., *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers*, viii (2000), available at http://www.dol.gov/asp/programs/agworker/report_8.pdf.

43. See Paul M. Secunda, “*The Longest Journey, with a First Step*”: *Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employment Law*, 19 DUKE J. COMP. & INT’L L. 107, 118 (2008).

44. See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 24-25 (noting that unauthorized workers will not receive any Social Security retirement benefits despite having paid Social Security taxes).

45. See Social Security Act, 42 U.S.C. §§ 401-404, 405(c)(2)(B)(i) (2006) (limiting Social Security benefits to elderly and disabled workers other than undocumented aliens). See also Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, at A1 (“While it has been evident for years that illegal immigrants pay a variety of taxes, the extent of their contributions to Social Security is striking: the money added up to about 10 percent of last year’s surplus”).

46. Ironically, while they are required to pay income tax and social security taxes, unauthorized workers will never receive Social Security much less file for income tax refunds. See *id.* (noting that not only do undocumented workers make significant contributions to the Social Security system, “[they] help even more because they will never collect benefits”). See also, OXFAM AM, *supra* note 17, at 43.

safety nets under U.S. law. While a supplemental cause of action under foreign law will do little to remedy the following systemic exclusions, it provides an additional litigation method to protect migrant workers under the current laws, as legal advocates wait for broader legislative change.

1. *The Absence of Statutory Protections: Federal and State Laws*

Statutorily, there is a history of excluding farmworkers from federal protections. The rationale is based on “the fiction . . . that farm workers [are] not really employees in the industrial sense.”⁴⁷ The National Labor Relations Act (NLRA), for example, specifically excludes farmworkers from its coverage. As a result, farm workers may be fired for joining a labor union or engaging in any collective action against an employer.⁴⁸ The Fair Labor Standards Act (FLSA) similarly excludes farmworkers from overtime pay.⁴⁹ Workers employed on smaller farms, as in any farm that employs fewer than seven workers in a calendar quarter, are not even protected by FLSA’s minimum wage provisions. Even when farmworkers are protected by statute, the protections are incomplete. While protecting unauthorized workers, the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (widely known as AWP) for example, exempts H2-A workers from its coverage.⁵⁰

The rights of migrant workers under state laws are not much better. While an exhaustive consideration of each state’s employment protections is beyond this Article’s scope, it may be said that state laws are colored by the fact that agribusiness exercises enormous influence over state governments.⁵¹ For example, neither of the two largest users of agricultural labor, for example, North Carolina and Florida, goes beyond the minimum protections afforded by the federal government with respect to farmworkers. Both states rely on federal

47. CLETUS E. DANIEL, *BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941* 282 (1981).

48. National Labor Relations Act, 29 U.S.C. §§ 151, 152(3) (2006). See also Art Read, *Let the Flowers Bloom and Protect the Workers Too – A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. PA. J. LAB. & EMP. L. 525 (2004) (arguing the current definition of agricultural labor under the NLRA and FLSA exclude more workers than the initial definition used by the National Labor Relations Board before 1946).

49. 29 U.S.C. § 213(b)(12) (2006).

50. 29 U.S.C. § 1802 (8)(B)(ii) (2006) (“The term ‘migrant agricultural worker’ does not include ... (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under § 1101(a)(15)(H)(ii)(a) and 1184(c)”); see also 29 U.S.C. § 10(B)(iii) (2006) (excluding H-2A workers also from the definition of “seasonal agricultural worker”).

51. GREG SCHELL, *Farmworker Exceptionalism Under the Law: How the Legal System Contributes to Farmworker Poverty and Powerlessness*, in *THE HUMAN COST OF FOOD: FARMWORKERS’ LIVES, LABOR, AND ADVOCACY* 152 (2002) (“[I]n major farm states, agricultural groups have few peers in terms of influence.”).

minimum wage standards.⁵² With limited political will, state funds allotted for enforcement of state protections are largely inadequate. This effect spills over to the administration of state benefits. In Pennsylvania and Michigan, for example, state courts have significantly reduced the amount undocumented workers may claim for workers compensation.⁵³

In summary, the protections afforded migrant workers are limited whether under U.S. federal or state law. While U.S. federal law and the employment protections contained therein suggest a minimum floor for states, in enacting their own labor laws states are free to exceed this federal minimum. However, states, with the exception of California, rarely exceed those minimums established by U.S. federal law and often struggle to meet even those standards.⁵⁴

2. Inadequate Enforcement by Government Agencies

When migrant workers *are* covered by U.S. law, there is an argument that federal enforcement of employment protections is equally inadequate. AWPA, for example, is largely under-enforced. In 2001, the U.S. Department of Labor (DOL) employed just 23 to 24 full-time officials to conduct over 2,000 AWPA investigations.⁵⁵ Highlighting the rampant violations of farmworkers' rights, nearly half of those investigations yielded findings of AWPA violations.⁵⁶ Likewise, in 2004, DOL investigated 89 H2-A employers, yet there are approximately 6,700 H2-A certified employers nationwide.⁵⁷ Even when abuse by the employer was found, the DOL was not precluded from approving the employer's application to import more H2-A workers the following year.⁵⁸

Additionally, the growers' use of farm labor contractors (FLC) to recruit, hire, transport, pay and supervise farmworkers undermines the government's enforcement efforts. Under this system, growers argue FLSA and AWPA regulate "employers" only. Since farm owners do not control or supervise migrant workers, they often argue that the regulations do not apply to them. While both the language and legislative history of FLSA and AWPA suggest a

52. OXFAM AM, *supra* note 17, at 44.

53. See, e.g., *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003) (ruling that employers may cut off wage loss benefits to workers as of the date of discovery of undocumented status); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 108 (Pa. 2002) (lowering the burden of proof required of employers seeking to suspend undocumented workers with partial work-related disabilities).

54. OXFAM AM, *supra* note 17, at 44.

55. This number is down from 1979, when DOL employed 58 full-time investigators and the number of investigations was 5,708. See OXFAM AM, *supra* note 17, at 47.

56. OXFAM AM, *supra* note 17, at 47.

57. Lornett Turnbull, *New State Import: Thai Farmworkers*, SEATTLE TIMES, Feb. 20, 2005.

58. See U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS (1997).

broad definition of “employer” is appropriate, courts have sometimes agreed with the growers, defining “employer” narrowly.⁵⁹ Despite the DOL’s amendment of its regulations to consider “joint employment” by FLCs and growers, much of DOL’s enforcement actions remain targeted against FLCs, not growers. As such, the absence of a credible threat of enforcement allows employers to risk labor law violations.

3. Barriers to a Private Right of Action

Lapses in substantive protections and government enforcement are compounded by the practical and procedural barriers facing migrant workers who attempt to assert their legal rights in private suits.⁶⁰ First, migrant workers have limited access to legal resources. Legal services organizations that receive federal funding, for example, are barred from representing either unauthorized workers or H2-B workers.⁶¹ The small claims involved in wage and hour claims attract few private attorneys. Additionally, under AWPAs, there is no provision granting a successful plaintiff an award of attorneys’ fees from the employer.⁶²

Second, logistical barriers further hinder migrant workers’ ability to seek legal remedies. Many courts’ requirement that plaintiffs be present during the discovery period and trial is problematic for guest workers who are legally required to return to their country of origin after several months.⁶³ For unauthorized workers, employment litigation is foreclosed given their fears of questions regarding their immigration status.⁶⁴ Additionally, language barriers

59. In several cases, federal courts have found that the farmer was not legally responsible to workers for violations of their rights because the farmer was not an employer. *See* *Aimable v. Long & Scott Farms*, 20 F.3d 434, 445 (11th Cir. 1994); *Howard v. Malcolm*, 852 F.2d 101, 106 (4th Cir. 1998). *See generally*, Bruce Goldstein et. al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 U.C.L.A. L. REV. 983, 984 (1999) (arguing that courts’ neglect of the statutory definition of “employ,” i.e., to suffer or permit to work, has “led to fifty years of inadequately reasoned decisions and inconsistent enforcement of basic labor standards”).

60. *See generally*, Laura K. Abel & Risa E. Kaufman, *Preserving Aliens’ and Migrant Workers’ Access to Civil Legal Services: Constitutional and Policy Considerations*, U. PA. J. CONST. L. 491 (2003). One organization founded in response to the problems presented by transnational litigation is Centro de Derechos Migrante, *see* Victoria Gavito, *The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants’ Rights*, 14 NO. 3 HUM. RTS. BRIEF 5. *See also* Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 592 (2001).

61. *Id.* A recent exception is that of H2-B workers in the forestry industry, *see* Legal Services Corporation, *Temporary Forestry Workers Now Eligible for LSC-funded Legal Services*, available at http://www.lsc.gov/press/updates_2008_detail_T220_R0.php.

62. OXFAM AM, *supra* note 17, at 49.

63. *Id.*

64. *See* Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT’L L.J. 27, 28 (2008) (noting that *Hoffman* shattered the notion that

further discourage migrant workers from even contacting a lawyer, let alone bringing a suit in state or federal court.

Finally, limits on the available remedies further discourage unauthorized workers from asserting their legal rights. A 2002 U.S. Supreme Court decision, *Hoffman Plastics Compounds v. NLRB*, effectively established a two-tier legal system – one for those entitled to the full range of remedies and another for undocumented workers.⁶⁵ After *Hoffman Plastics*, unauthorized workers cannot recover the wages lost in exercising their right to engage in NLRA-protected activity, even when they are working outside the farmworker context.⁶⁶ The implications have not been confined to the NLRA.⁶⁷ In light of *Hoffman*, for example, the U.S. Equal Employment Opportunity Commission (EEOC) changed its policy and barred undocumented workers who are fired for discriminatory reasons from collecting lost wages remedies.⁶⁸ The sum effect is that unauthorized workers cannot seek back pay when their labor rights are violated.⁶⁹

In summary, the protections afforded migrant workers under U.S. law are significantly limited whether they are guest workers or unauthorized workers. The government largely declines to enforce its laws against employers on behalf of migrant workers even when it is clear migrant workers are ill equipped to assert their legal rights.

Importantly, this Article does not propose a remedy to these pervasive and systematic gaps in employment protections for migrant workers. A supplemental cause of action under foreign law will not lift the aforementioned barriers to litigation or increase the U.S. government's enforcement of its own

questions about a plaintiff's legal status would fall outside the normal course of civil discovery).

65. *Hoffman Plastic Compounds v. N.L.R.B.*, 535 U.S. 137 (2002).

66. See *Hoffman Plastic Compounds*, 535 U.S. at 137 (holding the policies underlying the Immigration Control and Reform Act of 1986 bar the grant of back pay to an illegal alien).

67. But see *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277 (D. Okla. 2006); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 323 (D.N.J. 2005); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002). Most courts have not extended the back pay limitation to minimum wage and overtime protections. These courts generally focus on structural issues such as the distinct nature of back pay under the FLSA, as compared to the NLRA.

68. See Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (repealing the 1999 Guidance on Remedies and noting “*Hoffman* may have [an effect] on the availability of monetary remedies to undocumented workers under the federal employment discrimination statutes”).

69. Many believe that, after *Hoffman*, immigrants face an increasingly hostile judicial system that will eliminate certain workplace protections in the future, see Maria Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301, 302-03 (2005); Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 501 (2004).

labor laws. However, the gaps in protection under U.S. law suggest that, until these problems are addressed, migrant workers must turn to other sources of law. Foreign law may serve as a potential stopgap measure for migrant workers who seek to effectively assert their employment rights. Part II considers foreign sources of law and how the use of two laws may be better than one when migrant workers must navigate labor law issues.

II.

RELOCATION COSTS: WHEN U.S. LAW IS AMBIGUOUS AND THE MINIMUM WAGE IS NOT GUARANTEED (AN APPLICATION)

*A. Migrant Workers: "Exploitation Begins at Home"*⁷⁰

"Every one of us took out a loan to come here. We had planned to pay back our debt with our job here. They told us we would have overtime, that we could get paid double for holidays, that we would have a place to live at low cost, and it was all a lie."

— Angela*, a guest worker, in an interview with the Southern Poverty Law Center⁷¹

Migrant workers—both guest workers and unauthorized workers—routinely arrive in the United States with significant debt. The irony for migrant workers is that when they seek better-paying jobs in the U.S., they are left exposed to exploitation by the employer's recruiters who inflate the cost of traveling from the worker's hometown to the worker's place of employment in the U.S. In order to pay the transportation costs, visa-related fees and recruitment fees necessary to work in the U.S., migrant workers often take out significant loans at exorbitant interest rates.⁷² The relocation cost problem is compounded by the fact that U.S. employers commonly fail to offer as many hours of work as promised.⁷³ At best, the effect of this system is that the duration of the migrant worker's employment with the employer extends much longer than the employee originally intended.⁷⁴

70. MARY BAUER ET. AL., SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUEST WORKER PROGRAMS IN THE UNITED STATES 27, at 9 (March 2007) http://www.splcenter.org/pdf/static/Close_to_Slavery.pdf.

71. *Id.*

72. A group of Guatemalan workers represented by Southern Poverty Law Center reported that they were charged twenty percent interest each month by a loan shark. *See id.* at 11.

