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## Articles

# International Employment: Antidiscrimination Law Should Follow Employees Abroad

Paul Frantz\*

### INTRODUCTION

The tremendous growth in international business coupled with the ease with which U.S.-based businesses move around the world makes it natural that employment concerns move with them. This is especially true as the nation's—and the world's—labor force becomes more mobile.<sup>1</sup> As a result, many U.S. citizens and lawful permanent residents<sup>2</sup> are employed abroad.

Within the United States, laws that protect workers from discrimination generally apply equally to both citizens and lawful permanent residents.<sup>3</sup> Beyond U.S. borders, however, U.S.

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\* With deep regret the Editors note that Professor Frantz recently passed away. Professor Frantz was extremely dedicated to the field of international business law and his loss will be noted. He held a J.D. degree from the University of Montana, a Masters in International Management from Thunderbird University, and an LL.M. from McGeorge University. He was an associate professor of international business/law, and the Co-Director of the International Business Program at California State University, Long Beach.

1. The mobility of the labor force has been due in large part to technological and sociological changes throughout the world. See, e.g., DONALD A. BALL ET AL., *INTERNATIONAL BUSINESS* 390 (9th ed. 2004).

2. Lawful permanent resident is defined as a noncitizen "having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20) (2000). Lawful permanent resident status does not grant citizenship, nor does it provide immunity from removal from the United States. Lawful permanent residents may be removed for various offenses including commission of certain crimes. 8 U.S.C. § 1227(a)(2) (2000).

3. See *infra* text accompanying notes 28–46. This discussion also raises the

citizens enjoy greater protections under U.S. employment laws than do their permanent resident counterparts. For example, U.S. companies must extend the protections of Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) to any employees at overseas sites who are U.S. citizens. On the other hand, U.S. law does not require U.S. companies to extend the same protections to U.S. permanent residents in their employ.

At the same time, U.S. citizens and lawful permanent residents may be covered by the employment laws of the nation in which they are working.<sup>4</sup> Numerous international agreements and treaties also contain language pertaining to employment and employment discrimination. The Universal Declaration of Human Rights (UDHR), for example, contains specific provisions about achieving full participation in all aspects of society for all people.<sup>5</sup> Free trade agreements also contain labor provisions.<sup>6</sup>

This Article discusses extraterritorial application of U.S. federal employment discrimination laws and the resultant consequences for international business. Part I discusses the mobility of labor followed by a general discussion of extraterritori-

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issue of application of U.S. employment antidiscrimination laws to non-citizens working in the United States for foreign companies. While the general rule is that U.S. laws apply to all people within the United States, treaties existing between the United States and other nations complicate the issue. *See generally* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982). A thorough discussion of how treaties influence the application of U.S. laws to non-citizens within the United States is beyond the scope of this Article. For a discussion of the applicability of employment discrimination provisions to foreign companies operating in the United States, see Keith Sealing, *Sex, Allies and BFOQs: The Case for Not Allowing Foreign Corporations to Violate Title VII in the United States*, 55 ME. L. REV. 90 (2002).

4. Of course, these laws may or may not be consistent with U.S. laws. Scholars have identified five core labor standards worldwide, one of which is nondiscrimination in employment based on gender, ethnicity, and other similar factors. KEITH E. MASKUS, SHOULD CORE LABOR STANDARDS BE IMPOSED THROUGH INTERNATIONAL TRADE POLICY 5 (The World Bank Dev. Res. Group, Working Paper No. 1817, 1997), <http://worldbank.org/research/trade/pdf/wp1817.pdf>. The other four core labor standards are freedom of association, collective bargaining over working conditions, prohibition of forced labor, and prohibition of exploitative forms of child labor. *Id.*

5. G.A. Res. 217 (III)A, U.N. GAOR (1948).

6. When originally considered, the North American Free Trade Agreement contained no provisions on labor matters, although it did contain immigration provisions. North American Free Trade Agreement, Dec. 17, 1992, 107 Stat. 2057 (1994), 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA]. Before its final approval the parties added a side agreement on labor, the North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

ality. The Article then discusses federal employment discrimination acts and their extraterritorial application. Finally, the Article discusses how employment discrimination laws in other nations and international law interact with U.S. employment discrimination laws. The Article concludes by arguing that Title VII, the ADA, and the ADEA should apply extraterritorially as to both U.S. citizens and lawful permanent residents who work abroad for U.S. employers. This extraterritorially should apply regardless of foreign labor laws<sup>7</sup> and conditions, which often frustrate, but do not prevent, extraterritorial application of U.S. laws.

## I. THE GLOBALIZATION OF LABOR AND CAPITAL MARKETS

### A. THE INCREASING MOBILITY OF THE LABOR MARKET

Classical economists assumed labor was immobile because more complications were involved in moving people than in moving capital or goods.<sup>8</sup> Technological improvements, however, particularly those related to transportation,<sup>9</sup> have made labor mobility increasingly possible in recent years.<sup>10</sup> National laws<sup>11</sup>

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7. As in the United States, the cultural, religious, and social forces at work in other countries influence their working conditions and employment laws. For a discussion of employment laws in other nations, see *infra* text accompanying notes 121–127.

8. BALL, *supra* note 1; see also RAFAEL GOMEZ, GLOBALIZATION AND LABOR STANDARDS: MULTINATIONAL WORKER PROTECTION IN AN ERA OF “FOOTLOOSE” CAPITAL 12 (University of Toronto Centre for Industrial Relations, Working Paper No. 1998-4), <http://www.utoronto.ca/cis/essay.pdf>.

9. For example, in 1969, the Boeing Company introduced its Boeing 747, which allowed masses of people economically to be on the other side of the planet within a day. Joe Sharky, *Happy Birthday to the Boeing 747*, N.Y. TIMES, Feb. 10, 2004, at C7.

10. For example, in 2000, at least 1.3 million people entered Europe to work and live. OECD in Figures 2002/Supplement 1, at 82 [hereinafter OECD in Figures].

11. In the United States, immigration is a matter reserved exclusively for the federal government. See, e.g., *Smith v. Turner*, 48 U.S. 283 (1849). The basis for this congressional power is found in the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. As a practical matter, it would be difficult for each state to establish its own set of immigration rules. Essentially, each state would be setting its own foreign policy, which would violate the Constitution. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (declaring that federal law preempted enforcement of a Massachusetts law barring agencies and divisions of the Massachusetts state government from buying goods or services from organizations doing business with

favoring immigration further accelerate global labor mobility, while more restrictive immigration policies have the opposite effect.<sup>12</sup>

Immigration has risen since the mid-1990s in most developed nations, including the member states of the Organization for Economic Cooperation and Development (OECD).<sup>13</sup> As an indication of worldwide labor mobility, there are 31,107,889 foreign-born individuals living legally<sup>14</sup> in the United States and

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Myanmar). Additionally, allowing each state to establish its own immigration laws would result in a confusing patchwork of immigration laws with questionable results as immigrants crossed state lines. This situation would be complicated by the Constitutional mandate to give full faith and credit to acts of other states. U.S. CONST. art. IV, § 1.

12. For example, certain immigration provisions passed in the wake of the September 11th terrorist acts may have a chilling effect on labor mobility. *See, e.g.,* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA PATRIOT Act tightened restrictions on the Visa Waiver Program, which allows temporary visitors from certain countries to enter the United States without a visa. 8 U.S.C. § 1187 (2000); *see also* [http://travel.state.gov/visa/tempvisitors\\_novisa\\_waiver.html](http://travel.state.gov/visa/tempvisitors_novisa_waiver.html) (last visited Jan. 20, 2005). Participation in the Visa Waiver program is now limited to nations employing measures to prevent passport theft and tampering. Pub. L. No. 107-56, sec. 417, 115 Stat. 272, 355. Such modifications to the Visa Waiver Program will potentially affect labor mobility, as many of the participating nations in the Visa Programs are principal destinations for employment of U.S. citizens and lawful permanent residents working abroad.

13. The OECD is an organization of thirty nations based in Paris, France. <http://www.oecd.org> (last visited Jan. 20, 2005). The United States and Germany received the highest numbers of foreign migrants in 2000, with 850,000 green cards awarded in the former and 650,000 newly registered long-term immigrants in the latter. Japan, the U.K., Italy, and Canada each absorbed more than 200,000 legal immigrants. OECD in Figures, *supra* note 10, at 82.

14. The U.S. Census Bureau reported that as of the 2000 Census, there were 31,107,889 foreign-born individuals living legally in the United States. Of that total, 40.3% were U.S. citizens. U.S. DEPARTMENT OF COMMERCE, UNITED STATES SUMMARY: 2000 CENSUS OF POPULATION AND HOUSING, table 1 (2003). Foreign-born individuals made up 11.1% of the total U.S. population in 2000. *Id.* The U.S. Citizenship and Immigration Services (CIS) reported that the United States admitted 705,827 noncitizens in immigrant (permanent) visa categories and 27,849,443 in non-immigrant (temporary) visa categories for a total of 28,555,270 to the United States in fiscal year 2003. 2003 YEARBOOK OF IMMIGRATION STATISTICS, <http://uscis.gov> [hereinafter "Statistics Yearbook 2003"]. "Admission" to United States is a technical term indicating lawful entry. 8 U.S.C. § 1101(a)(13)(A) (2000). Europeans are still coming to the United States, but in much smaller numbers than they did in the 19th century. Immigrants now come from all over the world, with the largest number of legal immigrants coming each year to the United States from Mexico (91,000), Vietnam (78,000), the Philippines (59,000), and republics of the former Soviet Union (44,000). Among these immigrants, nearly three-fourths intend to reside in six states: California, New York, Texas, Florida, New Jersey, and Illinois. Statistics Yearbook 2003.

probably several million more living illegally.<sup>15</sup> By comparison, there are 4,163,810 U.S. citizens living outside of the United States.<sup>16</sup> People may be motivated to move because of better opportunities abroad, or because of adverse political or economic conditions in their home nations.<sup>17</sup>

