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Ryuichi Yamakawa

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Ryuichi Yamakawa*

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This Article is based on my research paper submitted for the master of laws course at the University of Washington School of Law. I am very grateful to Professors Daniel Bodansky, Daniel Foote, John Haley, and Dan Henderson for valuable comments on an earlier draft of this Article. I also would like to thank Gary Born and Frederick Brown, Esqs., both of whom kindly provided me with instructive materials on the subject, and Cynthia Pevehouse, Esq., who made helpful suggestions on the manuscript of this Article. Errors that remain are, of course, my own.
In today's global economy many U.S. corporations are doing business in foreign countries. Their labor and employment relations, traditionally local, now have an increasingly transnational setting. This situation presents the question of the extraterritorial application of U.S. fair employment laws. Although the applicability of U.S. laws abroad has long been discussed in such fields as antitrust and securities, it is only recently that the coverage of fair employment laws outside the territorial U.S. has become a frequently debated issue.

Recently, the United States Supreme Court rejected the extraterritorial applicability of Title VII of the Civil Rights Act of 1964 in *EEOC v. Arabian American Oil Co. (ARAMCO)*. Title VII makes it unlawful for an employer to discriminate against its employees on the basis of race, color, religion, sex, or national origin. The Court left open several important questions, among them the distinction between the territorial and extraterritorial application of domestic laws. With respect to statutes such as the Age Discrimination in Employment Act that do have extraterritorial reach, the limits placed on their extraterritorial application are a significant issue, particularly when they conflict with foreign laws and customs.

This Article analyzes the geographical coverage of U.S. fair em-
Employment laws. As this issue is closely connected to the limits of legislative or prescriptive jurisdiction in international law, Part II of this Article briefly addresses issues of extraterritorial jurisdiction in general. After introducing the principles and limits of jurisdiction in international law, Part II examines the presumption against extraterritoriality as a canon of interpretation of municipal statutes and points out that there are two distinct presumptions which have different doctrinal bases and strengths. Part III of this Article analyzes the coverage of major fair employment legislation—the Equal Pay Act as a part of the Fair Labor Standards Act, the Age Discrimination in Employment Act, and Title VII. This Article analyzes the ARAMCO case in considerable detail and examines some of the problems found in the Supreme Court's opinion. Finally, Part IV discusses the limits of territorial as well as extraterritorial application of these statutes. Two types of situations are suggested in which territorial U.S. laws apply to employment relations between employers in the United States and their employees working in foreign countries: (1) the situation in which employees are working at extended U.S. workplaces, and (2) the situation in which decisions over termination and hiring of employees who are working or supposed to work abroad are made in U.S. territory. Next, the availability of defenses resulting from the conflicts between extraterritorial U.S. laws and territorial foreign laws and customs is discussed with regard to limits of extraterritorial application. This Article suggests that defenses based on bona fide occupational qualifications and foreign compulsion are available for employers in the United States under certain limited circumstances.

In the analysis in Part IV, this Article examines the necessity for and result of the application of U.S. fair employment laws, with reference to Japanese laws that do or do not apply to employment relations between U.S.-based corporations in Japan and their employees. This issue is of great interest because ever-increasing numbers of U.S. corporations are doing business in Japan.

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8 29 U.S.C. §§ 201-219 (1988). This Act obligates employers to pay overtime and minimum wages, and regulates the employment of children under 18 years of age.

9 The Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 (1990)), which takes effect in 1992, does not contain a provision indicating Congress' intent to apply it abroad. The Court in ARAMCO implied that the Americans With Disabilities Act does not have extraterritorial coverage. EEOC v. ARAMCO, 111 S.Ct. 1227, 1231-32 (1991) (citing this Act in stating that a broad definitional language as to "commerce" or "employer" may not be a basis for extraterritorial jurisdiction).

10 After ARAMCO, a bill was introduced to amend Title VII to extend its coverage to foreign countries. See infra note 301 and accompanying text. But until the amendment becomes law, the limits on the territorial application of Title VII remains an important issue.
II. Extraterritoriality in International Law

A. Extraterritoriality and Principles of Jurisdiction

1. Principles of Jurisdiction in International Law

The extraterritorial application of national laws raises the question of whether the principles of jurisdiction in international law are violated. Jurisdiction in the context of international law is the "legal power or competence of states to exercise governmental functions."11 Depending on the nature of the governmental functions to be exercised, jurisdiction can be classified into one of three categories: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.12 Jurisdiction to prescribe is the power of a state to "make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court."13 Jurisdiction to adjudicate is the power to "subject persons or things to the process of courts or administrative tribunals" of the state.14 Finally, jurisdiction to enforce is the state's power to "induce or compel compliance or to punish non-compliance with its laws or regulations."15 The issue of extraterritoriality arises, in many cases, around jurisdiction to prescribe, since this issue is often related to the state's scheme to regulate or prescribe certain conduct beyond its territorial boundaries.