73. Indeed, employers under the H2-A and H2-B programs often seek longer visa periods and know that they must attract workers. Therefore, employers commonly claim to have many more months of work than they actually need. *See id.* at 23-24.

74. At worst, the burden of relocation costs on migrant workers rises to the level of imposing a form of debt bondage. A question left unexplored by this Article is when does the burden of relocation costs on workers rise to the level of labor trafficking. *See* U.S. DEP'T. OF HEALTH & HUMAN SERVS., Human Trafficking: Fact Sheet (2008), <http://www.acf.hhs.gov/>

For the purposes of this Article, “relocation costs” refer to the sum of three components: transportation costs, visa fees, and recruitment fees. All three costs are largely paid for upfront by the migrant worker. While the Eleventh Circuit Court of Appeals found that employers have some obligation to reimburse migrant workers for transportation and visa costs,⁷⁵ in practice it is rare that migrant workers are ever fully reimbursed. Even when employers do pay for travel and visa-related costs upfront, they often deduct these expenses from the worker’s wages.

Notwithstanding this limited legal success regarding transportation and visa fees, migrant workers routinely pay the third cost—the grossly inflated recruitment fees charged by private agencies. As detailed in a report for *The Nation*, U.S. employers largely rely on private agencies to find and recruit workers abroad.⁷⁶ U.S. employers, in turn, pay these agencies based on the number of workers they find. As such, these foreign agencies hold enormous power in the eyes of potential workers in Mexico.⁷⁷ Largely operating in an unregulated industry, some agencies have required workers to leave a property deed as collateral to ensure that the worker “comply” with the terms of their employment contract.⁷⁸ Other agencies charge migrant workers a recruitment fee ranging from \$500 to over \$10,000.⁷⁹ The practice is so well-known that at least one U.S. embassy in Latin America is known to have routinely asked prospective workers how much they paid in recruitment fees. The concern was

trafficking/about/fact_human.html (“Victims of trafficking are often subjected to debt-bondage, usually in the context of paying off transportation fees into the destination countries. . . . Victims do not realize that their debts are often legally unenforceable In many cases, the victims are trapped into a cycle of debt because they have to pay for all living expenses in addition to the initial transportation expenses.”); U.S. DEP’T. OF HEALTH & HUMAN SERVS., Labor Trafficking: Fact Sheet (2008), http://www.acf.hhs.gov/trafficking/about/fact_labor.html (describing bonded labor, as when a worker’s “labor is demanded as a means of repayment for a loan or service in which its terms and conditions have not yet [been] defined or in which the value of the victims’ services as reasonably assessed is not applied toward the liquidation of the debt”). For an extensive report on the various forms of trafficking, see generally U.S. DEP’T OF STATE, *infra* note 80.

75. See *Arriaga v. Florida Pacific Farms*, 305 F. 3d 1228, 1237 (11th Cir. 2002) (holding that travel and visa costs must be reimbursed within the first week of employment to the extent necessary to avoid pushing the worker’s pay below the federal minimum wage).

76. See Mello, *supra* note 25. The following are examples of recruitment agencies: Head-Honchos LLC, available at <http://www.head-honchos.com/12step.html>; Recruiting Business Center Corp., available at <http://recruitmexicanlabor.com/introduction.html>, and Más Labor available at <http://www.maslabor.com/pages/h2aServices.html>. Note, this list is meant to illustrate the myriad of recruitment agencies available for “selecting pre-screened qualified workers” in Mexico; it is not meant to serve as an indictment of their recruitment practices.

77. See BAUER, *supra* note 70, at 9; Mello, *supra* note 26.

78. BAUER, *supra* note 70, at 11.

79. *Id.* at 9; see also Katie L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico’s Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL’Y J. 383, 388 (2008) (noting a number of lawsuits have alleged employer representatives demanded “grossly inflated” recruitment fees).

that “a high level of indebtedness would cause workers to overstay their visas in order to pay off their debt.”⁸⁰

In the end, these costs and related loan interests add up, especially when workers come from distant countries where the cost of travel is steeper.⁸¹ While the exploitation starts at home, the responsibility for this debt system lies on *both* sides of the border. As stated in a 2007 State Department report, the main source of vulnerability for migrant workers is “[t]he intentional imposition of exploitative and often illegal costs and debts on [] laborers in the source country or state, often with the complicity and/or support of labor agencies and employers in the destination country or state.”⁸² Some have argued that the current U.S. guest worker system should be amended to require that the employer requesting labor certification pay the relocation costs of the workers upfront.⁸³ Yet, as detailed in Part II.B, there remains a lack of clarity as to the extent to which U.S. laws truly reign in U.S. employers recruiting Mexican laborers under abusive terms.

B. Relocation Costs under U.S. Law and Regulations: An Unanswered Question

Under U.S. federal law, it is unclear whether employers are legally responsible for the relocation costs of their workers.⁸⁴ AWPA requires agricultural employers disclose the terms of employment at the time of recruitment and to comply with those terms.⁸⁵ However, AWPA does not consider who bears the burden of costs incurred during the pre-employment period. Notwithstanding the debate between circuits,⁸⁶ FLSA is largely silent on how relocation costs prior to employment factor into its minimum wage guarantees.

When relocation costs are taken into account, they are couched within federal regulations related to the guest worker program. H2-A regulations require employers reimburse workers for the costs incurred for “transportation

80. BAUER, *supra* note 70, at 14.

81. Thai and Indonesian workers, for example, paid \$5,000 to \$10,000 or more for the right to be employed as H2-A workers in North Carolina at less than \$10 per hour. *Id.* at 11.

82. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2007), available at <http://www.state.gov/g/tip/rls/tiprpt/2007/>.

83. Bryce W. Ashby, Note, *Indentured Guests – How the H2-A and H2-B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 921 (2008) (calling for policy changes in the guest worker program).

84. A narrow exception to this statement is the H2-A program which requires employers pay relocation costs once the worker has completed 50% of his/her employment contract, see *infra* note 87 and accompanying text.

85. 29 U.S.C. § 1821 (2006).

86. A possible exception is 29 U.S.C. § 203(m) under FLSA. See *infra* note 87 and accompanying text.

and daily subsistence from the place from which the worker has come to work for the employer to the place of employment.”⁸⁷ However, the guarantee only arises upon completion of fifty percent of the work contract; it does not include the most burdensome cost incurred, as in recruitment fees, and it does not extend to unauthorized workers or H2-B workers.

That said, recent cases suggest that courts remain open to recognizing an employer’s obligation to pay some relocation costs. In *Arriaga v. Florida Pacific Farms, LLC*, the Eleventh Circuit held H2-A workers from Mexico should be reimbursed for the transportation and visa costs incurred in traveling to the U.S. “to the extent necessary to comply with FLSA.”⁸⁸ In its reasoning, the court identified an overlap between H2-A regulations and FLSA. Although H2-A regulations seem to require reimbursement only upon completion of fifty percent of the work contract, the court noted, it also mandated that employers “comply with applicable federal, State, and local employment-related laws.”⁸⁹

Therefore, under FLSA the court determined that the employer was required to reimburse some of the relocation costs to migrant workers in the first week of employment. In other words, the employer had to reimburse enough of the transportation and visa costs that the workers had paid upfront in traveling to the place of employment in order to ensure workers’ wages for the first week provided them a federal minimum wage. All other expenses could be reimbursed at the midway point pursuant to H2-A regulations.⁹⁰

In *Recinos-Recinos v. Express Forestry*, the Eastern District Court of Louisiana extended the reasoning of *Arriaga* to H2-B workers.⁹¹ Concluding that *Arriaga* was a FLSA case, and not a case about H2-A regulations, the court held H2-B workers must likewise be reimbursed to the extent necessary to ensure the federal minimum wage.⁹² Notably, however, the H2-B workers were not entitled to full reimbursement at the midway point, as provided to H2-A workers in *Arriaga* who benefitted from H2-A regulations.⁹³

87. 20 C.F.R. § 655.102(b)(5)(i) (2009).

88. 305 F.3d 1228. For an in-depth discussion of the *Arriaga* case, see Ashby, *supra* note 83, at 906-15.

89. 305 F.3d 1228, 1233 (11th Cir. 2002) (quoting 20 C.F.R. §655.103(b)). Notably, under 29 U.S.C. § 203(m), the FLSA deductions provision allows an employer to deduct below minimum wage for “furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.” Under the regulations, if deductions “are primarily for the benefit or convenience of the employer,” they are not “other facilities” and therefore, when the deductions bring the worker below minimum wage, it represents an improper FLSA deduction. 29 C.F.R. § 531.32. The challenge with this provision is that the definition of “other facilities” is debated by the courts. See *infra* notes 90-101 and accompanying text.

90. *Id.*

91. 2006 U.S. Dist. LEXIS 2510, at *44-45 (E.D. La. Jan. 24, 2006).

92. *Id.*

93. *Id.*

Recinos-Recinos, in turn, paved the way for *Rivera v. Brickman Group*, which was decided in the Eastern District of Pennsylvania.⁹⁴ In *Rivera*, a landscaping company required guest workers to seek employment through a particular recruitment company, which charged each employee certain recruitment fees.⁹⁵ The court held the employer liable for the recruitment fees, in addition to transportation and visa-related costs incurred by the employees to the extent it brought wages below minimum wage.⁹⁶ This decision was significant for migrant workers because recruitment fees are routinely the most costly of the three relocation expenses.

Nevertheless, it is important to note several limitations of *Arriaga* and the cases that followed. First, *Arriaga*, *Recinos-Recinos* and *Rivera* do not stand for the proposition that employers must reimburse *all* relocation costs. Specifically, *Arriaga* did not reach the issue of recruitment fees because, in that case, it found the individuals charging the recruitment fees were not agents of the employer nor did the employers give those agents actual or apparent authority.⁹⁷

Second, courts have sought to limit the holding in *Rivera*. They assert liability in that case was only triggered because the employer required employees to hire the specific recruitment company charging employees recruitment fees.⁹⁸

Third, while the workers in *Arriaga* were eventually reimbursed for the entirety of their transportation and visa-related expenses, this was done as mandated by H2-A regulations. The workers in *Recinos-Recinos* did not have a similar regulatory guarantee under the H2-B program. In the end, the *Recinos-Recinos* workers were reimbursed for only a part of their transportation and visa-related expenses—that is they were reimbursed the amount necessary to ensure they were always paid a minimum wage *and no more*.

Fourth, one circuit has explicitly disagreed with *Arriaga*. In *Castellanos-Contreras v. Decatur Hotels, LLC*, a decision issued on February 11, 2009, the Fifth Circuit found that FLSA did not require the employer to reimburse employees for transportation, visa, or recruitment fees.⁹⁹ In that case, H2-B workers were recruited to fill vacant hotel jobs following Hurricane Katrina, and each worker paid between \$3,000 to \$5,000 in relocation costs.¹⁰⁰ In a footnote, the court referred to the DOL's December 2008 interpretation of its FLSA

94. 2008 WL 81570 (E.D.Pa. 2008).

95. *Id.* at *14.

96. *Id.*

97. See 305 F.3d 1228, 1245-46 (11th Cir. 2002) (“Because the Farmworkers have failed to allege facts to support the creation of apparent authority, the Growers are not liable for the recruitment fees.”).

98. See 559 F. 3d 332, 340-41 (5th Cir. 2009) (distinguishing *Rivera* because the recruitment fees in that case were for the “primary benefit of the employer”).

99. *Id.* at 339 (“We cannot accept the holding in *Arriaga*.”).

100. *Id.* at 333.

regulations which stated, “*Arriaga* and the district courts that followed its reasoning in the H-2B context misconstrued the Department [of Labor]’s regulations and [were] wrongly decided.”¹⁰¹ Interestingly, the *Arriaga* cases had largely rejected deference to DOL opinion letters because of their lack of consistency and lack of persuasive value.¹⁰²

In sum, it remains unsettled whether relocation costs are the responsibility of the employer under U.S. law. As noted, the DOL has declined to enforce *Arriaga*.¹⁰³ The position of DOL is that it cannot enforce the contractual rights of workers.¹⁰⁴ Given this ambiguous legal landscape in the U.S., a supplemental cause of action based on foreign law may be necessary to ensure migrant workers are not already indebted when they arrive to work in the U.S.

C. Article 28 of the Mexican Federal Labor Law: The Potential for Protection

As examined in Part II, there are a myriad of systemic barriers to migrant workers asserting their employment rights. Although a supplemental right of action based on foreign law may do little to address these broader deficiencies, it may be an important source of protection for migrant workers recruited abroad to work in the U.S.

In considering the significant debt workers incur in traveling to the U.S., a variety of other proposals have been made by legal advocates. Some have recommended federal regulations that would explicitly require employers bear all costs of recruitment fees and increased enforcement of employment protections to prevent abuse by recruitment agencies.¹⁰⁵ Others call for reforming the guest worker program¹⁰⁶ and still others argue for eliminating the guest worker program altogether.¹⁰⁷

Many legal advocates have argued employers have shielded themselves from any liability by using middlemen and labor brokers. The deficiencies existing in U.S. employment regulations have increasingly pushed legal advocates to consider international and foreign sources of law.¹⁰⁸ For support,

101. *Id.* at 339.