As a result of immigration coupled with social and cultural changes in society, the workforce in the United States has changed significantly and this change has affected international employment. For example, while almost half of the work force in the United States is composed of women,<sup>18</sup> most U.S. citizens employed abroad are men.<sup>19</sup> Although opportunities abroad are increasing for women, progress is slow.<sup>20</sup> As opportunities for

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15. By comparison to the number of foreign-born individuals living legally in the United States, the illegal immigrant population is hard to determine with any precision. Based on information gathered from the 2000 census, the CIS (formerly known as the Immigration and Naturalization Service, or INS) in 2000 estimated the illegal immigrant population in the United States to be seven million in the United States with 2.2 million in California alone. [uscis.gov](http://uscis.gov) (last visited Dec. 8, 2004). Another estimate put the number of illegal immigrants in California at three million. Tyche Hendricks, *Davis Oks Licenses for Illegal Residents*, S.F. CHRON., Sept. 6, 2003, at A1. Others estimate the number nationwide may be ten million. Diane E. Lewis, *Labor Urges Amnesty for Undocumented Workers*, BOSTON GLOBE, Sept. 11, 2003, at E1. Tom Ridge, former Secretary of the U.S. Department of Homeland Security, put the estimate in the nation between eight to twelve million. Philip Shenon, *Ridge Talks of Need to Change Status of Illegal Immigrants*, N.Y. TIMES, Dec. 11, 2003, at A29. In 2002, the CIS estimated that sixty-nine percent of illegal immigrants were from Mexico. [uscis.gov](http://uscis.gov) (last visited Dec. 8, 2004). The number of illegal immigrants includes individuals who entered the nation legally, but overstayed visa time limits. The Immigration Reform and Control Act of 1986 (IRCA) defined "unauthorized alien" as follows: "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." Pub. L. No 99-603, 100 Stat. 3359, (codified at 8 U.S.C. § 1324a(h)(3) (2000)). See *infra* note 78 for a discussion of IRCA.

16. Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 n.289 (1990) (citing THE WORLD ALMANAC AND BOOK OF FACTS: 1990, at 555 (1989)). This example of labor mobility had forced a renewed recognition of the importance of examining the extraterritorial aspects of federal employment discrimination laws.

17. The late 1990s with its economic boom resulted in low unemployment in many industrialized nations, including the United States. The beginning of the 21st century saw the United States and other nations suffer economic problems resulting in higher unemployment. BALL, *supra* note 1, at 396.

18. Women comprise 46.5% of the U.S. labor force and 49.5% of managerial and professional specialty positions in the United States. Catalyst 2000, Census of Women Corporate Officers and Top Earners of the Fortune 500, Catalyst. Catalyst is a nonprofit research and advisory organization working to advance women in business.

19. Only 13% of U.S. managers sent abroad are women. *Id.*

20. According to a study conducted by Catalyst, misconceptions about women's

women abroad increase, employment law concerns for women abroad also will increase, including potential discrimination issues for which laws such as Title VII were enacted to address.

## B. THE INCREASING MOBILITY OF PRODUCTIVE CAPITAL (OUTSOURCING)

Governments around the world have been concerned for decades about the exodus of their highly intelligent workers to the United States. Many in the United States are now concerned about an exodus of a different sort: that of U.S. productive capital—and the jobs that go along with it—moving overseas. This trend, known as outsourcing, occurs when companies hire foreign employees to fill positions from outside of the United States.<sup>21</sup> Current outsourcing includes both skilled and unskilled positions and has become especially controversial in recent years.<sup>22</sup> China and India are especially popular destinations for such jobs.<sup>23</sup> Companies have moved many business services, including call centers and even computer network op-

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ability to handle international assignments and willingness to accept those assignments are key barriers to women getting selected for the global business arena. According to the Catalyst study:

Survey respondents believe that women are not as “internationally mobile” as men, yet 80 percent of female expatriates have never turned down a relocation, compared to 71 percent of men. A second powerful assumption is that women encounter more work-life conflict while managing a global schedule. However, nearly half of both women and men report that they find work-life balance difficult. Finally, survey respondents believe clients outside the United States are not as comfortable doing business with women as they are with men. In fact, 76 percent of women expatriates said being a woman had a positive or neutral impact on their effectiveness overseas. Both women and men, managers and human resources executives, hold the preconceptions that emerged in this study about women’s ability in the international arena. Yet paradoxically, 90 percent of female expatriates, 91 percent of women with global responsibility who haven’t relocated, and 93 percent of men married to expatriates said they would accept their current assignments again.

Catalyst, *Passport to Opportunity: U.S. Women in Global Business*, October 2000.

21. For a discussion of outsourcing, see *A World of Work: A Survey of Outsourcing*, *ECONOMIST*, Nov. 13, 2004.

22. Edwin Chen, *Bush Pledges Help on U.S. Jobs*, *L.A. TIMES*, Feb. 13, 2004, at A37. The article reported that President Bush remained concerned about “the flow of jobs to other countries.” President Bush spoke after N. Gregory Mankiw, Chairman of the Council of Economic Advisers, who said that outsourcing of jobs was “just a new way of doing international trade.” *Id.* Indeed, economic theory indicates that when jobs are forced abroad, they are usually replaced by other higher paying jobs in the United States. *The New Jobs Migration*, *ECONOMIST*, Feb. 21, 2004, at 11.

23. *Outsourcing 101*, *WALL ST. J.*, May 27, 2004, at A20.

erations, abroad.<sup>24</sup>

The increasing mobility of U.S. productive capital raises interesting questions about the applicability of U.S. laws to people with no connection to the United States other than being employed by U.S. companies abroad.<sup>25</sup> The Supreme Court has been reluctant to extend U.S. laws to non-Americans living outside the United States.<sup>26</sup> Congress was specific in that the extraterritorial provisions of Title VII, the ADA, and the ADEA apply to U.S. *citizens* working abroad.<sup>27</sup>

## II. THE PERSONAL AND TERRITORIAL REACH OF U.S. LAWS

### A. APPLICABILITY OF U.S. LAWS TO NON-CITIZENS IN THE UNITED STATES

Within the United States, laws generally apply equally to both citizens and others legally in the United States. The U.S. Supreme Court has used the Constitution<sup>28</sup> to strike down state laws differentiating citizens from noncitizens in areas such as education,<sup>29</sup> commercial licenses,<sup>30</sup> student financial aid,<sup>31</sup> and

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24. *The Latest in Remote Control*, *ECONOMIST*, Sept. 11, 2004, at 57.

25. The legal issues raised by employment of people with no connection to the United States other than being employed by U.S. companies abroad are beyond the scope of this Article. For a discussion of the use of the Alien Tort Claims Act for alleged personal injury by noncitizens employed outside of the United States by U.S.-based employers, see Phillis R. Morgan & R. Bradley Mokros, *International Employment*, 35 *INT'L LAW* 351, 351-52 (2001).

26. In a recent antitrust case, *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 124 S. Ct. 2359 (2004), a unanimous Supreme Court ruled that foreign customers cannot sue international companies in the United States claiming antitrust violations. See *infra* text accompanying notes 47-72 for a discussion of the presumption against extraterritoriality.

27. Pub. L. No. 102-166, sec. 109, 105 Stat. 1071, 1077 (1984) (codified as amended in scattered sections of 42 U.S.C.); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, sec. 802, 98 Stat. 1767, 1792 (codified in scattered sections of 29 U.S.C.).

28. Equal Protection Clause, U.S. CONST. amend. XIV, § 1; Supremacy Clause, U.S. CONST. art. VI.

29. *Plyler v. Doe*, 457 U.S. 202 (1982) (addressing education of illegal immigrants).

30. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (striking down a California law barring issuance of commercial fishing licenses to those ineligible to become U.S. citizens).

31. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

state welfare programs.<sup>32</sup> Additionally, constitutional rights, such as the First Amendment, apply to lawful permanent residents.<sup>33</sup> With limited exceptions (for national security purposes, for example), private employers requiring U.S. citizenship as a basis for employment are in violation of federal law.<sup>34</sup> Noncitizen residents of the United States can be treated differently depending upon constitutional mandates. For example, noncitizens do not have the right to vote.<sup>35</sup>

With respect to most provisions of federal employment and labor laws, the Supreme Court has ruled that these laws apply only to those noncitizens legally in the United States. The Court stated this position in 1976 in *De Canas v. Bica*,<sup>36</sup> and in 2002 in *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>37</sup> Unlike the situations mentioned above, prohibitions against illegal immigrants do not differentiate between citizens and noncitizens, but between illegal and legal immigrants. *De Canas* upheld a California law preventing employment of illegal immigrants. *Hoffman* ruled that the National Labor Relations Board could order neither back pay nor reinstatement to an illegal immigrant who was wrongly terminated by an employer for union activity. *Hoffman* is significant because it showed that when prevention of employment of illegal immigrants is at stake, immigration law trumps the National Labor Relations Act.<sup>38</sup> By contrast, later in 2002, the United States District Court for the Northern District of California in *Singh v. Jutla & C.D. & R's*

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32. *Graham v. Richardson*, 403 U.S. 365 (1971). In the absence of specific federal authorization, states are not permitted to require citizenship as a requirement for benefit eligibility. In prohibiting this distinction, the Supreme Court identified noncitizens as a "discrete and insular minority" deserving heightened judicial protection. *Id.* at 372 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). As a result, the *Graham* Court applied a strict scrutiny test requiring provisions of state welfare laws to serve a compelling governmental interest. 403 U.S. at 376. *Graham* noted the inconsistency of excluding noncitizens who pay taxes from public benefit programs. *Id.* The Court rejected the states' claim of a compelling government interest in preserving limited welfare benefits for citizens. *Id.* at 376-77. The Court held that classifications based on citizenship were unjustified and constituted a violation of the Equal Protection Clause. *Id.* at 382.

33. *Rafeedie v. INS*, 795 F. Supp. 13, 21-23 (D. D.C. 1992).

34. 8 U.S.C. § 1324b(a)(1)(B) (2000). However, national defense contractors are often required to have citizenship employment requirements. See 8 U.S.C. § 1324b(a)(2)(C) (2000).