a. Territorial Principle

A state has prescriptive jurisdiction over conduct that takes place within its territory.16 Based on the sovereignty of states, this territorial principle is the traditional and common basis for jurisdiction to prescribe.17 Sometimes the conduct to be prescribed occurs partly outside the territory of the regulating state. In such a case, the territorial principle can be extended in two directions. First, when the conduct commences within a state but is completed outside its territory, the state can prescribe the conduct based on the "subjective territorial principle."18 The Restatement (Second) of the Foreign Relations Law of the United States gives an example: "X hides a bomb aboard a plane in state A. The bomb explodes while the

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12 Restatement (Third) Of The Foreign Relations Law Of The United States § 401 (1987) [hereinafter Restatement (Third)].
13 Id.
14 Id.
15 Id.
17 See Restatement (Third) § 402(1)(a). See also F.A. Mann, The Doctrine of Jurisdiction in International Law, 111 R.C.A.D.I. 1, 30 (1964).
plane is flying over state B, causing the plane to crash, killing all the passengers. A has jurisdiction to prescribe a criminal penalty for homicide."

Second, when the conduct commences abroad but is completed within the territory of a state, the state can prescribe such conduct under the "objective territorial principle." The decision of the Permanent Court of International Justice in the Lotus case invoked this principle. In this case, Turkey asserted its criminal jurisdiction over the collision of French and Turkish vessels on the high seas, as a result of which Turkish nationals were killed and their vessel sank. The court held that where the negligence of a French officer on the French vessel caused the harm to the Turkish vessel, which is treated as Turkish territory, international law did not prohibit the Turkish government from applying its criminal law to prosecute the officer. In this case, the "effects" of the negligent conduct of the French officer can be recognized without difficulty. However, U.S. courts have relied on more vague or intangible "effects," such as effects on the national economy within its territory, as a basis for jurisdiction over conduct abroad. This is called the effects doctrine.

b. Effects Doctrine

The landmark U.S. case that established the effects doctrine is United States v. Aluminum Co. of America (ALCOA). The dispute in this case was whether agreements by which foreign corporations doing business abroad set up quotas for production of aluminum violated the Sherman Act when the aluminum was to be exported to the United States. Judge Learned Hand stated that the Sherman Act may regulate conduct outside the United States if such conduct was intended to and did have some effects upon imports to the United States. Since ALCOA, a number of U.S. courts have relied on the effects doctrine in areas such as antitrust and securities regulations. As a result, the 1909 Supreme Court decision in American Banana Co.
v. United Fruit Co., which expressed a strict territorial principle for the Sherman Act, has lost much of its vitality. The Restatement (Third) has also adopted the effects doctrine, stating that a state has prescriptive jurisdiction over conduct outside its territory that has or is intended to have substantial effects within its territory.

However, the effects doctrine has received unfavorable responses from foreign countries whose laws are in conflict with U.S. laws. Relying on the traditional territorial principle, foreign commentators have criticized this doctrine. Moreover, some states have shown resistance to U.S. extraterritorial economic regulations based on the effects doctrine. For example, the United Kingdom has asserted the invalidity of the effects doctrine through diplomatic documents, and has submitted amicus curiae briefs in U.S. antitrust cases. The United Kingdom has also enacted "blocking statutes," which empower the government to prohibit its nationals from obeying orders under foreign laws to submit documents in their possession. On the other hand, other states such as Germany and the European Community have themselves adopted the effects doctrine. In any event, it has been widely recognized that some measure is necessary to resolve conflicting interests between states involved in extraterritorial regulations.

c. Nationality Principle

The nationality principle is a basis for prescriptive jurisdiction by a state over its nationals, whether they are within its territory or not. Based on the idea that nationality is a mark of allegiance and one aspect of sovereignty, this principle, along with the territorial principle, has long been accepted in the United States as well as in other states. For example, in Blackmer v. United States, the Supreme Court upheld U.S. jurisdiction based on this principle over