102. *Arriaga*, 305 F.3d at 1239 (noting the lack of a coherent or consistent policy by the DOL, thereby not warranting deference under the *Skidmore v. Swift* standard).

103. *See, e.g.,* Luna-Guerrero v. North Carolina Grower’s Association, 370 F. Supp. 2d 386, 390 (E.D.N.C. 2005).

104. BAUER, *supra* note 70, at 30.

105. *See id.* at 42.

106. The most prominent demand made by legal advocates is that temporary work visas should no longer be tied to one specific employer. As is, guest workers often suffer the abuse received from their employer because they are barred from seeking other work by other employers under the visa.

107. *See* Michael Wishnie, *Labor Law after Legalization*, 92 MINN. L. REV. 1446, 1447 (“Immigration reform may reasonably be characterized as the most significant labor reform in a generation.”).

108. For a discussion on the opposite problem, *see* Paul M. Secunda, *The Longest Journey, with*

these efforts often cite the Supreme Court's decision in *Lawrence v. Texas*, which looked to international norms and foreign practice in striking down a statute criminalizing sodomy.¹⁰⁹ Within the labor context, Professor Beth Lyon argues that international practice and norms should also be used to supplement existing U.S. employment law.¹¹⁰ In particular, she notes that reference to international law may "tip the balance" in favor of greater protections for undocumented workers.¹¹¹

Likewise, Professor Michael J. Wishnie recommends two ways international law may be used to advance workers' rights. The first is to bring a federal suit under the Alien Tort Claims Act for violations of international labor law.¹¹² The second is to invoke the international consultative and arbitration processes established by the North American Free Trade Agreement (NAFTA), formerly known as the North American Agreement for Labor Cooperation (NAALC).¹¹³ Still others propose filing claims with international human rights mechanisms, such as the International Covenant on Civil and Political Rights, and regional mechanisms, such as the Inter-American Human Rights System.¹¹⁴

While many of these recommendations would improve the chances that migrant workers do not arrive in the U.S. indebted, this Article takes a different approach and considers an existing law that already places the burden of relocation costs on employers – Article 28 of Mexico's Federal Labor Law. In focusing on foreign law, as opposed to international law, the proposal for a

a First Step: Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employment Law, 19 DUKE J. COMP. & INT'L L. 107, 118. Professor Secunda argues that U.S. benefits legislation, namely ERISA, should be granted to foreign employees, both documented and undocumented, working in the U.S.

109. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("The right the petitioners seek . . . has been accepted as an integral part of human freedom in many other countries.").

110. See Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT'L L. 169, 207 (2007) (arguing for greater recognition of international norms in the context of employment rights as was done in *Lawrence v. Texas* with respect to gay rights).

111. *Id.*

112. 28 U.S.C. § 1350 (2001) (establishing the right of action and federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

113. See Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U.PA. J. LAB. & EMP.L. 529, 530-31 (proposing legal advocates make greater use of international labor norms and arguing that there is a "need for upward harmonization of labor rights across borders"). For an illustration of the limitations of ATCA, however, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004). For a criticism of NAALC arbitration, see Adam Brower, Note, *Rethinking NAFTA'S NAALC Provision: The Effectiveness of its Dispute Resolution System on the Protection of Mexican Migrant Workers in the United States*, 18 IND. INT'L & COMP. L. REV. 153 (2008).

114. See Elizabeth Goergen, *Women Workers in Mexico: Using the International Human Rights Framework to Achieve Labor Protection*, 39 GEO. J. INT'L L. 407, 435-40 (suggesting that various international mechanisms may be used to combat gender discrimination in Mexico's workplace).

foreign law cause of action follows the suggestion made by Professor Lyon that foreign law may serve beyond mere guidance for U.S. courts. Translated, Article 28 specifically states:

The cost of transportation, repatriation, transport to the place of origin, and nourishment of the worker and his family, as applicable, and all costs which arise from crossing the border and fulfillment of the arrangements of migration, or for any other similar concept, will be the exclusive responsibility of the employer. The laborer will receive the whole salary that belongs to him/her [without] any deductions for those concepts.¹¹⁵

Given that migrant workers are overwhelmingly Mexican-nationals, there is increasing “interest in the potential application of . . . Article 28 in U.S. courts.”¹¹⁶ As a neighboring country with few economic opportunities, Mexico is the largest source country for both unauthorized workers and low-skilled guest workers.¹¹⁷ It was estimated that unauthorized workers from Mexico totaled 4.8 million in January 2000 and that Mexico’s share of the total unauthorized worker population was 69%.¹¹⁸ In addition, approximately three-fourths of all low-skilled guest workers are from Mexico.¹¹⁹ Thus, there is an argument that the applicability of Mexican law in U.S. courts has the potential to apply to a large percentage of migrant workers in the U.S. Most importantly, the protections afforded under Article 28 are clear with respect to relocation costs. Not only does Article 28 explicitly speak to the issue of travel and visa fees, it also places the burden of recruitment fees, or “all costs which arise from . . . fulfillment of the arrangements of migration” on the employer.¹²⁰ Recognizing the significance of Article 28, at least one professor has considered a role for the provision in protecting the rights of migrant workers. Professor Kate L. Griffith proposes that Article 28 acts as a “foreign law influence” on U.S. employment statutes in certain circumstances.¹²¹ In other words, Professor Griffith persuasively argues Article 28 can be used as an aid in interpreting FLSA and incorporated as a term of an AWPA working arrangement. The advantage to this approach is that “dynamic incorporation” can “save lawmaking costs, lead to better rules and standards, and solve collective action

115. Ley Federal de Trabajo, art. 28(l)(b), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.

116. Griffith, *supra* note 79, at 390.

117. U.S. DEPARTMENT OF LABOR, DEVELOPMENTS IN INTERNATIONAL MIGRATION TO THE UNITED STATES 45 (2004). For more statistics on Mexico and the new immigrant labor force, see Ishwar Khatiwada, *New Foreign Immigrants and the U.S. Labor Market*, Center for Labor Market Studies (2006).

118. U.S. DEPARTMENT OF LABOR, *supra* note 117, at 45.

119. BAUER, *supra* note 70, at 14 (presenting a table listing countries of origins for H2 workers).

120. Ley Federal de Trabajo, art. 28(l)(b), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.

121. See Griffith, *supra* note 79, at 391.

problems.”¹²² Indeed, some courts have routinely recognized the idea of incorporation in the context of contracts.¹²³

This Article, however, considers a more direct function for Article 28. While it does not remedy the inadequate protections under U.S. law or the barriers to private rights of action presented in Part II, Article 28 may serve as the basis for a cause of action independent of a U.S. statute. Applying the employment law of a foreign country in U.S. courts is not without precedent. In *Curtis v. Harry Winston, Inc.*, for example, the Southern District of New York recognized that it could consider Venezuelan labor law where a Venezuelan citizen sued a U.S. employer.¹²⁴ Additionally, in *Chinnery v. Frank E. Basil*, the D.C. District Court went a step further in asserting jurisdiction despite an express choice of law provision in the employment agreement to use Saudi Arabian law.¹²⁵

While the individuals in those cases performed services abroad, this Article considers whether a foreign law may also apply even when services are ultimately performed domestically. Part III will present the legal framework for analyzing whether a foreign law may apply when the interests of two different jurisdictions overlap. Part IV will then apply this framework in analyzing Article 28 of Mexico’s Federal Labor Law. This Article concludes the foreign law of a country may apply when a worker is both recruited in that country and relocates from that country to their place of employment. For legal advocates, the provision may provide an important right of action for migrant workers in U.S. courts in the absence of more systemic reform of U.S. laws to better protect migrant workers.

III.

LEGAL FRAMEWORK: THE CHOICE OF LAW ANALYSIS

A. Supplemental Jurisdiction and U.S. Federal Courts

Before it is determined that the foreign law is meant to be applied extraterritorially and that a foreign law cause of action does not “clash” with a state law cause of action,¹²⁶ the first question that must be answered is whether the case may be heard in U.S. federal court at all. In order for a U.S. federal

122. Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 103 (2008) (characterizing incorporation of the law of another polity as a delegation of lawmaking authority).

123. *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412, 1414 (9th Cir. 1989).

124. 633 F.Supp. 1504 (S.D.N.Y. 1987).

125. 1988 U.S. Dist. LEXIS 19438, 11-12 (D.D.C. Jan. 13, 1988). *But see* *U.S. v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (providing a cautionary tale with respect to U.S. courts applying foreign law in that the court misapplied Honduran Law).

126. *See infra* Part III.B and Part III.C, respectively.

court to hear a non-federal claim, the non-federal claim must be so related to the claim under original jurisdiction that it forms part of the same case or controversy.¹²⁷

The basis for this supplemental jurisdiction is both constitutional and statutory. In *Osborn v. Bank of the United States*, Chief Justice John Marshall held that the “arising under” language of Article III of the Constitution gave federal courts jurisdiction over non-federal claims that are part of the same case as a federal claim for which there is original jurisdiction.¹²⁸ That holding was finally codified by Congress in 1990 under 28 U.S.C. § 1367 after 130 years of judicially-created doctrines of ancillary and pendent jurisdiction.¹²⁹

Under § 1367(a), a federal district court “shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constitution.”¹³⁰ This grant of jurisdiction, however, is not without its limits. First, some circuit courts have approached supplemental jurisdiction restrictively.¹³¹ Although, by its terms, § 1367(a) effectively equates the outer limits of supplemental jurisdiction with the outer limits of that which the Constitution allows, some circuits require a “common nucleus of facts.”¹³²

Second, and more relevant for the purposes of this Article, the grant of supplemental jurisdiction is subject to § 1367(b). Under §1367(b), a federal court may decline to exercise supplemental jurisdiction if any one of the four exceptions delineated in the statute is met. Specifically, a court may abstain from exercising jurisdiction if: “(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”¹³³

As a final point, it should not be overlooked that this inquiry is only

127. For a general background on the history of supplemental jurisdiction, see C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction after the Demise of United Mine Workers v. Gibbs*, 60 FLA. L. REV. 277, 279 (2008).

128. 22 U.S. 738 (1824).

129. The history behind 28 U.S.C. § 1367 is that Congress sought to overturn the Court’s decision in *Finley v. United States*, 490 U.S. 545 (1989). In that case, the Court found it lacked authority to assert jurisdiction over the state law claims against the non-federal defendants.

130. 28 U.S.C. § 1367(a).

131. Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L. J. 849, 890 (1992).

132. Compare, e.g., *Iglesias v. Mut. Life Ins. Co. Of New York*, 156 F.3d 237, 241 (1st Cir. 1998) (applying the “common nucleus of facts” standard established in *Gibbs* even after the enactment of § 1367) with *Channell v. Citicorp Nat’l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996) (reading the extent of § 1367 as reaching the outerlimits of Article III).

133. 28 U.S.C. § 1367(b).

necessary when litigants bring a claim in federal court. There are many reasons why a litigant may instead bring suit in state court. Unlike federal courts, state courts are courts of general jurisdiction. As Professor Henry Hart noted, state courts have authority “over all persons and matters within the state’s power,” and “have . . . at their command a theoretically complete set of answers for every claim of breach of private duty that might be brought before them.”¹³⁴ Importantly, this means state courts can hear any case whether or not it is anchored to a federal law claim. While this Article focuses on federal practice, state courts are also available to migrant litigants.

B. Extraterritoriality: When Do a Country’s Laws Apply Outside its Borders?

The next logical step in considering when a supplemental foreign law cause of action may be brought in a U.S. court is to determine if the foreign law is meant to be applied extraterritorially in the first place. Admittedly, this step may seem unnecessary at first blush. Courts have routinely applied the laws of foreign sovereigns without explicitly considering whether the foreign sovereign mandated it, whether it was implicit, or whether the foreign sovereign even had an interest in applying its laws.¹³⁵

However, the exercise may be considered a “best practice.” A choice of law analysis is superfluous if there are not two laws that overlap with respect to a given dispute. As a result, academics have identified two approaches to considering whether a law may be applied extraterritorially—the territorial approach and the “effects test.” In practice, however, the two approaches often intersect—laws are presumed not to apply beyond a nation’s territory (territorial approach) when a nation has no interest in the activity (“effects test”). Therefore, while Part III.A. discusses the history and development of each approach separately, it is important to keep in mind that clear demarcations are rare and courts will often use ideas from both approaches in the same decision.

As a preliminary matter, it should be noted that the approaches are formulated from the perspective of whether U.S. law, or U.S. legislative jurisdiction, operates outside U.S. borders. The question of whether U.S. law applies abroad differs slightly from the question of whether foreign law applies within the U.S.¹³⁶

134. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954).

135. See e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 482, 491-93 (1983) (permitting suit in federal court based on Netherlands law); *Bonstingl v. Md. Bank, N.A.*, 662 F. Supp. 882, 884 (D. Md 1987)(applying Greek law in a torts case); *Kashi v. Philbro-Salomon, Inc.*, 628 F. Supp. 727, 737 (S.D.N.Y. 1986) (applying Iranian law in a contract dispute); *Milkovich v. Saari*, 295 Minn. 155 (1973) (concerning Ontario’s guest statute in a tort claim); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938) (allowing defendants to invoke a German law defense).