35. See generally Elise Brozovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLINE J. PUB. L. & POL'Y 403 (2002).

36. 424 U.S. 351 (1976).

37. 535 U.S. 137 (2002).

38. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

*Oil, Inc.* held that illegal immigrants are entitled to receive pay for work actually performed.<sup>39</sup> In *Singh*, the employer recruited an illegal immigrant for employment, and, after the illegal immigrant employee filed a claim for unpaid wages, the employer reported him to immigration officials.<sup>40</sup> While the *Singh* court noted that *Hoffman* eliminated back pay as a remedy available to illegal immigrants, it distinguished *Hoffman* from the case before it: “*Hoffman* does not establish that an award of unpaid wages to undocumented workers for work actually performed runs counter to [the Immigration Reform and Control Act].”<sup>41</sup> As a result, the *Singh* court allowed the employee to proceed with his claim for payment of unpaid wages.<sup>42</sup>

To qualify for Title VII protection in the United States, some courts have held that noncitizen plaintiffs must establish that they are qualified for employment in the United States. In *Egbuna v. Time-Life Libraries, Inc.*,<sup>43</sup> the Court of Appeals held that a foreign national who applied for a job in the United States was entitled to Title VII protection “only upon a successful showing that the applicant was qualified for employment.”<sup>44</sup> The Fourth Circuit later clarified that a foreign national is qualified for employment if “the applicant was an alien authorized for employment in the United States at the time in question.”<sup>45</sup> Other courts have held that Title VII applied to all non-citizens, including those not legally in the nation.<sup>46</sup>

## B. EXTRATERRITORIAL REACH OF U.S. LAWS GENERALLY

While lawful permanent residents are subject to and protected by most laws within the United States, those laws do not always cover lawful permanent residents abroad.<sup>47</sup> Subject to

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39. 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

40. *Id.* at 1056–57.

41. *Id.* at 1061 (citing *Flores v. Albertsons, Inc.*, 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002)).

42. *Singh*, 214 F. Supp. at 1062.

43. 153 F.3d 184 (4th Cir. 1998).

44. *Id.* at 187.

45. *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999).

46. *EEOC v. Tortilleria “La Mejor”*, 758 F. Supp. 585, 590 (E.D. Cal. 1991).

47. It is uncommon, but not unheard of, to apply U.S. laws extraterritorially to lawful permanent residents, who by definition are noncitizens. The Internal Revenue Code requires compliance with tax laws by lawful permanent residents, including those living abroad or those having non-U.S. source income. See 26 U.S.C. § 7701(b)(1)(A)(i) (2000) (defining lawful permanent residents as resident aliens for tax purposes); 26 U.S.C. § 7701 (a)(30)(A) (2000) (defining “United States Persons” as including citizens or residents of the United States); 26 U.S.C. § 862 (2000) (re-

constitutional constraints, Congress has the power to regulate and control activity *within* the territory of the United States.<sup>48</sup> U.S. laws can also be extended *outside* the territory of the United States when there is a connection to the United States justifying extraterritorial application.<sup>49</sup> In general, however, the Supreme Court has maintained a “presumption against extraterritoriality” reflecting important foreign policy considerations of the United States.<sup>50</sup> Although the Supreme Court recognized that Congress has the power to extend application of its laws beyond U.S. territory,<sup>51</sup> the presumption is that laws were meant to apply only within the United States. The presumption is to defer to foreign law in order to avoid international discord.<sup>52</sup> In discussing the presumption against extraterritorial application of U.S. laws, the Supreme Court cited policy concerns including protection against conflicts between laws of the United States and those of other nations.<sup>53</sup>

The modern history<sup>54</sup> of the presumption against extraterri-

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quiring tax on income from abroad). Congress intended to have employment discrimination laws apply extraterritorially to citizens, but not to lawful permanent residents working abroad. See *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604–05 (N.D. Tex. 1999) (dismissing a case for lack of subject matter jurisdiction where a non-citizen brought Title VII and ADEA discrimination claims against a U.S. employer arising from employment abroad). Compare 42 U.S.C. § 2000e(f) (2000) (specifying that Title VII applies abroad to U.S. citizens employed by U.S. employers) with 42 U.S.C. § 2000e-1(a) (2000) (specifying that Title VII does not apply abroad to lawful permanent residents employed by U.S. employers). The *Iwata* court indicated that the ADEA provisions on foreign employment are “virtually identical” to those of Title VII, making the analysis the same. *Iwata*, 59 F. Supp. 2d at 604–05. The court indicated the noncitizen in *Iwata* was a resident alien. *Id.* at 602. A resident alien is a lawful permanent resident. 26 U.S.C. § 7701(b)(1)(A)(i) (2000).

48. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a)–(b) (1987) [hereinafter RESTATEMENT].

49. A nation may “prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory. . . .” *Id.* § 402(2). Such law must be reasonable. See *id.* § 403(1).

50. Equal Employment Opportunity Comm’n v. Arabia American Oil Co., 499 U.S. 244, 248 (1991) [hereinafter *Aramco*].

51. *Id.*

52. *Id.* (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)).

53. *Id.* The Court in *Aramco* also noted that in adding extraterritorial application to the ADEA, “Congress specifically addressed potential conflicts with foreign law. . . .” *Id.* at 256. In *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 286 (1949), the Court expressed its concerns about attempting to control labor conditions in other nations: “An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.”

54. For a detailed discussion of the application abroad of U.S. laws regulating

toriality can be traced to 1902 to an antitrust case, *American Banana Co. v. United Fruit Co.*,<sup>55</sup> in which the Supreme Court adopted a rule of construction limiting U.S. laws in their "operation and effect to the territorial limits over which the lawmaker has general and legitimate power."<sup>56</sup> *American Banana* involved allegations of illegal acts under the Sherman Antitrust Act.<sup>57</sup>

While one must usually overcome the presumption against extraterritoriality in order to enforce a U.S. law overseas, the presumption is subject to two significant exceptions: clear congressional intent and direct effect within the United States. These exceptions require courts to determine whether extraterritoriality is appropriate. In making such extraterritoriality determinations, courts have struck a balance between showing respect for international law and recognizing that the Constitution is subordinate to no other law.<sup>58</sup>

The first exception to the presumption against extraterritoriality appears when there is clear congressional intent to apply a law abroad. In the absence of clear congressional extraterritorial mandates, courts typically apply the presumption against extraterritoriality and refuse to allow extraterritorial extension.<sup>59</sup> In *Equal Employment Opportunity Commission v. Arabia American Oil Co. (Aramco)*,<sup>60</sup> the Supreme Court acknowledged that "Congress has the authority to enforce its laws

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businesses prior to *Aramco*, see Jonathan Turley, "When In Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

55. 213 U.S. 347 (1902).

56. *Id.* at 357.

57. Sherman Antitrust Act of July 2, 1890, ch. 647, 26 Stat. 209-10. *American Banana* did not prevent all future extraterritorial application of antitrust laws. On several occasions, the Court distinguished *American Banana* by holding that a "conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). Courts after *American Banana* have limited its ruling to its specific facts, allowing extraterritorial application in certain situations. See, e.g., *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 608-09 (9th Cir. 1976).

58. See *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994) (stating that in "determining whether a statute applies extraterritorially, we . . . presume that Congress does not intend to violate principles of international law."); see also *infra* notes 205-18 (discussing the significance of the Constitution in ensuring sovereignty of the United States).

59. See, e.g., *Aramco*, 499 U.S. at 248; see also *Smith v. United States*, 507 U.S. 197, 203-04 (1993); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952).

60. 499 U.S. 244 (1991).

beyond the territorial boundaries of the United States,"<sup>61</sup> but tempered it with the definitive statement "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>62</sup> The Court found no clear intent in *Aramco*.<sup>63</sup> While courts recognize that Congress has power to impose laws extraterritorially, in the absence of clear congressional intent, they are reluctant to conclude that Congress exercised that power. Extraterritorial application has been extended through congressional intent in a variety of areas including taxation<sup>64</sup> and business practices.<sup>65</sup>

Even in the absence of clear congressional intent, as a second exception to the presumption against extraterritoriality, courts have authorized extraterritorial application where certain conduct abroad has a direct effect within the United States through the effects doctrine.<sup>66</sup> In light of *Aramco*, some courts question whether the effects doctrine is still valid absent a clear congressional intent to extend the law extraterritorially.<sup>67</sup>

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61. *Id.* at 248.

62. *Id.* (quoting *Foley Bros.*, 336 U.S. at 285).

63. *Aramco*, 499 U.S. at 256 ("Congress failed to provide any mechanisms for overseas enforcement of Title VII.").

64. Congress imposes a tax on the worldwide taxable income of U.S. citizens and lawful permanent residents according to the rates set forth in 26 U.S.C. § 1 (2000). See *supra* note 47 and accompanying text for a discussion of tax requirements for lawful permanent residents. In 1924, the Supreme Court authorized taxation of U.S. citizens living abroad. *Cook v. Tait*, 265 U.S. 47, 56 (1924). The RESTATEMENT addressed taxation specifically as it discussed extraterritoriality. RESTATEMENT, *supra* note 48, § 411(1)(a) (permitting exercise of tax jurisdiction on the basis of nationality); *id.* § 412(1)(a) (allowing tax jurisdiction over "a national, resident, or domiciliary of the state, whether the source of the income is within or without the state").

65. One of the best examples of a law containing clear congressional intent requiring extraterritorial application is the Foreign Corrupt Practices Act (FCPA) of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.). The FCPA sought to prevent bribery abroad by U.S. businesses and mandated that activity occurring abroad should come under scrutiny of U.S. law. See *id.*

66. The RESTATEMENT indicates that a nation may "prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory . . ." RESTATEMENT, *supra* note 48, § 402(1)(c).

67. See, e.g., *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994) (noting that the "Supreme Court's recent discussions of the presumption against extraterritoriality [which included the discussion in *Aramco*] seem to require that all statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears."). The RESTATEMENT, which provided authority for the effects doctrine, was prepared in 1987, four years before *Aramco*. See RESTATEMENT, *supra* note 48.