136. C.f. Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 952

Nevertheless, there are several reasons the issues to be discussed are equally applicable in considering whether foreign laws apply within the U.S. First, the principles guiding the territorial approach and the effects test are international in scope. They were first embodied in the Treaty of Westphalia and *S.S. Lotus*, respectively.¹³⁷ Respectively, international political bodies in those contexts sought to avoid conflicts between sovereign nations and to take into account the interests of each country involved. As will be discussed, the principles U.S. courts use to determine whether its own domestic laws should apply abroad are largely derived from these international doctrines regarding territorial limits to a country's laws. As such, historical concerns regarding territorial jurisdiction originated on the world stage and therefore apply to both U.S. and foreign laws.

Second, the baseline issue with extraterritoriality is not that two different laws conflict, but that two different territorial jurisdictions overlap.¹³⁸ Whether foreign conduct impacts U.S. interests or domestic conduct impacts foreign interests, courts must navigate these overlapping jurisdictions consistently and in accordance with the "practices of nations."¹³⁹ As such, international rules regarding legislative jurisdiction play a role as "an interpretive gloss" for both U.S. and foreign law.¹⁴⁰ As such, similar to its use in the context of U.S. laws, the territorial approach and/or effects test may be used to determine the applicability of foreign law.

Third, it must be recognized that just as U.S. courts are under no obligation to apply foreign law or defer to foreign legislative acts,¹⁴¹ foreign courts are equally under no obligation to apply U.S. laws. It would be disingenuous for courts to asymmetrically apply U.S. law to foreign activities, yet bar foreign regulation of domestic activities. Therefore, while appeals for reciprocity are sometimes criticized as ill-defined doctrines,¹⁴² a court may consider the

(1998) (identifying distinct doctrines within the phrase "international comity" including "extraterritorial application of U.S. law" and "enforcement of foreign law" in U.S. courts).

137. See Leo Gross, *The Peace of Westphalia: 1648-1948*, 42 AM. J. INT'L L. 20 (1948); *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10.

138. See Ramsey, *supra* note 136, at 925 ("Friction arises not from conflicting laws but from conflicting legislative jurisdictions"). The demise of a strict territorial approach to laws is discussed in Part III.A., see *infra* Part III.A.1.

139. *Id.*

140. Ramsey, *supra* note 136, at 930; see also *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 601-605 (9th Cir. 1976) (using international rules regarding legislative jurisdiction to weigh U.S. and Honduran interests under a ten-factor balancing test).

141. See Ramsey, *supra* note 136 (noting neither the Constitution nor U.S. law commands application of foreign law).

142. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (defining comity as respect for foreign juridical, legislative, or executive acts). *But see* Ramsey, *supra* note 136, at 893, 925 (criticizing "international comity" as confusing inquiries that ought to be clear and distinct and that describing the inquiry as one of "comity," or equitable discretion, disconnects it from international law). While an in-depth discussion of the merits of comity are outside the scope of this Article, note that there are

extraterritoriality of a foreign law just like it considers the extraterritoriality of a U.S. law in the interest of international comity. It should be noted, however, that the court is not simply bowing to “international comity” and applying foreign law. Indeed, applying the *same* meticulous analysis to the extraterritoriality of a foreign law as applied to U.S. laws provides a satisfying justification for hearing a foreign law cause of action in a U.S. court than merely a passing reference to comity.

Finally, it is important to emphasize that both of the following approaches focus on a nation’s jurisdiction to prescribe, as is the power of a nation to apply its substantive law to particular persons or events.¹⁴³ The jurisdiction to prescribe, or legislate, is separate from the jurisdiction to adjudicate—that is the power of a nation to subject persons or things to the process of its courts—which is also separate from the jurisdiction to enforce, as in the power of a nation to compel compliance with its laws.¹⁴⁴ Therefore, in the U.S., while a court’s jurisdiction to adjudicate is clearly restricted by its territory under *Pennoyer v. Neff*,¹⁴⁵ the question of whether the substantive law of another country may prescribe conduct in the U.S. remains ripe for analysis.

1. The Territorial Approach

In the international sphere, the concept of territoriality as a limit to a nation’s power holds a long tradition. Under the Treaty of Westphalia of 1648, a sovereign’s power, both its jurisdiction and the reach of its laws, was deemed to end at its border.¹⁴⁶ In the U.S., this principle was embodied in *American Banana Co. v. United Fruit Co.* – a case in which Justice Holmes rejected the application of the Sherman Act to conduct outside the United States, stating, “[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”¹⁴⁷

In the 19th and 20th centuries, U.S. courts largely followed this strict

arguments that international comity may not actually support a uniform approach to the question of extraterritorial application of U.S. and foreign laws. International comity may, in fact, play out in opposite directions. For example, in considering whether U.S. law applies abroad, international comity counsels that courts “pull back” in deference to the foreign sovereign. In considering whether foreign law applies to domestic conduct that impacts foreign interests, however, international comity may support a thorough application of the effects test, discussed *infra*.

143. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

144. *Id.*

145. *Pennoyer v. Neff*, 22 U.S. 714, 720 (1878) (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”).

146. See Gross, *supra* note 137, at 28-29 (1948) (noting the Treaty of Westphalia’s role in creating an international regime based on territory).

147. *Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

territorial approach in interpreting U.S. and foreign laws.¹⁴⁸ These principles were embodied in the First Restatement of the Conflict of Laws¹⁴⁹ in 1934 and, in fact, remain the approach adopted by several states today. Some commentators have suggested the territorial approach was and remains justified because it is “commonsense” for Congress to legislate with domestic issues in mind.¹⁵⁰ Whatever the merits of those arguments, the original rationale for the territorial approach was to avoid conflict on the international stage.¹⁵¹ As stated by Joseph Beale, the fear was that anarchy might ensue if “two laws were present at the same time and in the same place upon the same subject.”¹⁵²

By the mid-1900s, however, it became clear that “tidy circles demarcating national jurisdiction [based on territory]” were “either impossible or meaningless.”¹⁵³ An increasingly globalized and economically interdependent world called into question the robustness of using territory as a limit to legislative action.¹⁵⁴ Professor Larry Kramer noted that, “the territorial principle reflected neither what states do nor what they should necessarily want

148. See, e.g., *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) (“Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.”); *The Apollon*, 22 U.S. 363, 370 (1824) (“The laws of no nation can justly extend beyond its own territories . . . They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”).

149. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378, 382-83 (1934) (applying a vested rights theory, where rights “vest,” or attach, in a particular jurisdiction and once vested in one territorially-defined jurisdiction, other jurisdictions were required to respect them).

150. *Foley Bros., Inc. v. Filardo*, 336 U.S. at 285; see also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 513-16 (1997).

151. This could be considered the “Charming Betsy” principle. In *Murray v. Schooner Charming Betsey*, Chief Justice Marshall stated “[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” 6 U.S. (2 Cranch) 64 (1804). See also *MacLeon v. U.S.*, 229 U.S. 416, 434 (1913) (finding the Charming Betsy principle “essential to the peace and harmony of nations”).

152. JOSEPH BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935); see also Elliot E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-385 (1945).

153. Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World*, available at <http://ssrn.com/abstract=39380>; see also Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 736 (1995). But see Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1503 (2008) (“There is no reason to assume that the regulation [of transnational activities] must be . . . unilateral and domestic in nature.”).

154. Compare Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT’L & COMP. L.J. 123, 127 (1996) (arguing defendants “hid[e] behind the idea that the extraterritorial application of U.S. law violates the sovereignty of other countries”) and Jonathan Turley, *“When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990) (arguing that the presumption should be that statutes do apply extraterritorially absent a contrary congressional intent) with Parrish, *supra* note 153, at 1478 (arguing that the effects test “provides no meaningful constraint on the exercise of jurisdiction”).

in multi-state situations.”¹⁵⁵ Other commentators criticized the dubious use of territoriality as a means to prevent enforcement of human and indigenous rights.¹⁵⁶ Still others argued for “‘reasonableness’ as the touchstone of jurisdictional analysis.”¹⁵⁷

Indeed, some commentators even argued that territoriality was never a hard and fast rule.¹⁵⁸ The result of this change in thinking about the territorial approach was that it became less a strict “choice of law” rule and more a canon of statutory construction—in other words, the prohibition against extraterritoriality became a presumption. Under the current doctrine, the presumption is rebutted upon a showing that the legislature intended for a law to apply outside its borders. Yet, since the presumption remains firmly rooted in the historical prohibition against extraterritoriality, the rebuttal is sometimes a tall order for litigants.

Notably, the presumption is particularly strong in the field of labor law.¹⁵⁹ This fact manifested itself most clearly, at least with respect to the extraterritorial application of a U.S. law in *E.E.O.C. v. Arabian American Oil Co. (Aramco)*.¹⁶⁰ Writing for the majority in *Aramco*, Chief Justice Rehnquist suggested that only a “clear statement in the language of the statute would overcome the presumption.”¹⁶¹ In that case, the Court barred a Title VII action

155. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (1991). For a response to attacks on territoriality, see Parrish, *supra* note 153, at 1466-1470.

156. See, e.g., Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 206-07 (1999) (criticizing government invocations of sovereignty to limit compliance with international human rights law).

157. *Id.* at 1470. See Parrish, *supra* note 153, at 1468. Parrish recognizing the distaste for territoriality by liberal internationalists, realists, and other political schools of thought. See also LEA BRILMAYER, CONFLICT OF LAWS 33-46 (2d ed. 1995) (noting that the rise of legal realism challenged territorial approaches to both jurisdiction and choice of law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (adopting the reasonableness test).

158. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 24-25 (1999); see generally Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508 (2005) (providing a general background on the strict territoriality approach).

159. See, e.g., *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963) (holding the National Labor Relations Act was inapplicable to contracts made outside the U.S.); *Benz v. Compania Naviera Hidalgo, S.A.*, 252 U.S. 138 (1957) (Labor Management Relations Act); *Jackson v. The Archimedes*, 275 U.S. 463 (1928) (the Merchant Marine Act of 1920); *Sandberg v. McDonald*, 248 U.S. 185 (1918) (rejecting application of the Seaman’s Act of 1915 to a contract not made in the U.S., i.e., a dispute between British sailors and their British vessel).

160. See *EEOC v. Arabian American Oil Co. (“Aramco”)*, 499 U.S. 244, 248 (1991).

161. Notably, soon after *Aramco*, Congress responded by amending Title VII to provide a “clear statement” that Title VII applies extraterritorially. See 42 U.S.C. § 2000e(f), § 2000e-1(c) (1994). For a more detailed analysis on the effect of *Aramco* on Title VII, see generally Mary Claire St. John, Note, *Extraterritorial Application of Title VII: The Foreign Compulsion Defense and Principles of International Comity*, 27 VAND. J. TRANSNAT’L L. 869 (1994) and Ryuichi Yamakawa, *Territoriality and Extraterritoriality: Coverage of Fair Employment Laws after EEOC v. ARAMCO*, 17 N.C. J. INT’L L. & COM. REG. 71 (1992).

by a U.S. citizen working in Saudi Arabia despite suggestions that Congress intended Title VII to apply extraterritorially.¹⁶² The Court reached this holding despite the fact that the defendant in *Aramco* was a U.S. company and could not have argued the often-used criticism of extraterritorial applications of law—that the application of U.S. law subjected them to a foreign law to which they had not consented.¹⁶³

However, it is important to highlight a point of flux in the current doctrine. While *Aramco* breathed some life into the presumption, the Supreme Court declined to apply it with respect to U.S. laws on anti-trust and trademark law in *Hartford Fire*¹⁶⁴ and *Steele v. Bulova Watch Co.*,¹⁶⁵ respectively. In *Hartford Fire*, for example, the Court failed to mention the presumption with respect to the Sherman Act.¹⁶⁶ In determining whether Congress intended a law to apply extraterritorially, courts are willing and, in fact, often *do* consider the structure, purpose, legislative history, and administrative interpretations of a statute. Even when the court determines the presumption to bar extraterritorial application of the law, as it did with respect to the Federal Tort Claims Act¹⁶⁷ and the Immigration and Nationality Act,¹⁶⁸ the court respectively considered “congressional intent” and “all available evidence about the meaning of [INA] § 243(h).”

In summary, legislative intent matters. The current doctrine no longer imposes an absolute rule against extraterritoriality. While the presumption seems to present a formidable challenge for litigants seeking extraterritorial application of a given law based on the interpretation found in *Aramco*, the Court has subsequently declined to adopt a clear statement rule or single approach to considering extraterritoriality.¹⁶⁹ In other words, after *Hartford Fire*, the presumption is not an insurmountable barrier to litigants seeking to

162. The majority in *Aramco* rejected the arguments that Title VII regulates “commerce” broadly defined and that the Supreme Court should agree with the EEOC interpretation that Title VII applies extraterritorially. *Aramco*, 499 U.S. at 248. For a more in-depth analysis of Congress’s intent in enacting Title VII, see Yamakawa, *supra* note 161, at 92.