Other courts, by contrast, have allowed extraterritorial application of certain laws.<sup>68</sup>

Antitrust law is one example of where extraterritorial application has been allowed through the effects doctrine.<sup>69</sup> In order to establish jurisdiction in an antitrust case, there must be a direct and substantial effect on commerce in the United States.<sup>70</sup> Another example is environmental law. In *Environmental Defense Fund, Inc. v. Massey*,<sup>71</sup> the D.C. Circuit extended U.S. environmental laws abroad where the regulated conduct would "result in adverse effects within the United States."<sup>72</sup> Even though each individual employed abroad would have a minimal effect on commerce in the United States, collectively, all employees employed abroad would have a significant impact on commerce in the United States.

### III. FEDERAL EMPLOYMENT DISCRIMINATION LAWS

As originally passed, the three employment discrimination acts discussed in this Article were silent on the issue of extraterritorial application. In the case of Title VII, this silence resulted in the Supreme Court's 1991 *Aramco* decision that Title VII did not apply to U.S. citizens working for U.S. employers abroad.<sup>73</sup> The Equal Employment Opportunity Commission (EEOC) in *Aramco* argued that Congress intended Title VII to apply extraterritorially,<sup>74</sup> but the Court found insufficient evidence to support that position.<sup>75</sup> In its analysis, the Court noted that unlike Title VII, Congress had amended the ADEA specifically to provide for extraterritorial application.<sup>76</sup> The *Aramco*

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68. As mentioned later in the text, *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993), which was decided after *Aramco*, extended certain environmental laws extraterritorially. 986 F.2d at 530-32. See also *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1544 (9th Cir. 1994) (acknowledging that the effects doctrine may be a possible basis for extraterritorial application of the Bank Company Holding Act and the Sherman Antitrust Act).

69. See, e.g., *Cont'l Ore*, 370 U.S. at 704-05; *Timberline Lumber*, 549 F.2d at 608-15; *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) [hereinafter *Alcoa*].

70. *Timberline Lumber*, 549 F.2d at 615.

71. 986 F.2d 528 (D.C. Cir. 1993).

72. *Id.* at 531.

73. 499 U.S. 244, 259 (1991).

74. *Id.* at 248.

75. *Id.* at 259.

76. *Id.* at 258-59. Congress amended the ADEA through the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, sec. 802, 98 Stat. 1767, 1792 (codified as amended in scattered sections of 29 U.S.C.).

Court emphasized the power of Congress to address extraterritoriality issues: "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way we cannot."<sup>77</sup> In a direct response to this invitation, Congress in 1991 amended both Title VII and the ADA to provide for their extraterritorial application.<sup>78</sup>

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

78. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 109, 105 Stat. 1071, 1077.

Congress's approach to extraterritorial application of Title VII, the ADA, and the ADEA can be contrasted with its stance on extraterritorial application of two other federal employment statutes. The Fair Labor Standards Act of 1938 (FLSA) aimed to eliminate unfair working conditions through measures such as a federal minimum wage and a prohibition on discrimination in wages based on sex. 52 Stat. 1060 (codified beginning at 29 U.S.C. § 201 (2000)); see also 29 U.S.C. § 206(a)(1) (minimum wage provision), 29 U.S.C. § 206(d) (gender pay equity provision). Congress addressed the extraterritoriality issue for the FLSA in 1957, specifying that the FLSA does not apply abroad. Pub. L. 85-231, 71 Stat. 514 (codified at 29 U.S.C. § 213(f) (2000)). See also *Cruz v. Chesapeake Shipping, Inc.*, 738 F. Supp. 809, 820 (D. Del. 1990) (noting that the foreign workplace exemption was "added to the FLSA 'to exclude from any possible coverage . . . work performed by employees within a foreign country'" (quoting Senate report)), *aff'd*, 932 F.2d 218 (3d Cir. 1991).

The Immigration Reform and Control Act of 1986 (IRCA) made it illegal to employ people not authorized to work in the United States. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a(a)(1) (2000)). The IRCA's legislative history report highlighted congressional desire to control illegal immigration to the United States. The committee report stated:

This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. The bill would prohibit the employment of aliens who are unauthorized to work in the United States because they either entered the country illegally, or are in an immigration status which does not permit employment. U.S. employers who violate this prohibition would be subject to civil and criminal penalties.

Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

In light of fears that IRCA would result in discrimination against certain groups, Congress prohibited most employers from discriminating against individuals based on their national origin or citizenship, if such individuals were otherwise authorized to work in the United States. 8 U.S.C. § 1324b(a)(1). Of the five employment discrimination acts, only IRCA remains silent on extraterritorial application.

## A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (TITLE VII)

The Civil Rights Act of 1964<sup>79</sup> came into law after a great deal of national debate and included broad protections against unlawful discrimination in many areas of U.S. life.<sup>80</sup> The Civil Rights Act of 1964 contained eleven titles.<sup>81</sup> The purpose of Title VII was "to eliminate . . . discrimination in employment" based on race, color, religion, sex, or national origin.<sup>82</sup> The Civil Rights Act of 1964 also created the EEOC, which began operations in 1965 and was charged with enforcement of Title VII.<sup>83</sup>

In 1991, in its *Aramco* decision, the United States Supreme Court held that Title VII did not apply to U.S. citizens working for U.S. companies abroad.<sup>84</sup> The *Aramco* case was initiated by a naturalized U.S. citizen against two Delaware corporations, Arabian American Oil Company (Aramco), with its principal place of business in Saudi Arabia, and a subsidiary, Aramco Service Company (ASC), with its principal place of business in Houston, Texas.<sup>85</sup> ASC hired the employee in Houston in 1979. In 1980, ASC transferred the employee to Saudi Arabia where he remained so employed until he was discharged in 1984.<sup>86</sup> He

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79. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections throughout U.S.C.).

80. See *id.* President Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964. *Id.*

81. Title I prohibited discrimination in voting; Title II protected individuals from discrimination in public accommodation; Title IV provided for desegregation of public education; and Title V established the Civil Rights Commission. *Id.*

82. H.R. REP. NO. 88-914, at 26 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2401. The original classifications in the draft legislation were race, color, religion, and national origin. *Id.* Noticeably absent from that list is sex, which was added prior to final congressional approval. Many believe that prohibitions on discrimination in employment based on sex were inserted in an attempt to defeat the entire bill. DAVID P. TWOMEY, EMPLOYMENT DISCRIMINATION LAW: A MANAGER'S GUIDE at 30 (6th ed. 2005); see also Mary L. Wiseman, Case Note, California Federal Savings & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987), 9 ARK. LITTLE ROCK L.J. 669, 670 (1986-87). Protections against unlawful discrimination in employment based on national origin are also found in IRCA. For a discussion of IRCA, see *supra* note 78.

83. Tit. VII, sec. 705, 78 Stat. at 258 (codified as amended beginning at 42 U.S.C. § 2000e-4) (2000). In addition to enforcing Title VII, the EEOC also enforces employment provisions of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, Pub. L. No. 101-336, sec. 107, 104 Stat. 327, 336 (codified at 42 U.S.C. § 12117 (2000)).

84. 499 U.S. at 259. The Supreme Court declined to follow the reasoning of the court of appeals decision relying upon long established precedent against extraterritorial application of federal law. See *Boureslan v. Aramco*, 892 F.2d 1271, 1275 (5th Cir. 1990).

85. 499 U.S. at 247.

86. *Id.*

filed claims with the EEOC and in federal district court in the United States alleging he was discharged on account of his race, religion, and national origin.<sup>87</sup>

The Supreme Court concluded that Title VII did not apply extraterritorially. The Court noted that Title VII lacked a congressional mandate establishing extraterritorial application of the law, and therefore found that Congress did not intend Title VII to be applied abroad.<sup>88</sup>

Prior to the Supreme Court's decision in *Aramco*, there had been disagreement among courts as to the extraterritorial application of Title VII. Whereas the Fifth Circuit had held that Title VII did not apply abroad,<sup>89</sup> other courts had concluded that Title VII could be applied to U.S. employers employing U.S. citizens abroad.<sup>90</sup>

The Supreme Court's *Aramco* decision eliminated the disagreement about the extraterritorial application of Title VII, but apparently not in the direction that Congress would have preferred. In response to *Aramco*, Congress amended Title VII and the employment provisions of the ADA through the Civil Rights Act of 1991, to provide for extraterritorial application of both laws.<sup>91</sup> This permitted application of these employment dis-

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87. *Id.*

88. *Id.*

89. *Boureslan v. Aramco*, 892 F.2d at 1275.

90. *See, e.g., Love v. Pullman*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976) (concluding that "[s]ince Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state . . ."), *aff'd*, 569 F.2d 1074 (10th Cir. 1976); *see also* *Abrams v. Baylor Coll. of Med.*, 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in part, rev'd in part*, 805 F.2d 528 (5th Cir. 1986); *Bryant v. Int'l Sch. Serv's, Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

91. Pub. L. No. 102-166, sec. 109(a), 105 Stat. 1071, 1077 (1991) (codified as amended in scattered sections of 42 U.S.C.). Congress amended Title VII to read: "With respect to employment in a foreign country, [the term 'employee'] includes an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f) (2000). Title VII defines an employer as "a person . . . who has fifteen or more employees . . ." 42 U.S.C. § 2000e(b) (2000). The courts have held that in order to meet the fifteen-employee floor, the employees must be in the United States. Employees who are abroad do not count toward the jurisdictional minimum. *Minutillo v. Aqua Signal Corp.*, 73 Fair Empl. Prac. Cas. (BNA) 1569, 1570 (N.D. Ill. 1997); *Robins v. Max Mara, U.S.A.*, 72 Fair Empl. Prac. Cas. (BNA) 331, 334 (S.D.N.Y. 1996), *amended by* 914 F. Supp. 1006 (S.D.N.Y. 1996). Likewise, independent contractors do not count as employees. *Rao v. Kenya Airways*, 73 Fair Empl. Prac. Cas. (BNA) 1633, 1634 (S.D.N.Y. 1995).

Prior to 1991, the only federal employment discrimination law specifically protecting U.S. citizens abroad was the Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000). For a discussion of the ADEA's extraterritorial application, see *infra* text accompanying

crimination laws in cases brought by U.S. citizens against U.S. companies operating abroad.<sup>92</sup> Congress changed the law shortly after *Aramco*, effectively nullifying the extraterritorial aspects of its decision. In the small window between *Aramco* and enactment of the Civil Rights Act of 1991, there were few decisions using *Aramco*'s extraterritoriality analysis.<sup>93</sup>

## B. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

The Age Discrimination in Employment Act of 1967 (ADEA)<sup>94</sup> prohibits age discrimination in employment. It prohibits employers from terminating or otherwise adversely affecting terms and conditions of employment for reason of age of individuals who are at least forty years old.<sup>95</sup> The ADEA was patterned after Title VII.<sup>96</sup>

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notes 94–105.

92. This extraterritorial application puts U.S.-based employers operating abroad in an awkward position because otherwise similarly-situated employees in foreign workplaces may find themselves in separate categories for resolution of employment discrimination allegations under federal law. For a discussion of this dilemma, see generally Elisa Westfield, *Resolving Conflict in the 21st Century Global Workplace: The Role for Alternative Dispute Resolution*, 54 RUTGERS L. REV. 1221 (2002). Westfield discusses a scenario in which three women (one American, one French, and one Kenyan) are working in Japan for a Multinational Enterprise (MNE) controlled by a U.S. company. *Id.* at 1223. All three women complain they have been sexually harassed by their non-American boss. Under Title VII, the law would protect only the American woman. *See id.* at 1236. "Consequently, there remains a global work environment that permits inconsistent results in conflict resolution due to the different protections for U.S. and non-U.S. employees working for the same MNE." *Id.* With respect to extraterritoriality, the author concluded:

Congress limited the extended law to only cover employees who are U.S. citizens. Thus, while a McDonald's operation in, say, Zimbabwe, cannot discriminate against employees who are U.S. citizens, there is nothing (at least according to U.S. law) to prohibit the franchise from discrimination against its foreign workers. This leads to inconsistent results. . . .

*Id.* at 1236–37 n.104, (quoting Mark Gibney, *Treat Overseas Workers Fairly—By Law Not Whim*, L.A. TIMES, May 25, 1998, at B5).

Westfield recommends that alternative dispute resolution be engaged to solve workplace conflicts. She notes that "while the globalization process has changed the significance of national boundaries, national customs and local identities still remain. Thus, conflict in international society is an inevitable consequence among individuals because of the convergence of those who hold different values, interests, and cultures." *Id.* at 1222.

93. *See, e.g.*, Hammell v. Banque Paribas, 780 F. Supp. 196, 199–200 (S.D.N.Y. 1991).

94. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended beginning at 29 U.S.C. § 621) (2000).

95. 29 U.S.C. §§ 623, 631(a) (2000).

96. DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172–73 (2d Cir. 1993).

Prior to 1984, the ADEA was silent on the issue of extraterritorial application and courts consistently ruled that the ADEA had no extraterritorial application.<sup>97</sup> The only exception was where an employer would transfer an employee abroad for a short period to enable the employer to fire the employee.<sup>98</sup> In 1984, Congress amended the ADEA specifically to provide for its extraterritorial application.<sup>99</sup> As amended, the ADEA provided: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."<sup>100</sup> The ADEA also provides that where a U.S. employer "controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under [the ADEA] shall be presumed to be such practice by such employer."<sup>101</sup> Congress patterned the factors for determination of whether an employer controls a corporation in Title VII and the ADA after the factors used in the ADEA.<sup>102</sup> The ADEA ap-

97. See *De Yoreo v. Bell Helicopter Textron, Inc.*, 608 F. Supp. 377, 377-81 (N.D. Tex. 1985), *aff'd* 785 F.2d 1282 (5th Cir. 1986); *Wolf v. J.I. Case Co.*, 617 F. Supp. 858, 861-63 (E.D. Wis. 1985).

98. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 559-60 (7th Cir. 1985).

99. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, sec. 802, 98 Stat. 1767, 1792. The committee reported:

The Committee has added two amendments to the Age Discrimination Act [sic] (ADEA) of 1967. The first amendment would assure that the protections of the ADEA would be applicable to any citizen of the United States who is employed by an American employer in a workplace outside the United States.

The purpose behind the amendment is to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the Age Discrimination in Employment Act. When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms. Moreover, it is the intent of the Committee that this amendment not be enforced where compliance with its prohibitions would place a U.S. company or its subsidiary in violation of the laws of the host country.

S. REP. NO. 98-467, at 27-28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000-01.

100. 29 U.S.C. § 630(f) (2000). The ADEA provision is similar to those found in Title VII and the Americans with Disabilities Act (ADA). See *supra* note 91 and accompanying text for a discussion of Title VII. See *infra* note 112 for a discussion of the ADA.

101. 29 U.S.C. § 623(h)(1).

102. The factors used in the ADEA are: "(A) interrelation of operations,

plies only to U.S. citizens working abroad for companies controlled by U.S. employers.<sup>103</sup> U.S. citizens working abroad for companies not controlled by U.S. employers are not covered.<sup>104</sup> By comparison, the ADEA has also been held to apply to foreign entities operating within the United States.<sup>105</sup>

### C. AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)

Congress passed the Americans with Disabilities Act of 1990 (ADA) with the intention of preventing discrimination against disabled persons in the United States.<sup>106</sup> The ADA is broad in its scope, prohibiting discrimination against those with disabilities in employment, public services, public accommodations, and telecommunications.<sup>107</sup> In enacting the ADA, Congress intended to "welcome individuals with disabilities fully into the mainstream of American society."<sup>108</sup> The employment provisions in the ADA's Title I incorporate by reference the powers, remedies, and procedures of Title VII of the Civil Rights Act.<sup>109</sup>

The Civil Rights Act of 1991<sup>110</sup> amended both Title VII and the employment provisions of the ADA to permit extraterritorial application in cases brought by U.S. citizens against U.S. companies.<sup>111</sup> The 1991 amendments to the ADA applied only to its

(B) common management, (C) centralized control of labor relations, and (D) common ownership or financial control, of the employer and the corporation." 29 U.S.C. § 623(h)(3). This language is virtually identical to the language used for Title VII and for the ADA. See, e.g., 42 U.S.C. §2000e-1(c)(3) (2000).

103. *Robinson v. Overseas Military Sales Corp.*, 827 F. Supp. 915, 920–21 (E.D.N.Y. 1993), *aff'd*, 21 F.3d 502 (2d Cir. 1994).

104. *Id.*; see also *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879 (E.D. Pa. 1995), *aff'd*, 109 F.3d 147 (3d Cir. 1997), *cert. denied*, 522 U.S. 820 (1997).

105. *Hansen v. Danish Tourist Bd.*, 147 F. Supp. 2d 142, 148 (E.D.N.Y. 2001).

106. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended beginning at 42 U.S.C. § 12101) (2000). The ADA has been credited with changing attitudes in the United States toward disabled persons, including disabled travelers. See, e.g., David Koepfel, *Hotels Learn to Deal with Disability*, N.Y. TIMES, Feb. 17, 2004, at C8.

107. ADA Title I, §§ 101–108, 104 Stat. At 330–37 (employment); Tit. II, §§ 201–205, 104 Stat. At 337–38 (public services); ADA Tit. III, §§ 301–310, 104 Stat. at 353–65 (public accommodation); Tit. VI, §§ 401–402, 104 Stat. 366–69 (communications).

108. H.R. REP. NO. 101-485(I), at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 267.

109. Compare ADA §107, 104 Stat. at 336 with Civil Rights Act Tit. VII, 78 Stat. at 253.

110. Pub. L. No. 102-166, 105 Stat. 1071, 1077 (1991).

111. Civil Rights Act of 1991 § 109, 105 Stat. at 1077.

employment provisions and not to the remainder of the Act.<sup>112</sup>

#### D. CONTROL ABROAD BY A U.S. EMPLOYER

Both Title VII and the ADA apply to foreign employers controlled by U.S. business entities. The Civil Rights Act of 1991<sup>113</sup> amended Title VII to include within its coverage a U.S. employer that “controls a corporation whose place of incorporation is a foreign country.”<sup>114</sup> The 1991 amendments provide that “any practice prohibited by [Title VII] engaged in by such corporation shall be presumed to be engaged in by such employer.”<sup>115</sup> The 1991 amendments gave the ADA similar provisions<sup>116</sup> while amendments in 1984 gave the ADEA similar provisions.<sup>117</sup> In a time of mergers and acquisitions that often ignore international borders, these control provisions put U.S.-based employers in a precarious position. An employer that strictly follows rules in the United States may nonetheless find itself in violation of those rules because it controls a foreign company with employment practices forbidden in the United States. The mere acquisition of a foreign company may permit employees of that company to sue the parent employer in the United States.<sup>118</sup>

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112. 42 U.S.C. § 12111(4) (2000) (defining “employee” to include U.S. citizens employed by covered employers in nations abroad). As discussed above, the ADA is a comprehensive law, affecting many aspects of U.S. society. *See supra* notes 106–108 and accompanying text. Many have argued that the ADA employment extraterritoriality provisions should apply to other titles of the ADA as well. *E.g.*, Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does it Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL’Y REV. 291 (2003) (arguing that Congress should give extraterritorial application to the remaining provisions of the ADA, using court decisions involving students with disabilities participating in study abroad programs).

113. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of the U.S.C.).

114. § 109(b)(1), 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e-1(c)(1) (2000)).

115. *Id.*

116. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(b)(1), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 12112(c)(2)(A) (2000)).

117. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(2), § (g)(1), 98 Stat. 1767, 1792 (codified at 29 U.S.C. § 623(h) (2000)).