163. See *infra* text accompanying note 185; see also Parrish, *supra* note 153, at 1483 (arguing that extraterritorial application of laws are irreconcilable with “democratic principles” because they “force foreigners . . . to bear the costs of domestic regulation, even though they are nearly powerless to change those regulations”).

164. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

165. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

166. See *Hartford Fire*, 509 U.S. at 796 (“[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”); see also William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 98 (1998) (characterizing the *Hartford* decision as “the dog that did not bark”).

167. *Smith v. United States*, 507 U.S. 197, 203-04 (1993).

168. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993).

169. See generally Dodge, *supra* note 166 (providing an extensive background on the presumption and the evidence sufficient to rebut the presumption).

bring a supplemental cause of action under foreign law.

2. The “Effects” Test

The effects test considers whether a country’s laws have extraterritorial applications, thereby undercutting the long-standing principle of territorial jurisdiction. It first made its appearance on the international stage in 1927, in a dispute before the Permanent Court of International Justice (PCIJ). In *S.S. Lotus (France v. Turkey)*, a French steamer collided with a Turkish vessel on the high seas.¹⁷⁰ When the French ship docked in Turkey, Turkish officials arrested, tried, and convicted the French naval officer for criminal negligence.¹⁷¹ The PCIJ famously upheld Turkey’s jurisdiction as well as the application of Turkish law on the ground that “the effects” of the negligence were felt on Turkish territory.

This international application soon influenced American jurisprudence. In 1945, Judge Learned Hand used the effects test for the first time in his quasi-Supreme Court opinion,¹⁷² *United States v. Aluminum Co. of America (Alcoa)*. Under the test, courts may consider where the effects are actually felt, public policy, international comity,¹⁷³ and legislative intent in determining whether a law should apply extraterritorially. In *Alcoa*, the Sherman Act was applied to agreements intended to affect, and affecting, U.S. commerce. Famously, Judge Hand declared, “[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders that the state reprehends.”¹⁷⁴

By the mid 1900s, courts routinely invoked an “effects test” to hold that U.S. laws regulated activities occurring abroad, at least with respect to anti-trust and intellectual property laws.¹⁷⁵ In *Steele v. Bulova Watch Co.*, the Supreme Court formally adopted the reasoning of *Alcoa* to prevent use of the plaintiff’s trademark in Mexico.¹⁷⁶ The Court stated that when no conflict arises with foreign law, the “[u]nlawful effects in this country . . . are often decisive.”¹⁷⁷

170. *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10.

171. *Id.*

172. Interestingly, in that case, so many Supreme Court justices had to disqualify themselves that the Court lacked a quorum, so, for the only time in history, the Second Circuit sat by designation as the Supreme Court. See *United States v. Aluminum Co. of America (“Alcoa”)*, 148 F.2d 416 (2d Cir. 1945).

173. *But see Ramsey*, *supra* note 136, at 893 (arguing that international comity is an expression of unexplained authority, imprecise meaning, and uncertain application).

174. *Alcoa*, 148 F.2d 416 (2d Cir. 1945).

175. *Steele*, 344 U.S. at 280. For a discussion of the possible extraterritorial reach of U.S. law in bankruptcy contexts, see David M. Green & Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85 (2002).

176. *Id.*

177. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

In 1965, this trend was formally recognized in the Restatement (Second) of the Foreign Relations Law of the U.S., which stated federal statutes may apply to conduct “having an effect within[] the territory of the United States.”¹⁷⁸ In fact, the D.C. Circuit “went so far as to hold that even foreign plaintiffs could sue foreign defendants . . . for harms that occurred overseas, as long as some harmful effect was felt within the United States.”¹⁷⁹

Today, the current doctrine is largely embodied in the Restatement (Third) of the Foreign Relations Law of the U.S., which permits a state to regulate “conduct outside its territory that has or is intended to have substantial effect within its territory.”¹⁸⁰ Notably, the Restatement (Third) observes “[the Holmes opinion in *American Banana*], though still often quoted, does not reflect the current law of the United States.”¹⁸¹ In fact, lower federal courts have routinely applied U.S. laws extraterritorially.¹⁸² Professor Parrish goes a step further and notes, while the “presumption against extraterritoriality remains (at least on the books), in reality it has lost almost all its influence.”¹⁸³

Similar to the territoriality approach, however, the effects test has yielded its own debates. Proponents of the test argue extraterritorial application of laws is required from a public policy perspective, particularly with respect to transnational issues such as the environment and labor.¹⁸⁴ However, critics of the effects test disagree, notwithstanding Professor Parrish sounding the death toll on strict territoriality. First, critics argue the effects test is flawed on a theoretical level. In their view, extraterritorial laws are “irreconcilable with democratic principles” because “they force [one population] . . . to bear the costs

178. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965).

179. Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2515 (2005) (noting that the Supreme Court overturned the D.C. Circuit Court decision but that the Justice Department generally supports extraterritorial assertions). *See also* *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (2003), *rev'd Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

181. *Id.* § 415, Reporters' Note 2 (1987).

182. *See, e.g.*, *Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1071 (9th Cir. 2006) (rejecting the presumption where excluding a statute's foreign application results in harms within the United States); *Env'tl. Def. Fund v. Massey* (“Massey”), 986 F.2d 528, 531 (D.C. Cir. 1993) (finding that an adverse effect within the United States renders the presumption inapplicable, even if significant effects of the conduct are also felt abroad); *Tamari v. Bache & Co. (Leb.) S.A.L.*, 730 F.2d 1103, 1108 n. 11 (7th Cir. 1984) (holding reliance on the presumption is “misplaced” when conduct abroad could affect domestic conditions).

183. Parrish, *supra* note 153, at 1475. *But see* Dodge, *supra* note 166, at 87 (“Although a number of scholars have suggested that the presumption . . . is obsolete . . . , the Supreme Court seems unlikely to follow [suit]”).

184. Gibney & Emerick, *supra* note 154, at 141; *see also* Michael J. Calhoun, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 *LOY. U. CHI. L.J.* 679 (1999) (concerning the need for extraterritoriality in cases of transnational securities fraud).

of [another population's governmental] regulation."¹⁸⁵

Second, critics argue the effects test is difficult to apply in practice. While the Supreme Court in *Aramco* declined to apply the effects test with respect to Title VII, *Aramco* did not bar application of the effects test with respect to other statutes. As such, the district courts are divided as to both the proper role of the effects test and its application. Some lower courts have adopted the view that U.S. law applies only to conduct that has effects within the United States regardless of where the conduct occurs.¹⁸⁶ Others argue that U.S. law applies to both conduct that occurs within the U.S. and has effects outside the U.S. and all conduct that has effects within the U.S.¹⁸⁷ Additionally, lower courts are split on the importance of defendants' intent under the effects test. While the test originally required defendants to have intended the effect be felt in the U.S., some courts have dispensed with any intent requirement.¹⁸⁸

For the purposes of this Article, it is accurate to state that the effects test is probably not an independent approach to extraterritoriality, but instead a factor that interacts with the presumption. The *Steele* decision provides an illustrative example. In considering the geographical scope of the Lanham Act, the Court in *Steele* began its analysis with the presumption—"the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears."¹⁸⁹ However, in its reasoning, the Court ultimately applied the effects test—"the defendant's] operations and their effects were not within the territorial limits of a foreign nation"—and imposed the Lanham Act on conduct occurring in Mexico.¹⁹⁰

The *Steele* decision is also important because it involved the extraterritorial application of intellectual property law. Intellectual property is an area of law that often sparks the most protest from other sovereigns.¹⁹¹ Like *Hartford Fire*

185. See Parrish, *supra* note 153, at 1483.

186. See *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) ("[W]e might be inclined to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors."); see also *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) (finding that the presumption means that the Securities Exchange Act only rarely applies to conduct in the United States that causes no effects here).

187. *Massey*, 986 F.2d at 531 (listing situations where the presumption does not apply, including where there is an "affirmative intention of the Congress clearly expressed" to extend the scope of the statute to conduct occurring within other sovereign nations and where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States).

188. See, e.g., *Sabre Shipping Corp. v. Am. President Lines*, 285 F. Supp. 949 (S.D.N.Y. 1968); *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

189. *Steele*, 344 U.S. at 286.

190. *Id.*

191. Cf. Melissa Feeney Wasserman, *Divided Infringement: Expanding the Extraterritorial Scope of Patent Law*, 82 N.Y.U. L.REV. 281, 295 (2007) (arguing for U.S. patent law to expand its geographical scope much like U.S. trademark law).

in the context of anti-trust law, *Steele* undermines the argument that courts have adopted a territorial approach in order to avoid international discord.¹⁹² Thus, it appears that a court's decision to read territorial limits into a statute, as the Supreme Court did in *Aramco*, *Smith*, and *Sale*, or a court's decision to reject territorial limits, as the Supreme Court did in *Hartford* and *Steele*, will not be based solely on whether there is a potential for conflict with foreign laws.

In summary, the effects test may both be limited by the territoriality approach and used to rebut the presumption against extraterritoriality.¹⁹³ To avoid conflicts with foreign nations and international discord, the effects test may be reined in by the territorial approach. However, at a time when national borders rarely prevent the conduct in one country from affecting another, there has evolved a persuasive argument that a country, when it clearly states its intention, may enact extraterritorial laws that regulate conduct abroad that has effects within the country.

B. Foreign Law versus State Law: A Clash of Civilizations?

The presumption against extraterritoriality is a canon of construction that may be nuanced by the effects test. The practical result of moving away from this presumption is that the legislative jurisdictions of two polities may overlap. Where they do overlap, the court must engage in choice of law analysis to determine which jurisdiction's law governs the subject or conduct in question.

When a U.S. court determines that a foreign law may apply extraterritorially, one of three situations arises regarding the subject or conduct in question: 1) Extraterritorial law and domestic law both govern without any conflict. 2) Domestic law does not govern at all. 3) Extraterritorial law and domestic law both govern, and they conflict with one another.¹⁹⁴ In each situation, the court must ask whether the extraterritorial application of the foreign law will lead to a type of "clash of civilizations"¹⁹⁵ between the laws of the foreign and domestic polities.

For now, this Article assumes that a litigant will bring a cause of action under U.S. federal law or FLSA. Once a cause of action is brought under federal law the issue becomes whether a supplemental claim may be brought

192. While Justice Souter argued there was no conflict of law issue in *Hartford Fire* because no foreign law "require[d] [the defendants] to act in some fashion prohibited by the law of the United States," there was certainly a conflict in the other direction – i.e., the Sherman Act prohibited an act that the British law allowed. *Hartford Fire*, 509 U.S. at 799.

193. The extent to which the effects test is limited by territoriality depends on whether the case involves application of U.S. law abroad or application of foreign law domestically, see *supra* Part III.A.1.

194. See Ramsey, *supra* note 136, at 933.

195. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (coining the term "clash of civilizations" in reference to the conflict between people's cultural and religious identities in the post-Cold War world).

under foreign law as opposed to a state domestic law. The following subsections consider a choice of law analysis framework for extraterritorial law and U.S. domestic state law.

1. The Easy Case: Simultaneous Compliance and “False Conflicts”

The easy case arises when there is no conflict between state law and foreign law. This may occur on two different occasions but results in the same outcome, as discussed below. These occasions are: (a) where no conflict exists because simultaneous compliance with foreign and state law is possible, or (b) when a false conflict exists.

a. Simultaneous Compliance

The analysis for simultaneous compliance is relatively simple. This occurs whenever foreign law and state law regulate the same conduct in such a way that both laws may be followed at the same time. The determining factor in this situation is whether U.S. courts will enforce the foreign law in the absence of a constitutional or statutory requirement to do so.¹⁹⁶ Notwithstanding the opportunity for simultaneous compliance, a defendant may argue that the supplemental foreign law cause of action should be dismissed.

There are two reasons why a claim under foreign law should still be recognized in U.S. courts when a state law also exists. First, residents of a jurisdiction in which a court sits may be potential defendants and may not be immune to claims against them arising under another jurisdiction.¹⁹⁷ To avoid the perception of harboring wrongdoers, a U.S. court may seek to adjudicate claims under foreign law. Second, in the alternative, residents of a jurisdiction in which a court sits may be potential plaintiffs and have claims under foreign law.¹⁹⁸ When adjudication in a foreign court is not reasonable or possible, it would be appropriate for a U.S. court to hear the foreign law claim rather than leave residents with outstanding grievances to resolve their disputes through extrajudicial means.