118. For an interesting discussion of this situation, see Donald C. Dowling, Jr., *How to Ensure Employment Problems Don’t Torpedo Global Mergers and Acquisitions*, 13 DEPAUL BUS. L.J. 159 (2000). In the article, Dowling gives recommendations and guidelines for U.S.-based buyers of global companies, including dealing with issues related to employees, and more specifically, anti-discrimination and harassment laws:

Because a U.S.-domestic buyer company will, after the closing, “control” the overseas units of the target, the U.S. anti-discrimination and harassment

As a result of these control provisions, aggrieved U.S. citizens may seek relief in U.S. courts against U.S. employers for discrimination by a foreign company controlled by a U.S. employer. The issue then becomes what constitutes control. In determining whether a U.S. employer controls a foreign corporation for Title VII and ADA purposes, the Civil Rights Act of 1991 requires consideration of the following with respect to the U.S. parent and the foreign corporation: "the interrelation of operations; the common management; the centralized control of labor relations; and the common ownership or financial control, of the employer and the corporation."<sup>119</sup> Amendments in 1984 gave the ADEA similar language.<sup>120</sup>

#### IV. LAWS IN OTHER NATIONS

##### A. EMPLOYMENT LAWS

Many nations have enacted employment laws similar to those in the United States. For example, England prohibits discrimination in employment based on sex<sup>121</sup> (including preg-

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laws will cover any U.S. citizens working abroad. A buyer must watch out for discrimination and harassment issues in international deals, especially where the buyer is based in the states and, after closing the deal, will take on new American employees overseas (including even U.S. dual-nationals and locally-hired Americans who are not, for payroll purposes, "expatriates").

*Id.* at 194 (citations omitted). Dowling notes that workplaces abroad rarely conform to standards of conduct expected in workplaces in the United States. "Often workers overseas will stereotype one another based on nationality and engage in sexual banter that would be wildly inappropriate stateside." *Id.* The disconnect between American and foreign employment practices also manifests itself in the form of employment advertising. "Overseas, companies—even American-based ones—place grossly discriminatory help-wanted ads that limit job openings to people based on their gender, age and even their beauty." *Id.* Rules prohibiting discrimination against persons with disabilities also appears to be a concept not widespread throughout the world. "[F]ew foreign managers understand the uniquely American concept of 'reasonable accommodation' for the disabled." *Id.*

119. 42 U.S.C. § 2000e-1(c)(3) (2000) contained this language for Title VII and 42 U.S.C. § 12112(c)(2)(C) (2000) contained this language for the ADA. (paragraph numbering omitted.) See *Soo Cheol Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 815–16 (9th Cir. 2002).

120. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(2), § (g)(3), 98 Stat. 1767, 1792 (codified as amended at 29 U.S.C. § 623(h)(3) (2000)); see *Morelli v. Cedel*, 141 F.3d 39, 42 (2d Cir. 1998).

121. Sex Discrimination Act, 1975, c. 65, §§ 6–21 (Eng.); Sex Discrimination Act, 1986, c.59 (Eng.).

nancy),<sup>122</sup> race,<sup>123</sup> or trade union membership.<sup>124</sup> France prohibits discrimination based on sex, marital status, national origin, race, or religion.<sup>125</sup> The European Union requires “equality between men and women with regard to labor market opportunities and treatment at work.”<sup>126</sup> By contrast, employment law in Saudi Arabia specifically prohibits commingling of men and women in the workplace.<sup>127</sup>

## B. LOCAL LAW EXEMPTION

What happens when an employer based in the United States is operating in a nation that permits employment discrimination prohibited in the United States? Must the employer follow the host nation’s local law or U.S. law? Should the employer attempt to reach a compromise? Reaching answers to these questions is not easy and often puts employers into a difficult dilemma. Congress attempted to ease this dilemma with the Civil Rights Act of 1991,<sup>128</sup> which contained an exemption to Title VII<sup>129</sup> and the ADA<sup>130</sup> for local laws in host nations. As mentioned above, these amendments were a direct result of the Supreme Court’s *Aramco* decision.<sup>131</sup>

It is not a violation of U.S. law for an employer to engage in conduct that ordinarily would constitute illegal behavior if such behavior were required by local law where the conduct took place. This provision is found in both Title VII<sup>132</sup> and the

122. Trade Union Reform and Employment Rights Act, 1993, c. 19, §§ 23–34 (Eng.).

123. Race Relations Act, 1976, c. 74, §§ 4–16 (Eng.).

124. Trade Union and Labour Relations Act (Consolidation), 1992, c. 52, §§ 137–177 (Eng.).

125. C. TRAV., Art. L. 12-1 and L. 122-45.

126. Treaty Establishing the European Community, art. 137, 2002 O.J. (C 325) 5, 93 [hereinafter *EC Treaty*].

127. LABOR REG., Art. 160. Saudi Arabia did not vote in favor of the United Nations adoption of the Universal Declaration of Human Rights (UDHR), which was adopted by forty-eight member states voting in favor with eight abstentions. G.A. Res. 217, U.N. GAOR (1948). The UDHR is discussed later in this Article. See *infra* text accompanying notes 162–167. Likewise, Saudi Arabia is not a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). See *infra* text accompanying notes 168–171.

128. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1077-78 (1991).

129. *Id.*, § 109(b)(1), § (b).

130. *Id.*, § 109(b)(2), § (c)(1).

131. 499 U.S. 244 (1991). See *supra* text accompanying notes 59–63 for a discussion of *Aramco*.

132. 42 U.S.C. § 2000e-1(b) (2000).

ADA.<sup>133</sup> As amended, Title VII provides:

It shall not be unlawful under [Title VII] for an employer (or a corporation controlled by an employer) . . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation) . . . to violate the law of the foreign country in which such workplace is located.<sup>134</sup>

This exemption is also found in the ADEA,<sup>135</sup> a provision which courts have upheld. For example, in *Mahoney v. RFE/RL, Inc.*,<sup>136</sup> the U.S. District Court for the District of Columbia determined that the discharge in Germany by Radio Free Europe of a U.S. citizen at age 65 was not a violation of the ADEA.<sup>137</sup>

This local law exemption must be read in conjunction with the bona fide occupational qualification (BFOQ) exception of Title VII. Title VII allows discrimination in employment based on religion, sex or national origin "in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."<sup>138</sup> A type of BFOQ exception is also allowed in the ADEA.<sup>139</sup> While the ADA has no BFOQ exception, it allows exclusion of persons with disabilities if they cannot perform "essential" job duties with or without "reasonable accommodation."<sup>140</sup> Exceptions to employment discrimination prohibitions are extremely unusual. Race and color are never allowed as exceptions to employment discrimination laws. It is important to distinguish between laws in other nations and customer preferences. In *Fernandez v. Wynn Oil Co.*, the Ninth Circuit held that customer preferences could not constitute a BFOQ.<sup>141</sup> Courts will defer to local foreign laws that require gender discrimination, but will not defer to cultural views of

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133. 42 U.S.C. § 12112(c)(1) (2000).

134. 42 U.S.C. § 2000e-1(b) (2000). The ADA's local law exemption is virtually identical. 42 U.S.C. § 12112(c)(1) (2000).

135. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended beginning at 29 U.S.C. § 621) (prohibiting discrimination in employment based on age).

136. 47 F.3d 447 (D.C. Cir. 1995).

137. The contract and the German labor practice incorporated therein were considered to be law in Germany. Radio Free Europe terminated the employee pursuant to a collective bargaining agreement that expressly required mandatory retirement at age 65. *Id.* at 449-50.

138. 42 U.S.C. § 2000e-2(e) (2000).

139. 29 U.S.C. § 623(f)(1) (2000).

140. 42 U.S.C. § 12111(8) (2000).

141. 653 F.2d 1273 (9th Cir. 1981).

customer preferences requiring discrimination.<sup>142</sup>

## V. INTERNATIONAL LAW

### A. U.S. SOVEREIGNTY AND INTERNATIONAL LAW

International law is difficult to define because of the nature of national sovereignty.<sup>143</sup> To be accepted in the community of nations, a nation must respect commitments made under international law and those made pursuant to international agreements.<sup>144</sup> The Supreme Court has reinforced the desire of the United States to accommodate international accords: "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."<sup>145</sup> Founding documents of international organizations in which the United States is a member do not contain any assumption of sovereignty.<sup>146</sup> The United Nations (UN), for example, relies on the good will of its member nations for cooperation and for its income.<sup>147</sup> The UN is not a world government; its charter contains no provision granting it governmental status.<sup>148</sup> In a similar vein, the World Trade Organiza-

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142. *Id.* at 1276 ("[C]ustomer preferences should not be bootstrapped to the level of business necessity."). The Ninth Circuit refused to adopt "a separate rule . . . in international contexts." *Id.* at 1277.

143. One argument is that international law really is not law because there is no international sovereign, or world government, to enforce it. Even without an international sovereign or a world government, international law "is law, quite simply, because states and individuals regard it as such." RAY AUGUST, INTERNATIONAL BUSINESS LAW 1 (4th ed. 2004).

144. The U.S. Supreme Court in *Reid v. Covert* asserted its right to determine whether an international agreement is constitutional or whether it may violate laws of the United States. *Reid v. Covert*, 354 U.S. 1 (1957).

145. *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

146. This is in contrast to the documents creating the European Union (EU), where member states do yield sovereignty to the EU. See *EC Treaty*, supra note 126.

147. For example, in early 2001, the United States agreed to pay back dues owed to the UN. See Christopher Marquis, *Satisfied with U.N. Reforms, Helms Relents on Back Dues*, N.Y. TIMES, Jan. 10, 2001, at A8. See also *The United States and Its Treaties: Observance and Breach*, AM. J. OF INT'L. LAW, Apr. 2001, at 313.