Notably, these justifications for hearing a foreign law claim are already considered by U.S. courts during ordinary contract disputes where the contract stipulates a foreign law as governing. Here, the plaintiff may bring a cause of action under foreign law on U.S. soil and the defendant may be liable to foreign law by virtue of having entered into the contract. Such cases are routinely adjudicated under foreign law in U.S. courts.¹⁹⁹ As such, when simultaneous

196. Ramsey, *supra* note 136, at 934.

197. *Id.*

198. *Id.*

199. See, e.g., *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 491-92 (1983) (agreeing to hear a case where neither party was a United States entity).

compliance is possible, courts have applied foreign law despite the existence of a state law regarding the conduct.

b. False Conflicts

False conflicts require more complex analysis than simultaneous compliance cases. To analyze whether a false conflict exists, the court must identify any underlying policies and relevant interests of both legislative jurisdictions. A false conflict exists when, despite appearances to the contrary, either the foreign nation or the domestic state is uninterested in the dispute at hand. Traditionally, a polity does not apply its law where it has no interest. Captured in the Supreme Court decision *Lauritzen v. Larsen*,²⁰⁰ Professor Ramsey calls this the “none of your business” rule.²⁰¹

To determine whether a false conflict exists, courts employ the two-component interest analysis laid out by Professor Brainerd Currie in the 1950s and 60s.²⁰² Under this analysis, the court first ascertains the purpose that led to the adoption of a law by analyzing domestic cases. Second, the court determines which contacts with the forum, if any, bring a multi-state case within the reach of that law.²⁰³ If multi-state contacts do not exist, then there is a false conflict and only the law of the state with contacts applies.²⁰⁴

This two-component interest analysis is the approach adopted by many states, including New York after *Babcock v. Jackson*,²⁰⁵ and its application is perhaps best illustrated in *Tooker v. Lopez*.²⁰⁶ In that case, the appellant-father brought a wrongful death suit against the New York driver whose car overturned in Michigan, killing both the appellant’s daughter and the driver. The defendant asserted the affirmative defense of the Michigan guest statute. In analyzing the first component, the New York court in *Tooker* held that the intention of Michigan’s guest statute was to prevent fraudulent claims against Michigan insurance companies. In analyzing the second component, the court held that Michigan had no interest in applying its guest statute to a dispute arising from a

200. 345 U.S. 571 (1953) (holding the U.S. Jones Act did not apply to a dispute between a Danish sailor on a Danish ship in Cuban waters).

201. Ramsey, *supra* note 136, at 920.

202. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U.CHI.L.REV. 227 (1958), reprinted in BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (Brainerd Currie ed., 1963); Grant v. McAuliffe, 41 Cal.2d 859 (1953) reprinted in BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS 152-53 (Brainerd Currie ed., 1963).

203. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 299 (1990) (summarizing the second component as a presumption that a law applies only when its domestic purpose is advanced).

204. Conversely, if multi-state contacts do exist, then there is a true conflict as multiple states’ laws apply. A further analysis of this “true conflict” is discussed below, *supra* Part III.B.2.

205. 12 N.Y.2d 473 (N.Y. Ct. App. 1963).

206. 24 N.Y.2d 569 (N.Y. 1969).

car accident given that the defendant was from New York and no Michigan insurance companies were implicated.²⁰⁷

While interest analysis is not without its detractors,²⁰⁸ it supplies a useful mechanism for analyzing state interest in the context of this Article. Foreign interest in governing a subject or conduct is affirmatively established when a court determines that a foreign law is meant to apply extraterritoriality, as explained in Part III.A. However, the question of state interest governing the same subject or conduct remains open.

Notably, if no state interest is identified, it does not always hold that a U.S. court will apply the foreign law.²⁰⁹ First, a court may dismiss the supplemental cause of action under foreign law for failure to state a claim. Second, as discussed previously, U.S. courts may choose not to enforce the foreign law absent an explicit requirement to do so.²¹⁰ Finally, a court may find that the domestic state and the foreign sovereign are equally disinterested. In this “unprovided for case,” the court would find that neither the foreign sovereign nor the domestic state’s law is sufficiently interested in governing the subject or conduct.²¹¹ In all such instances, the supplemental claim under foreign law will likely fail.

2. The Hard Case: True Conflicts

a. Setting the Stage for a True Conflict

The hard case arises when foreign law and state law come into direct conflict, as in when one cannot simultaneously obey the foreign and state law. With the weakening of the extraterritoriality prohibition and the rise of the effects test, the potential for “true” conflicts increase. A true conflict occurs when, in addition to the foreign law, a state law governs the subject or conduct in question.²¹² When this happens, application of a foreign law cause of action potentially displaces the state law cause of action.

207. *Id.*

208. The biggest criticism of interest analysis is that it incentivizes courts to create false conflicts. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 405 (1980) and Joseph Singer, *Facing Real Conflicts*, 24 CORNELL INT’L L.J. 197, 219-20 (1991). See also Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559-60 (1971) (criticizing the difficulty of identifying the policies underlying the relevant laws).

209. Importantly, the question of whether foreign law should be enforced by U.S. courts is distinct from the question of whether a domestic U.S. law applies. See Ramsey, *supra* note 136, at 932.

210. See *supra* Part III.B.1.a.

211. See Currie, *supra* note 181; Grant, 41 Cal.2d 859. But see Larry Kramer, *The Myth of the “Unprovided-For” Case*, 75 VA. L. REV. 1045 (1989).

212. Again, it is assumed that the foreign law applies given the extraterritoriality analysis under Part III.A.

Nonetheless, even where a true conflict seems to arise, foreign law might be heard by the court if the scope of the state law is ambiguous.²¹³ While the justifications for allowing a foreign law cause of action when a true conflict exists are fewer than when simultaneous compliance or false conflict is possible, there may still be a narrow argument that the court should hear the foreign claim. For example, while a state law may regulate the conduct, the state may not have an interest in regulating the conduct in the particular case before the court. This Part will discuss how a court may conduct this choice of law analysis in order to determine whether a foreign law should apply.

As a preliminary matter, it is important to note the subsequent discussion does not consider the true conflict that arises when a defendant uses foreign law as a defense.²¹⁴ In those cases, U.S. courts generally have no authority to apply a foreign law defense at the expense of a domestic law.²¹⁵ For the purposes of this Article, however, the question is whether a foreign law may serve as a basis for a supplemental cause of action, not whether it may be used as a defense to a state cause of action. This postural difference arguably leaves enough room under a choice of law analysis for a court to consider the foreign law.

b. A Choice of Law Analysis under the Most Significant Relationship Test

There is no uniform federal statute governing choice of law issues and each state adopts its own approach to conflicts. Thus, there are a multitude of approaches to resolving true conflicts, including the traditional approach,²¹⁶ an interest balancing approach, comparative impairment test, “better rule” test, and most significant relationship test.

For the purposes of this Article, I will focus on the Second Restatement’s most significant relationship test because it is the approach adopted by the largest number of U.S. jurisdictions.²¹⁷ In the context of contracts, for example,

213. See *Timberland*, 549 F.2d at 615, on remand 574 F. Supp. 1453, 1466-73 (N.D. Cal. 1983) (finding that Honduran interests outweighed U.S. interests), *aff’d*, 749 F.2d 1378, 1382-85 (9th Cir. 1984).

214. For an example of when a foreign law was recognized as a defense to a cause of action, see *Holzer*, 277 N.Y. 474 (1938) (recognizing the fact that Germany promulgated laws which required persons of non-Aryan descent to be retired as a defense).

215. Ramsey, *supra* note 136, at 933. The significant factor in *Holzer*, one of a few cases to recognize a foreign law defense, was that the contract of hiring was made and was to be performed in Germany. Under U.S. law, the law of the country or state where the contract was made and was to be performed by citizens of that state governs. *Id.*

216. Sometimes called a jurisdiction-selecting approach, this approach is largely based on territory.

217. A sample of the states that have adopted the most significant relationship test include Alaska, Arkansas, Colorado, Florida, Idaho, Iowa, Kentucky, New Hampshire, Ohio, Oklahoma, Texas, Washington, and Wisconsin, see Stephen D. Coggins, *Tort Trial & Insurance Practice Section*, American Bar Association, *Fifty State Survey of Choice of Law Rules*, available at

twenty-four states use the Second Restatement approach.²¹⁸ While the test is not without its detractors,²¹⁹ this decision to limit the choice of analysis to the Second Restatement is justified by the fact that the test is in many ways all-encompassing.²²⁰ For example, the Second Restatement does not abandon the traditional approach to choice of law. Instead, it chooses a presumptively applicable rule based on territoriality and then tests this choice against 1) basic choice of law principles and 2) other general provisions in light of relevant contacts. Examples of the latter include § 145 (torts), § 188 (contracts), and reach even the more mundane disputes like § 184 (when chattel brought into state after death of owner may be administered).

To illustrate how the Second Restatement operates, consider the general provision regarding contracts for the rendition of services. The presumptive rule under § 196 is to apply the “[l]ocal law of the state where the contract requires that the services . . . be rendered.”²²¹ However, there are several caveats. First, the presumptive rule is subject to § 6, which lists seven choices of law principles that may suggest the law of some other state with the most significant relationship should apply to the dispute.²²² Second, § 196 contains an explicit exception. It reads, “[t]here [may] be occasions where the local law of some state other than that where the services are performed should be applied . . . because of the intensity of the interest of that state in having its local law applied.”²²³

As evident, the Second Restatement offers judges room to maneuver in a choice of law analysis. Notably, courts are free to weigh § 6 factors as they see fit.²²⁴ Some courts pay lip service to the presumptive rules but make their own evaluation under § 6.²²⁵ Other courts treat the presumptive rules as jurisdiction-selecting rules that render the Second Restatement effectively no different from

<http://www.abanet.org/tips/iplc/fiftystates.html> (listing the approaches taken by each state).

218. Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 942-43 (2004) (also noting 22 states use it for contracts).

219. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) (“Trying to be all things to all people, [the Second Restatement] produced mush.”).

220. In fact, some argue the most significant relationship test is just interest analysis under another guise. See, e.g., Luther McDougal, *Toward the Increased Use of Interstate and International Policies in Choice of Law Analysis in Tort Cases Under the Second Restatement and Leflar’s Choice-Influencing Considerations*, 70 TULANE L. REV. 2465 (1996).

221. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 196 (1971).

222. *Id.* at § 6.

223. *Id.* at cmt. d.

224. See Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997) (noting inconsistent evaluations under § 6).

225. See, e.g., *NL Indus. v. Commercial Union Ins. Co.*, 65 F.3d 314 (3d Cir. 1995); *General Ceramics, Inc. v. Firemen’s Fund Ins. Co.*, 66 F.3d 647 (3d Cir. 1995).

the First Restatement.²²⁶ The take home point, however, is that the most significant relationship test offers a kind of “laundry list”²²⁷ of important factors that courts may consider when confronted with a true conflict.²²⁸

IV.

RELOCATION COSTS: WHEN FOREIGN LAW SPEAKS AND THE RIGHTS OF MIGRANT WORKERS ARE PROTECTED (AN APPLICATION CONTINUED)

A. Article 28 and U.S. Law: Arising out of the Same Case or Controversy

Of the three analyses, the question of supplemental jurisdiction is perhaps the simplest. While no court has directly addressed the issue, several litigants have, in fact, brought a supplemental claim under Article 28 and similar foreign employment provisions. In *Iglesias-Mendoza v. La Belle Farm*, for example, the plaintiffs claimed defendants violated “Mexican Law” in addition to other U.S. statutes.²²⁹ Similarly, in *Aguilar et al. v. Imperial Nurseries et. al.*, the plaintiffs claimed defendants violated Guatemalan labor law.²³⁰ Notably, in the latter case, a default judgment was awarded for, among other things, damages on the cause of action under Guatemalan labor law.

A U.S. federal district court may hear the Article 28 foreign law cause of action, much like it hears state claims, when it arises out of the same case or controversy as a federal law claim.²³¹ The federal law claim, in the case of relocation costs, would be brought under FLSA, which guarantees to employees certain minimum wages. While it depends on the procedural history of a case, none of the discretionary exceptions likely apply. An Article 28 claim neither presents a novel or complex issue of State law; indeed, an Article 28 claim is not based on state law at all. As such, a U.S. court may hear an Article 28 claim under its supplemental jurisdiction.

226. See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (noting that while the Second Restatement “led, alas, to standards that were nebulous...it is “often, however, [that] the simple old rules can be glimpsed through modernity’s fog...”).

227. DAVID P. CURIE ET. AL., *CONFLICT OF LAWS: CASES, ARTICLES, QUESTIONS* 206 (7th ed. 2006) (noting the Restatement (Second) was a predictable response to the perceived flaws of the jurisdiction-selecting rules of Restatement (First)).

228. Indeed, the Restatement (Second) is often sharply criticized for reducing certitude with respect to choice of laws.

229. Plaintiffs’ Second Amended Complaint, *Iglesias-Mendoza v. La Belle Farm*, No. 06-cv1756 (S.D.N.Y. filed Nov. 15, 2006).

230. Plaintiffs’ Complaint, *Aguilar et al. v. Imperial Nurseries et al.*, No. 07-cv-00193 (D. Conn. filed Feb. 8, 2007).

231. 28 U.S.C. § 1367(a) (“[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”)

B. Article 28: The Case for Extraterritorial Application

Does Article 28 apply outside its borders? As established in Part III, the answer to this question is governed by the current approach to extraterritoriality and choice of law. Retreating from a strict prohibition against extraterritorial legislative jurisdiction, the current approach establishes a canon of statutory construction that is a presumption against extraterritoriality, which may be rebutted by the effects test. Under the approach, a litigant may consider the following factors: did the legislature expressly intend for its laws to apply outside its borders, would it frustrate a legislature's intent if its laws did not apply, and the location where the effects of the conduct in question are felt.