148. Specifically, the Charter of the UN recognizes the "sovereign equality" of its members. U.N. CHARTER art. 2, para. 1.

tion (WTO)<sup>149</sup> extracts no sovereignty from its members.<sup>150</sup> In joining the WTO, the United States specified that WTO agreements shall not supersede federal laws.<sup>151</sup> Many have questioned, though, whether mere participation by the United States in international organizations, such as the WTO, and in trade agreements, such as the North American Free Trade Agreement (NAFTA),<sup>152</sup> infringes on national sovereignty.<sup>153</sup> Although the United States respects its obligations under international

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149. The WTO is a multinational organization designed to deal with rules of trade between nations. Its goal is to reduce or eliminate trade barriers and restrictions worldwide. The WTO grew out of the General Agreement on Tariffs and Trade (GATT), which was originally approved in 1947. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

150. The WTO relies on voluntary cooperation of its member nations to implement its decisions. The United States, or any nation, could choose to ignore rulings of WTO panels, but such behavior would undermine the international system of cooperation. This situation has become apparent during on-going trade disputes between the United States and the EU, which over the years have involved products ranging from bananas to steel. See, e.g., Helene Cooper, *U.S., EU End Trans-Atlantic Banana War*, WALL ST. J., Apr. 12, 2001, at A2; David E. Sanger, *Bush Puts Tariffs of as Much as 30% on Steel Imports—Allies See a Trade Fight*, N.Y. TIMES, Mar. 6, 2002, at A1. As the United States and the EU continue to argue, such disputes draw into question the effectiveness of the WTO in reducing trade barriers.

151. 19 U.S.C. § 3512(a)(1)(2) (2000) provided:

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. . . . Nothing in this Act shall be construed to amend or modify any law of the United States. . . .

Nevertheless, U.S. courts recognize to some extent the authority of the WTO. See, e.g., *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924 (6th Cir. 2000). The U.S. Court of Appeals for the Federal Circuit noted that while the WTO's predecessor GATT did "not trump domestic legislation," Congress has an "interest in complying with U.S. responsibilities under the GATT." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992). Congress did anticipate that the WTO Agreement might be inconsistent with state laws and established a procedure for dealing with such situations. 19 U.S.C. § 3512(b) (2000). It provided that no state law "may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid." 19 U.S.C. § 3512(b)(2)(A) (2000). In *Hyundai Elec. Co., Ltd. v. United States*, the U.S. Court of International Trade explained that a WTO panel's findings may be a source of information for the court, but are not binding on the court. 53 F. Supp. 2d 1334, 1343 (Ct. Intl. Trade 1999).

152. NAFTA, *supra* note 6.

153. Such issues were raised during the 1994 WTO hearings. President Clinton sought congressional approval for the WTO in 1994 not by proposing it as a treaty, which would have required two-thirds approval in the Senate, but by submitting it to Congress for a simple majority vote. At the time, many questioned whether the approval process was constitutional.

agreements, the nation's sovereignty remains impenetrable. The Supreme Court explained: "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."<sup>154</sup> Courts have regularly and uniformly recognized the supremacy of the Constitution over treaties,<sup>155</sup> thereby securing the nation's sovereignty.<sup>156</sup>

## B. INTERNATIONAL ORGANIZATIONS AND AGREEMENTS

Multilateral cooperation has led to the creation of international organizations and agreements dealing with labor, employment, and human rights. For example, the International Labor Organization (ILO), the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and NAFTA all contain references to labor and employment issues.

The ILO is a specialized agency of the UN.<sup>157</sup> Its purpose is to promote social justice and internationally recognized human and labor rights worldwide. Today, the ILO formulates international labor standards in the form of treaties and recommendations setting minimum standards for basic labor rights: freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity, and treatment, and other standards regulating working conditions.<sup>158</sup>

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154. *Reid*, 354 U.S. at 16. In reaching this conclusion, the Court analyzed the Supremacy Clause stating:

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution . . . to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.

*Id.* at 16–17. The reason treaties were not limited to those made in “pursuance” of the Constitution was to enable agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, to remain in effect. *Id.*

155. *Reid*, 354 U.S. at 16–17.

156. The Constitution itself is unyielding in its placement in the supreme position in U.S. jurisprudence. Treaties, while subordinate to the Constitution, have a status equal to federal laws. U.S. CONST. art. VI. Similarly, “an unambiguous statute will prevail over an obligation under [an] international agreement.” *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061, 1083 (Ct. Int'l. Trade 2000).

157. The ILO was established in 1919 by the Treaty of Versailles. The ILO became the first specialized agency of the UN in 1946. [www.ilo.org](http://www.ilo.org). (last visited Jan. 20, 2005).

158. *Id.*

The ILO has numerous conventions dealing with various matters within its purpose, including one that deals with employment discrimination.<sup>159</sup> The United States has not ratified the employment discrimination convention even though it contains language similar to that found in employment discrimination laws of the United States.<sup>160</sup> U.S. courts have acknowledged the authority of ILO conventions, including those conventions that have not been ratified by the United States.<sup>161</sup> As a result, the United States recognizes the significance of the ILO in international labor matters.

In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights.<sup>162</sup> In the UDHR, the General Assembly declared: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>163</sup> Included among the rights enumerated in the UDHR are the "right to work, to free choice of employ-

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159. Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, Jun. 25, 1958, 382 U.N.T.S. 31, available at [www.ilo.org/public/english/employment/skills/recomm/instr/c\\_111.htm](http://www.ilo.org/public/english/employment/skills/recomm/instr/c_111.htm) (last visited Jan. 20, 2005). The convention provided:

For the purpose of this Convention the term "discrimination" includes— (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

*Id.*, art. 1(1) (emphasis and British spelling in original).

160. *Id.*

161. The U.S. Court of Appeals in *John Doe I v. Unocal Corp.* analyzed the ILO Forced Labor Convention, No. C29, Jun. 28, 1930. 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002). The ILO Forced Labor Convention has not been ratified by the United States. [www.ilo.org](http://www.ilo.org). (last visited Nov. 12, 2004).

162. G.A. Res. 217, *supra* note 5, art. 2.. The member nations voting in favor were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam (Thailand), Sweden, Syria, Turkey, United Kingdom, United States, Uruguay, and Venezuela. 2 United Nations Resolutions Series 1: Resolutions Adopted by the General Assembly, 29 (Dusan J. Djonovich ed., Oceana Publications, Inc. 1975).

163. G.A. Res. 217, *supra* note 5, art. 2.

ment, to just and favourable conditions of work and to protection against unemployment”<sup>164</sup> and “the right to equal pay for equal work.”<sup>165</sup> Certain U.S. courts have recognized the authority of the UDHR regarding individual rights,<sup>166</sup> but others have held that the UDHR is directed to governments and does not confer rights upon individuals.<sup>167</sup>

There are many international agreements signed by nations throughout the world pledging to end discrimination. These agreements appear to act in concert with U.S. laws intended to remove unwarranted forms of discrimination in employment. Examples of these agreements include the CEDAW<sup>168</sup> and the Declaration on the Elimination of Discrimination Against Women.<sup>169</sup> The CEDAW specifically directs member states to provide workplaces free from discrimination: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights. . . .”<sup>170</sup> Although the United States is a signatory to CEDAW, it has not ratified it.<sup>171</sup>

NAFTA came into effect on January 1, 1994, and was negotiated among the United States, Canada, and Mexico.<sup>172</sup> It created a free trade area,<sup>173</sup> but also includes provisions involving labor matters,<sup>174</sup> including a supplemental agreement on labor,

164. *Id.* at art. 23(1).

165. *Id.* at art. 23(2).

166. *See, e.g.,* *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Perkovic v. INS*, 33 F.3d 615, 622 (6th Cir. 1994).

167. *See, e.g.,* *Kyler v. Montezuma County*, No. 99-1052, 2000 U.S. App. LEXIS 1145, at \*2 (10th Cir. Jan. 28, 2000).

168. G.A. Res. 34/180, U.N. GAOR (1979).

169. G.A. Res. 2263 (XXII), U.N. GAOR, 22nd Sess., No. 16, at 35, U.N. Doc. A/6880 (1967).

170. G.A. Res. 34/180, *supra* note 168, art. 11.

171. *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, at <http://www.un.org/womenwatch/daw/cedaw/> (last updated Jan. 28, 2005).

172. NAFTA, *supra* note 6, art. 2203.

173. *Id.* at art. 101. NAFTA set forth objectives including elimination of trade barriers and increased investment opportunities in the territories of the NAFTA nations. *Id.* at art. 102(1).

174. NAFTA’s Preamble indicated the three NAFTA nations intended to preserve existing labor and employment protections in NAFTA nations. Among other things, in the Preamble, the Parties resolved to: “[create] new employment opportunities and improve working conditions and living standards in their respective territories; . . . [preserve] their flexibility to safeguard the public welfare; . . . and [pro-

the North American Agreement on Labor Cooperation (NAALC).<sup>175</sup> The NAALC created both international and domestic institutions, which serve to carry out NAALC policies.<sup>176</sup> The NAALC created the Commission for Labor Cooperation, an international institution, consisting of a Council supported by a Secretariat.<sup>177</sup> The Council consists of the three national cabinet level labor officials<sup>178</sup> and sets policy for the Commission's work.<sup>179</sup> The domestic institutions are National Administrative Offices (NAOs), located in each of the three nations, and national advisory committees.<sup>180</sup> Each party maintains its own NAO to implement provisions of the NAALC and to facilitate communication between the Commission and the national governments.<sup>181</sup> Since its inception in 1994, there have been relatively few submissions filed under the provisions of the NAALC. As of March 2004, twenty-eight submissions had been filed with the three NAOs, with the bulk of the submissions coming from unions and public interest groups.<sup>182</sup> The issues raised have dealt with a wide range of matters including the right to organize, employment discrimination, prevention of occupational injuries and illnesses, and protection of migrant workers.<sup>183</sup>

Prior to its effective date, each nation separately approved NAFTA. In the United States, Congress approved NAFTA through the NAFTA Implementation Act.<sup>184</sup> The implementing

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text], enhance and enforce basic workers' rights." *Id.* at pmb1.

175. NAALC, *supra* note 6.

176. *Id.* at arts. 8 & 15.

177. *Id.* at art. 8.

178. *Id.* at art. 9(1).

179. *Id.* at art. 10.

180. *Id.* at art. 15-17.

181. NAOs serve three main functions: (1) coordinating cooperative activities, (2) providing information to the parties, and (3) receiving and reviewing of public submissions. *Id.*, art. 16. NAALC required the NAOs to accept submissions on labor law matters in the other two nations. *Id.*, art. 16(3).

182. Commission for Labor Cooperation, *Summary of Public Communications*, at [http://www.naalc.org/English/pdf/pcommtable\\_en.pdf](http://www.naalc.org/English/pdf/pcommtable_en.pdf) (last updated Mar. 2004).

183. *Id.* Ministerial consultations occurred in a little more than half of the submissions. Several submissions resulted in public seminars to address the issues. Others resulted in a dialogue among the affected government agencies. *Id.*

184. The House of Representatives passed House Bill 3450 on November 17, 1993, and the Senate passed it on November 19-20, 1993. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2225 (1993). President Clinton signed the bill on December 8, 1993. *Id.* The House approved the NAFTA Implementation Act by a vote of 234 to 200. 139 Cong. Rec. H29,949. The Senate approved the Act by a vote of 61 to 38. 139 Cong. Rec. S31,040. Like the WTO agreement, President Clinton submitted NAFTA to Congress as a trade agreement, and not a treaty, for approval by a simple majority. Had NAFTA been submitted as a treaty, it would have

legislation specified that existing federal laws would prevail over NAFTA.<sup>185</sup> With respect to laws of states and political subdivisions of states, the act stated that no law would be declared invalid as a result of being inconsistent with NAFTA except as a result of an action brought by the U.S. government for that purpose.<sup>186</sup> The NAFTA Implementation Act established a federal-state consultation process in the United States to facilitate implementation of NAFTA as it pertained to the states.<sup>187</sup> No one, other than the U.S. government, has any cause of action or defense under NAFTA or the supplemental agreements.<sup>188</sup> Additionally, no one, other than the U.S. government, may challenge an action or inaction of the federal government or any state government or its subdivision on the ground that the action or inaction is inconsistent with NAFTA or its supplemental agreements.<sup>189</sup> Without attempting to change national laws, NAFTA and NAALC seek to promote safe and healthy working environments and adequate minimum employment standards. For example, NAFTA's Preamble shows the desire to "[create] new employment opportunities and improve working conditions and living standards in their respective territories."<sup>190</sup> NAALC's Labor Principle 9 speaks of a desire to prevent occupational injuries and illnesses by "[p]rescribing and implementing standards to minimize the causes of occupational injuries and illnesses."<sup>191</sup> NAALC's Principle 8 enunciates the principle of equal pay for women and men.<sup>192</sup> NAALC's Labor Principle 7 declares a desire to eliminate employment discrimination on

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required a two-thirds vote of the Senate, which it did not receive. See U.S. CONST. art. II, § 2, cl. 2.

185. NAFTA Implementation Act, Pub. L. No. 103-182, sec. 102(a), 107 Stat. 2057, 2062 (1993). See also H.R. REP. NO. 103-361(I), at 16 (1993) *reprinted in* 1993 U.S.C.C.A.N. 2552, 2566.

186. NAFTA Implementation Act, Pub. L. No. 103-182, sec. 102(b)(2), 107 Stat. 2057, 2063 (1993). See also H.R. Rep. No. 361(I), 103d Cong., 1st Sess. 17 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2552, 2567.

187. NAFTA Implementation Act, Pub. L. No. 103-182, sec. 102(b), 107 Stat. 2057, 2062-63 (1993). See also H.R. Rep. No. 361(I), 103d Cong., 1st Sess. 16-17 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2552, 2566-67.

188. NAFTA Implementation Act, Pub. L. No. 103-182, sec. 102(c)(1), 107 Stat. 2057, 2063 (1993). See also H.R. Rep. No. 361(I), 103d Cong., 1st Sess. 17 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2552, 2567.

189. NAFTA Implementation Act, Pub. L. No. 103-182, sec. 102(c)(2), 107 Stat. 2057, 2063 (1993). See also H.R. Rep. No. 361(I), 103d Cong., 1st Sess. 17 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2552, 2567.

190. NAFTA, *supra* note 6, pmb1.

191. NAALC, *supra* note 6, at 1516.

192. *Id.*

such grounds as race, religion, age, and sex, subject to certain reasonable exceptions, including bona fide occupational requirements.<sup>193</sup>

While the NAFTA Implementation Act specifies that no NAFTA provision shall conflict with U.S. domestic law, it can be argued that the authority of the international organizations created under NAFTA and NAALC do just that. The Eleventh Circuit addressed these issues in 2001 when it decided *Made in the USA Foundation v. United States*, where the constitutionality of the participation of the United States in NAFTA was questioned.<sup>194</sup> The appellants argued that NAFTA had been approved by a simple majority in Congress and not by two-thirds of the Senate as required for a treaty by the Constitution.<sup>195</sup> The Eleventh Circuit declined to reach the merits of the case, finding the issues surrounding the constitutional question to be a nonjusticiable political question.<sup>196</sup> The government argued on the merits that NAFTA's enactment did not require Senate ratification because it was not a "treaty."<sup>197</sup> The Court of Appeals noted:

Remarkably, . . . the United States Supreme Court has never in our nation's history seen fit to address the question of what exactly constitutes and distinguishes "treaties," as that term is used in Art. II, § 2, from "alliances," "confederations," "compacts," or "agreements," as those terms are employed in Art. I, § 10. Accordingly, the Court has never decided what sorts of international agreements, if any, might require Senate ratification pursuant to the procedures outlined in Art. II, § 2.<sup>198</sup>

Labor provisions are now the norm in free trade agreements. For example, in 2004, the United States negotiated the

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193. *Id.*

194. *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001), *cert. denied*, 534 U.S. 1039 (2001).

195. *Id.* at 1303-04.

196. *Id.* at 1319.

197. *Id.* at 1302.

198. *Id.* at 1305. The appeal to the U.S. Court of Appeals for the Eleventh Circuit was taken from the U.S. District Court for the Northern District of Alabama. *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). The district court held that "the case did not present a nonjusticiable political question," and reached the merits of the case. *USA Found.*, 242 F.3d at 1302. The district court determined that the treaty clause of the Constitution was not the "exclusive means of enacting international commercial agreements, given Congress's plenary powers to regulate foreign commerce under [the Commerce Clause] and the President's inherent authority under Art. II to manage [the] nation's foreign affairs." *Id.* The district court concluded that "NAFTA's passage in 1993 by simple majorities of both houses of Congress was constitutionally sound." *Id.*

Central American Free Trade Agreement (CAFTA)<sup>199</sup> with five Central American nations.<sup>200</sup> CAFTA included a reaffirmation of “obligations as members of the International Labor Organization.”<sup>201</sup> CAFTA included a chapter on labor,<sup>202</sup> in which each party agreed to enforce its own labor laws,<sup>203</sup> although employment discrimination is absent from CAFTA’s definition of labor laws.<sup>204</sup>

## VI. CONCLUSION

This Article examined the extraterritorial application of major U.S. federal employment antidiscrimination acts, along with the related impact of laws in other nations, international law, and regional agreements. Title VII, the ADEA, and the ADA apply to U.S. citizens working abroad for U.S.-based employers. With the worldwide mobility of U.S. workers, Congress determined it was important to extend protections abroad of these federal employment antidiscrimination acts for citizens. None of the three acts discussed allows extraterritorial application for lawful permanent residents. Given the value of lawful permanent residents to U.S. society, all federal employment antidiscrimination acts should apply extraterritorially equally to both citizens and lawful permanent residents. Specifically, Congress should amend the employment antidiscrimination provisions of Title VII, the ADEA, and the ADA to require extraterritorial application for both U.S. citizens and lawful permanent residents. In light of the presumption against extraterritoriality it would be difficult for courts to extend the acts abroad in the absence of congressional authority. Therefore, it is up to Congress to act. Since Congress has the power to make such changes, it should change the laws to allow for such extraterritorial application. Congress has already required extraterrito-

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199. Central American Free Trade Agreement, Jan. 28, 2004, at <http://www.natlaw.com/treaties/caftan/caftaenglish.htm>.

200. *Id.*

201. *Id.* at art. 16.1(1).

202. *Id.* at art. 16.

203. *Id.* at art. 16.2(1)(a).

204. *Id.* at art. 16.8. Included in its definition of labor laws are: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forces or compulsory labor; (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. *Id.*

rial application of Title VII, the ADEA, and the ADA for U.S. citizen employees, making it a simple procedural step to extend extraterritorial application to lawful permanent residents as well.

The same policy reasons that require extraterritorial application for citizens also apply to lawful permanent residents. By becoming a lawful permanent resident, an individual is making a commitment to the United States. Application of the acts abroad for lawful permanent residents would further cement the relationship between the United States and its lawful permanent residents. Extending Title VII and the other acts abroad would prevent employers from transferring lawful permanent residents abroad in order to engage in unlawful employment practices. Lawful permanent residents would join the same employment category as citizens for employment purposes, thus preventing a second class employment status. As with citizens, such provisions would not apply to the foreign operations of a foreign employer that is not controlled by a U.S. business entity.

This extraterritorially should apply regardless of labor laws and conditions in the host nation. The United States imposes income tax on lawful permanent residents on their worldwide income regardless of whether the lawful permanent resident lives in the United States or abroad. If the United States can impose a tax on lawful permanent residents living abroad, it should extend protection of its laws to those lawful permanent residents employed by U.S.-based companies abroad. The Supreme Court in *Graham v. Richardson* noted the inconsistency of excluding noncitizens who pay federal taxes from public benefit programs in the United States. This logic similarly applies when lawful permanent residents are employed by U.S.-based companies abroad. Since the United States taxes lawful permanent residents, it should also extend employment antidiscrimination protection to them.

Congress made it certain, with limited exemptions based on local foreign laws and bona fide occupational qualifications, in employment antidiscrimination cases brought under Title VII, the ADEA, or the ADA by U.S. citizen employees against U.S.-based employers abroad, employers will be subject to the same sanctions as if the alleged antidiscrimination had occurred in the United States. Congress ensured that federal acts protecting U.S. citizens in employment would follow them when their jobs take them abroad. Title VII and the other federal employment acts grant cherished rights to employees. Those rights are

never to be taken away except in the most limited circumstances. The United States should protect both its citizens and lawful permanent residents as they work for U.S.-based employers outside the United States.