1. The Territorial Approach: The Presumption and Its Rebuttal

Applying the framework to the application at hand, there is a strong argument that Article 28 applies to the employment relationship when recruitment occurs in Mexico even if the work occurs in the U.S. First, the history of Mexico's Federal Labor Law indicates the law was meant to be enforced even when Mexican citizens work abroad. Originally enacted in 1931 pursuant to Title VI of Article 123 of the Mexican Constitution, the law was described as "one of the most advanced labor codes in the world at its time."²³²

Most importantly, the history of the Bracero program, the ancestor of today's guest worker program, suggests Article 28 applies to U.S. employers recruiting in Mexico. Article 28 was the center of intense negotiations between the U.S. and Mexico with respect to the Bracero program.²³³ During the initial negotiations, Mexico insisted U.S. employers pay for the workers' relocation costs as required by Article 28²³⁴ and, in the end, the U.S. stipulated.²³⁵ As such, the text of the original Bracero Agreement in August 4, 1942 and subsequent updates explicitly referred to Mexico's relocation travel costs requirement.²³⁶

Additionally, the manner in which the Bracero program operated suggests Article 28 was meant to apply extraterritorially to migrant workers recruited in

232. MEXICO: A COUNTRY STUDY 41(Tim L. Merrill & Ramon Miro eds., 1997).

233. President Truman's Commission on Migratory Labor stated: "The negotiation [was] a collective bargaining situation in which the Mexican Government [was] the representative of the workers and the Department of State [was] the representative of our farm employers." See Kitty Calavita, *supra* note 33.

234. Agreement between the United States of America and Mexico revising the agreement of August 4, 1942 respecting the temporary migration of Mexican agricultural workers, Apr. 26, 1943, 57 Stat. 1152.

235. ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 48 (1964).

236. See *Agreement on the Temporary Migration of Mexican Agricultural Workers*, Aug. 4, 1942, 56 Stat. 1759; *Agreement Between the United States of America and Mexico Respecting the Recruiting of Mexican Non-Agricultural Workers*, April 29, 1943, 57 Stat. 1353.

Mexico and traveling to the U.S. for work. As Professor Griffith states:

Not only was Mexico's foreign employer provision included in the text of the bilateral Agreement but there are indications that the substance of Mexico's foreign employer provision may have been enforced in the United States under the Bracero Program. In the 1942 Bracero Agreement, the two governments jointly guaranteed compliance with the terms of the labor contract through administrative and diplomatic channels. The methods and mechanisms of enforcement fluctuated over time. Generally speaking, however, the U.S. Department of Labor, the U.S. Department of Agriculture, and Mexican consuls supervised contracts and enforced the Bracero Agreement's requirements. In the early 1950s, a formal grievance procedure was agreed upon, which relied on "joint decisions" by the Mexican and United States governments.²³⁷

In other words, given its history and prior inclusion under the Bracero program, Article 28 is "not entirely 'foreign' to the U.S. legal regime."²³⁸

Additionally, based on the statutory language, the intent of the Mexican legislature is clear – the Federal Labor Law is meant to apply extraterritorially. Article 28 states, "all costs which arise from crossing the border and fulfillment of the arrangements of migration, or for any other similar concept, will be the exclusive responsibility of the employer."²³⁹ In Spanish, the relevant language under Article 28 is "*todos los [costos] que se originen por el paso de las fronteras y cumplimiento de las disposiciones sobre migración . . . serán por cuenta exclusiva del patrón.*"

Arguably, if the language in Article 28 omitted reference to borders and migration, there may be an argument that it was meant to apply to internal employment relationships within Mexico. However, by including all costs that "arise from crossing the border" it is clear the legislature was concerned with Mexican nationals traveling to work in the U.S. If ambiguity exists as to whether the legislature, for some reason, referred to an internal border between Mexican states or an international border when it used the word *frontera*, this is clarified in its use of *migración*, a word primarily used in the context of migrating across international political borders.²⁴⁰

While it is rare that a legislature considers extraterritorial application of its

237. Griffith *supra* note 79, at 418-19. See also Agreement amending and extending the agreement of August 11, 1951, as amended and extended, Oct. 23, 1959, 10 U.S.T. 2036. Braceros, or Mexican Consuls on their behalf, often made complaints directly to the U.S. Department of Labor. Galarza, *supra* note 235, at 47.

238. *Id.*

239. Ley Federal de Trabajo Art. 28(1)(b) available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.

240. According to *Diccionario Manual de la Lengua Española*, *migración* in Spanish is defined as "*movimiento de población que consiste en dejar temporal o definitivamente el lugar de residencia para establecerse o trabajar en otro país o región, especialmente por causas económicas, políticas o sociales.*" While this includes in its definition movements to other regions in addition to other countries, it is the movement to other countries that is listed first. Additionally, a more appropriate word is available (and used) for internal movement: *trasladarse*.

laws, it is understandable given that the Mexican Constitution was framed in the aftermath of the Mexican Revolution of 1910 and sought to protect Mexican-nationals from both foreign and domestic exploitation.²⁴¹

Furthermore, Mexican officials interpret the statute as applying to U.S. employers recruiting Mexican-nationals in Mexico. In 1942, for instance, Mexico's Minister of Foreign Affairs contended that "Mexicans entering the United States under this agreement shall enjoy the guarantees of transportation, living expenses and repatriation established in [Mexico's foreign employer provision]."²⁴² This view continues today. In an affidavit in support of a U.S. lawsuit, one Mexican Consulate stated:

Abuse of Mexican citizens who are recruited for work in the United States by farm labor contractors is all too common. There are Mexican laws designed to ensure that Mexican workers . . . are not charged for travel expenses. . . [C]ontractors recruit thousands of Mexican nationals to work in the United S[t]ates in violation of Mexican laws designed to protect our citizens.²⁴³

Echoing this statement, the former Foreign Minister of Mexico, Jorge Castañeda noted, "We think that the broad immigration and labor agenda includes humane, civil and adequate treatment for Mexicans: Mexicans here, going there; Mexicans as they cross the border; Mexicans when they start work and Mexicans who have already been in the United States for a long time."²⁴⁴ In other words, Mexican officials continue to confirm that Article 28 was meant to be enforced against U.S. employers recruiting Mexican-nationals in Mexico.

In summary, the history of Article 28, its inclusion in the Bracero program, the statutory language, and affirmations by Mexican officials rebut the presumption against extraterritorially.

2. *The Effects Test*

The effects test also counsels for an extraterritorial application of Article 28. When employers fail to pay the relocation costs of its workers, it is Mexican-nationals who are affected. This is true whether workers pay the costs upfront or whether employers pay and deduct the costs from the employees' first paychecks. In the former case, migrant workers often take out significant loans

241. See Jenna L. Acuff, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 SAN DIEGO INT'L L.J. 387, 391 (2004) (providing the historical context for Mexico's employment regulations).

242. Agreement between the United States of America and Mexico revising the agreement of August 4, 1942 respecting the temporary migration of Mexican agricultural workers, Apr. 26, 1943, 57 Stat. 1152.

243. *Perez-Perez v. Progressive Forestry Servs.*, 2000 U.S. Dist. LEXIS 414 (D. Or. 2000) (affidavit of Alma P. Soria Ayuso, Consul General for the Consulate of the United Mexican States located in Portland, Oregon).

244. See Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers*, N.Y. TIMES, Feb. 16, 2001, at A1.

or collateralize their homes in order to pay the relocation costs before departing from Mexico.²⁴⁵

In the latter case, the effect is equally clear, although more indirect. When employers deduct costs from workers' paychecks, the workers' remittances to Mexico are impacted. This fact cannot easily be dismissed. While the amount of money migrant workers send home on a periodic basis is approximately two to three hundred dollars monthly, remittances are Mexico's second-largest source of foreign income after oil exports.²⁴⁶ In fact, remittances are higher in Mexico than in any other developing country and, in 2003, Mexico received more than \$13 billion in remittances.²⁴⁷

These remittances are often critical to the development of economic activity in Mexico.²⁴⁸ For example, several government-sponsored programs channel remittances into infrastructure development and business start-ups.²⁴⁹ Additionally, remittances often meet the needs of family members in Mexico. In some Mexican states, it is estimated that 80 percent of the money received pays for basic necessities such as food, clothing, health care, transportation, education, and housing expenses.²⁵⁰

The current economic crisis highlights the impact of remittances on Mexico.²⁵¹ A recent survey of Latino immigrants by the Inter-American Development Bank found that Latino immigrants, responding to the economic downturn and new uncertainties about their future, have stopped sending money

245. See *infra* text Part II.B; see also BAUER, *supra* note 70.

246. See Deborah Bonello, *Remittances to Mexico Continue to Fall*, L.A. TIMES, Oct. 2, 2008, <http://latimesblogs.latimes.com/laplaza/2008/10/remittances-to.html>; see also Inter-American Development Bank, *Remittances 2005* at 33 (providing statistics on Mexico's remittances). See generally Roberto Coronado, *Workers' Remittances to Mexico*, EL PASO BUSINESS FRONTIER, Issue 1 2004, at 1.

247. *Id.*

248. One estimate is that remittances are responsible for about 27 percent of the capital invested in microenterprises throughout urban Mexico and up to 40 percent in states with high migration rates to Mexico. See Christopher M. Woodruff & Rene Zenteno, *Remittances and Microenterprises in Mexico*, J. DEV. ECON. (2006).

249. These programs include the *Dos por Uno (Two for One)* program, which matches remittances dollar for dollar and *Invierte en Mexico*, which is run by Mexico's largest development bank and offers start-up capital for small businesses. See MIGUEL MOCTEZUMA L., RED INTERNACIONAL DE MIGRACIÓN Y DESARROLLO, INVERSIÓN SOCIAL Y PRODUCTIVIDAD DE LOS MIGRANTES MEXICANOS EN LOS ESTADOS UNIDOS, *available at* <http://meme.phpwebhosting.com/~migracion/modules/documentos/5.pdf>. For more on *Invierte en México*, see the Nacional Financiera's Website, <http://www.nafin.com>.

250. See *Migración México-Estados Unidos: Presente y Futuro, Importancia de las remesas en el ingreso de los hogares*, CONSEJO NACIONAL DE POBLACIÓN, Jan. 2000 (noting this is the case in Michoacan, Guerrero and Oaxaca).

251. Marc Lacey, *Money Trickles North as Mexicans Help Relatives*, N.Y. TIMES, Nov. 15, 2009, at A1 (reporting on the recent evidence of Mexicans supporting unemployed relatives in the U.S. due to the economic crisis).

home to their families in the last two years.²⁵² In July 2008, for example, remittances dropped 7 percent compared with the previous year – the biggest fall on record as measured by Mexico’s central bank.²⁵³

In summary, the economic crisis illustrates the direct relationship between workers’ wages and its impact, or “effects,” in Mexico.²⁵⁴ Thus, application of the effects test confirms that the foreign law should be applied extraterritorially.

C. Article 28 and State Laws

1. The Easy Case

When there is no conflict between foreign law and state law, the argument for enforcing Article 28 in U.S. courts is easier. A U.S. court will likely be open to enforcing an Article 28 claim when a court either identifies the possibility of simultaneous compliance with state law or establishes the existence of a false conflict.

a. Simultaneous Compliance

A migrant worker’s strongest argument that U.S. courts enforce Article 28 is that no conflict exists because employers may simultaneously comply with both federal and state law. There are several employment cases in which a court has recognized a foreign law cause of action when it found no conflict with domestic laws. In *Curtis v. Harry Winston*,²⁵⁵ for example, the court applied Venezuelan labor law, noting that the Venezuelan law was not “repugnant” to U.S. public policy.²⁵⁶ In that case, a Venezuelan citizen sued a U.S. employer and the Venezuelan labor law afforded greater benefits to workers. Additionally, in *Chinnery v. Frank E. Basil*,²⁵⁷ the court went a step further in asserting jurisdiction despite an express choice of law provision in the employment agreement to use Saudi Arabian law.²⁵⁸

252. See Julia Preson, *Fewer Latino Immigrants in U.S. Sending Money Home*, INT’L HERALD TRIB., Apr. 30, 2008, available at <http://www.ihf.com/articles/2008/04/30/america/01immig.php> (reporting on the IDB study).

253. See Laurence Iliff, *Mexicans Feeling the Pinch as Income Stream from U.S. Slows*, DALLAS STAR, Sept. 23, 2008, at A1.

254. For more studies on the impact of remittances on poverty in developing countries, see generally THE WORLD BANK, GLOBAL ECONOMIC PROSPECTS (2006); G. Esquivel & A. Huerta-Pineda, *Remittances and Poverty in Mexico*, INTEGRATION & TRADE, July-December 2007, at 27; Elisabeth Malkin, *Study Challenges Assumptions About Money Being Remitted to Mexico*, N.Y. TIMES, July 7, 2005, at C4; and RODOLFO GARCÍA ZAMORA, NEW PATTERNS FOR MEXICO, 19-32 (Barbara J. Merz ed., 2006).

255. 653 F. Supp. 1504 (S.D.N.Y. 2002).

256. *Id.* at 1508.

257. No. 86-2977, 1988 U.S. Dist. LEXIS 19438 (D.D.C. Jan. 13, 1988).

258. *Id.* at *11-12 (D.D.C. Jan. 13, 1988) (noting that it would apply Saudi Arabian law given

Thus, in the context of relocation costs, Article 28 of Mexico's Federal Labor Law may not be in true conflict when the state law concurs with Article 28 or is silent on the issue; the latter case being more likely. The relationship can be analogized to that between U.S. federal law and state law. U.S. federal law is largely considered a minimum floor for employment protections;²⁵⁹ when appropriate, state law may establish higher standards. Indeed, basic U.S. policies that ensure safe work conditions and basic Mexican policies that protect its nationals working abroad are in alignment. Similarly, in this case Article 28 may impose a higher standard than the state law when simultaneous compliance is possible. When this occurs, Article 28 may be enforced in U.S. courts.

b. False Conflicts

The process of identifying a false conflict relies in part on the analysis of whether the foreign law is meant to apply extraterritorially. For the purposes of this Article, it is assumed that when a foreign law is determined to apply extraterritorially, the foreign state has an interest in the dispute.²⁶⁰ The remaining question is whether a competing state interest exists. Although it is evident under the extraterritoriality analysis that Mexico has an interest in applying Article 28 to conduct occurring in the U.S., it may not be clear that states have a competing interest in applying their own contrary law.

Applying this framework to the question of relocation costs, it is clear that a false conflict between foreign and state law may exist, at least in those cases where a state has no interest in protecting the employer-defendant from liability. It should be noted, however, that such a case may be rare. Most states have an interest in protecting employers from liability because it encourages employers to do business within the state.

Nevertheless, given that state interests also seek to protect domestic workers from competition from low-wage workers, the scenario is not impossible. Such a case may arise when an employer-defendant is not incorporated in the state in question or the majority of its business is done outside the state. Even if a state law exists that places the burden of relocation costs on workers, there may be no state interest in allowing the employer-defendants to avail themselves of that law. While it is beyond the scope of this Article to consider the different interests of each state, it suffices to say the possibility for a false conflict exists. When it is identified, U.S. courts may

the express provision in the parties' Agreement).

259. Cf. Gary Minda, *Employment Law*, 42 SYRACUSE L. REV. 491, 531 (1991) (noting federal regulations serve as a minimum floor with respect to whistle-blowing regulations); Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U.I.L. L. REV. 357, 401 (2006) (noting the general approach is that federal regulations serve as a minimum floor that states may exceed).

260. See *supra* Part III.B.2.

consider a claim under Article 28.

2. *The Hard Case*

When Article 28 truly conflicts with state law, as interpreted by the court, the rule embodied in § 196 of the Second Restatement presumes that the law of the state where services are rendered should apply. Since a migrant worker's "services" are rendered in the U.S., the presumption is that U.S. state law applies. However, the inquiry does not end there; the caveats or factors identified in Part III.B.2 must be considered. Although there is no uniform approach to considering or weighing these factors, there remains an argument that U.S. courts should apply Article 28.

a. § 6 Caveats – *Justified Expectations*

First, § 6(2)(d) of the Second Restatement discourages disruption of "justified expectations" and the justified expectation of parties is that Mexican law applies. This argument is strongest with respect to H-2 guest workers since employers sign documentation explicitly promising to abide by relevant federal, state, or local employment laws.²⁶¹ Under this fact pattern, the presumptive rule of § 187 of the Second Restatement, that is, the law chosen by the parties in a contract, may be relied upon instead of § 196. Because legal obligations routinely arise in both Mexico and the U.S. prior to when actual work begins, there is a strong argument that the relevant "local law," i.e., the law chosen, is the law where recruitment occurs, i.e., Mexico.²⁶²

With respect to workers who have no explicit protection available in their contract, the argument is weaker; however, Mexican law may still apply. Even without express promise by employers to follow the relevant local law, it may be argued that the location of the pre-employment period still matters. For example, alongside the place of performance and the location of the subject matter of the contract, § 188 of the Second Restatement considers the place of contracting and the place of negotiation of the contract as factors to be taken into account in determining the applicable law.²⁶³

Additionally, even without an explicit provision, it is reasonable to believe that the expectation of parties is that Mexican law applies given that Mexican

261. 20 C.F.R. §§ 655.203(b), 633.103(b), 655.3(b) (West 2009). ("As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that . . . the employer will comply with applicable Federal, State and local employment-related laws").

262. See Griffith, *supra* note 79, at 399 (proposing the same argument in the context of incorporation of Article 28 by reference in AWPAs).

263. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 188(2) (1971) (governing contract issues in the absence of effective choice by the parties).

law was applicable at the time of contracting.²⁶⁴ Indeed, in many states, the traditional rule is that the law of the state where the contract is made, that is, where the last act legally necessary to bring the contract into effect occurs, governs a contract.²⁶⁵ This line of reasoning has been invoked in several cases considering whether Article 28 is incorporated into U.S. law.²⁶⁶ Thus, from an objective standard, it is likely that a grower who recruits in Mexico and a worker recruited in Mexico expect Mexican law to apply to their activities in Mexico.²⁶⁷

Finally, as mentioned previously, Congress often creates legal obligations for employers at times and in places prior to the start of the traditional employment relationship.²⁶⁸ Likewise, in Mexico, Article 28 requires recruiters and employers alike to respect a broad array of worker rights, suggesting the employment relationship is created, or is “cognizable,” in Mexico.²⁶⁹ Thus, in determining the “relevant law,” both Mexico and the U.S. find the location of the pre-employment period matters.

b. Section 6 Caveats – Needs of the Interstate and International System

Under section 6(2)(a) of the Second Restatement, the needs of the interstate and international systems must be considered. As such, section 6(2)(a) requires U.S. courts to enforce Article 28 domestically in two ways.²⁷⁰ First, U.S.-Mexico relations call for recognition of an Article 28 cause of action in U.S. courts. Although the balance of power between the nations is often characterized as lopsided in favor of the U.S., Mexico is an important ally to the

264. Griffith, *supra* note 79, at 401-407.

265. For an illustration of this traditional contract rule in action, see *Crawford v. Manhattan Life Ins. Co. of N.Y.*, 221 A.2d 877 (Pa. 1966). *Nationwide Mutual Insurance Co. v. Malta*, 434 A.2d 164 (Pa. 1981).

266. See, e.g., *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269, 1287 (M.D. Fla. 1999); *Colon v. Casco, Inc.*, 716 F. Supp. 688 (D. Mass. 1989).

267. Notably, a subjective test may require the Mexican worker and the U.S. employer actually knew Article 28 applied.

268. See 29 U.S.C. § 1831(e) (“No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any seasonal agricultural worker concerning the terms, conditions, or existence of agricultural employment”). For more information on the legislative history of AWPAs, see Bill Beardall, Equal Justice Center, *Migrant and Seasonal Agricultural Worker Protection Act, Outline and Annotations* (Updated and annotated by Greg Schnell, Migrant Farmworker Justice Project, Apr. 2009).

269. See Jennifer Hill, *Binational Guest Worker Unions: Moving Guest Workers into the House of Labor*, 35 FORDHAM URB. L.J. 307, 332-333 (2008) (arguing that an employment relationship exists in Mexico for both the purposes of enforcing minimum employment guarantees and for the purposes of workers exercising union rights).

270. It is important to note that neither of these ways should be labeled as “international comity.” See Ramsey, *supra* note 127, at 936.

U.S. in its War Against Drugs and its War Against Terror. Allowing foreign law causes of action is a relatively low-cost way for the U.S. to foster what some in Congress call a “special relationship” with Mexico.²⁷¹ Second, as a signatory to several international labor standards, the U.S. has agreed to provisions that were sometimes stricter than that otherwise provided under U.S. federal and state laws.²⁷² For example, both North American Free Trade Agreement (NAFTA) and Central America Free Trade Agreement (CAFTA) provide protections that go beyond U.S. laws.²⁷³

c. Section 196 Caveat – Intensity of the Foreign State’s Interest

In the comments to section 196, the Second Restatement provides an exception to the presumptive rule. In the case where another state has an interest in having its local law apply, that state’s law applies. To some extent, this caveat may be thought of as similar to the public policy exception used under the traditional approach to choice of law²⁷⁴ or as a variant on the interest analysis approach.²⁷⁵

Whichever perspective is adopted, the “intensity of interest” analysis largely mirrors the analysis of whether there was intent to apply the foreign law extraterritorially. While it will not be repeated here, it suffices to say Mexico has asserted an interest in having Article 28 apply to conduct in the U.S. Notwithstanding Mexican interest in protecting its nationals, the “intensity” of Mexico’s interest is reflected in the history and language of the statute, statements by Mexican officials, and the fact that the conduct directly affects the Mexican economy.

d. Applying the Test: Mexico Has the Most Significant Relationship

In summary, Article 28 should apply given the factors listed in section 6 and the “intensity of the interest”²⁷⁶ Mexico has in having its local law applied.

271. *See, e.g.*, 147 Cong. Rec. 10380-01 (2001) (statement of Sen. Dodd) (identifying the “special relationship” between the U.S. and Mexico in the context of fighting terrorism), 147 Cong. Rec. 5413-06 (2002) (statement of Rep. Pence) (noting the “special relationship” between the U.S. and Mexico).

272. *See generally* Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 *FORDHAM INT’L L.J.* 386 (2006).

273. *Id.*; *see also* Wishnie, *supra* note 113.

274. *See, e.g.*, *Louks v. Standard Oil Co. of New York*, 224 N.Y. 99 (1918) (applying the public policy exception).

275. Under an interest analysis, the relative interests of the competing jurisdictions are balanced and the law of the jurisdiction with the greater interest applies. *See* *Lilienthal v. Kaufman*, 239 Or. 1 (1964). Some states have adopted a related comparative impairment test. *See* *Bernard v. Harrah’s Club*, 16 Ca.3d 313 (1976).

276. *RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS* § 196, cmt. d.

This argument's reliance on the factors listed in section 6 should not be troubling. There are many cases where the presumptive rules are ignored and the courts solely base their analysis on the section 6 factors. For example, in *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, the court first went through the entire section 6 analysis to determine New Mexico law applied. Only as an afterthought did it add, "*A fortiori*, the presumption of section 196 that New Mexico law applies has not been rebutted."²⁷⁷

V.

CONCLUSION

This Article presents the argument that both U.S. laws and the laws of the worker's country of origin may regulate the employment relationship between a migrant worker and his or her employer when a worker is migrating between the two countries. Notably, this approach is not without its challenges. It largely depends on the choice of law approach adopted by U.S. courts toward legislative jurisdiction. In finding that U.S. courts should enforce Article 28, the analysis applies the effects test, incorporates factors such as the needs of the international system and justified expectations of parties, and considers state interests. While this methodology is sound under modern approaches to choice of law, it may be harder to defend under a strict territorial, or jurisdiction-selecting, approach.

That said, at least in those jurisdictions that employ a modern approach to choice of law, there is a strong suggestion that migrant workers who are recruited in Mexico and must travel from Mexico to the United States should not bear the costs of relocation under Article 28 of Mexico's Federal Labor Law. U.S. courts may choose to enforce Article 28 in addition to U.S. law because Article 28 was meant to apply extraterritorially, no conflict arises with state laws, and Mexico has an interest in seeing its laws enforced. Just as U.S. workers bring supplemental state law cause of actions in addition to federal claims, Mexican-nationals should likewise be permitted to bring a supplemental claim under Article 28.

A U.S. report stated, "Governments of destination countries for migrant workers have a special obligation to ensure that those workers are not subjected to servitude . . . [and] [g]overnments of major source countries have obligations . . . to protect [] workers' interests by limiting pre-departure fees and 'commissions' to reasonable levels."²⁷⁸ While this Article is limited to the question of relocation costs when a U.S. employer recruits workers in Mexico, other countries sending large number of workers to the United States, such as Guatemala, have similar laws and a similar analysis may be applied.

As a final note, there are a myriad of ways U.S. employment regulations

277. 198 Colo. 444, 449 (1979).

278. U.S. DEP'T OF STATE, *supra* note 82, at 16.

fail to protect migrant workers where a foreign law provides a right of action.²⁷⁹ This Article does not address the majority of the systemic problems of inadequate and unequal protection under U.S. law discussed in Part I. For example, in addition to provisions relating to relocation costs, Article 28 requires the payment of social security benefits while U.S. law does not explicitly bar it.²⁸⁰ However, it may be that a choice of law analysis would similarly allow enforcement of the foreign law in U.S. courts. In considering these other applications, the analysis regarding supplemental jurisdiction will be the same. While this Article examines the question within the context of an employee's relocation costs to the U.S., the analysis may be applicable in other areas where U.S. law is deficient or "silent" and foreign law "speaks."

279. See *supra* Part I (detailing deficiencies in U.S. laws in the protection of migrant workers).

280. Ley Federal de Trabajo: art. 28(I)(c), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf>.