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30 RESTATEMENT (THIRD) § 402(1)(c).
31 E.g., Mann, supra note 17, at 42.
33 E.g., Amicus curiae brief submitted by British Government during the Uranium Antitrust litigation, 3 August 1979, reprinted in part in id. at 156.
34 Protection of Trade Interest Act of 1980 § 1(2) (Eng.).
35 See RESTATEMENT (THIRD) § 402, reporter's note 2.
36 For example, the exercise of extraterritorial jurisdiction on the basis of the effects doctrine has been subject to the reasonableness test described below. See infra notes 46-62 and accompanying text.
38 284 U.S. 421 (1932).
an American citizen residing abroad who failed to respond to a sub-
poena issued and served by a U.S. court. To define the nationality 
of corporations, U.S. law has generally treated the place of incorpo-
ration as determinative. Thus, a corporation has the nationality of 
the state in which it is incorporated.

d. Other Principles

It is argued that a state may exercise its jurisdiction over an 
event which harms its nationals even if the event occurs outside its 
territory. This is called the passive personality principle. Although 
this principle has been increasingly recognized in anti-terrorist legis-
lation, including that of the United States, it has generally not been 
accepted as a basis for jurisdiction with respect to ordinary crimes or 
other conduct.

Also, a state may exercise its jurisdiction to prescribe, under 
what is called the protective principle, with respect to certain con-
duct that threatens the security of a state or the integrity of its gov-
ernmental functions even when the conduct is carried out by foreign 
nationals outside the state. This principle affords a basis for pun-
ishment of a limited class of crimes such as espionage, falsification of 
oficial documents, and perjury before consular officials. Finally, 
the universality principle provides a basis for punishing certain activ-
ities, such as piratical operation, so universally condemned that any 
state has an interest in imposing punishment.

2. Limits of Extraterritorial Jurisdiction

a. Reasonableness Test

Some jurisdictional principles, such as nationality, effects on ter-
ritory, protection of state’s security, and universality, provide a basis 
for extraterritorial application of national laws. However, the exer-
cise of extraterritorial jurisdiction by one state might affect another 
state’s interests, even if it does not violate international law. For ex-
ample, an international cartel agreement that is illegal under U.S. 
antitrust laws may be permissible under the laws of the country 
where the cartel agreement was entered into. Even if the United

39 Id. at 437.
40 Restatement (Third) § 213.
41 See Section 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 
42 See Restatement (Third) § 402 cmt. g; Mann, supra note 17, at 39-40.
43 Restatement (Third) § 402(3) & cmt. f.
44 Id.
45 Id. § 404.
46 If the definition of “extraterritorial application” includes the application of munici-
pal laws to events which only partly occur within a state’s territory, the objective and sub-
jective territorial principles, which would justify such an application, can also be a basis for 
extraterritoriality.
States may exercise its prescriptive jurisdiction in this situation, relying on the effects that the cartel would have on U.S. territory, such extraterritorial regulations may undermine the policies and interests of the foreign country's own market regulation. Moreover, it may bring about diplomatic and political tension between the two countries. Thus, some limitation on extraterritoriality becomes necessary.

The Restatement (Third) has adopted a reasonableness test for this purpose. Section 403(1) states that "[e]ven when one of the bases for jurisdiction under section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connection with another state when the exercise of such jurisdiction is unreasonable." Subsection (2) lists the elements for determining reasonableness in this respect. In Timberlane Lumber Co. v. Bank of America National Trust & Saving Ass'n, the Ninth Circuit adopted a similar approach when it addressed the issue of whether the Sherman Act applies to an alleged conspiracy abroad which interfered with the U.S. import of lumber from Honduras. Noting that the effect on U.S. commerce alone is not sufficient for the exercise of its extraterritorial jurisdiction, the court balanced various factors similar to those listed for the reasonableness test under the Restatement (Third). The notion of comity led the court to consider other

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47 See supra notes 32-34 and accompanying text.
48 Some commentators seem to classify the reasonableness test as another principle of jurisdiction, not as its limitation. See, e.g., The Extraterritorial Application of National Laws, supra note 2, at 38.
49 Restatement (Third) § 403(1).
50 Restatement (Third) § 403(2) states:
   (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
      (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
      (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
      (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
      (d) the existence of justified expectations that might be protected or hurt by the regulation;
      (e) the importance of the regulation to the international political, legal, or economic system;
      (f) the extent to which the regulation is consistent with the traditions of the international system;
      (g) the extent to which another state may have an interest in regulating the activity; and
      (h) the likelihood of conflict with regulation by another state.
51 549 F.2d 597 (9th Cir. 1976).
52 Id. at 613-14.
nations' interests under this approach.\textsuperscript{53} Several decisions have followed \textit{Timberlane},\textsuperscript{54} but commentators have doubted that this test is an established international law principle.\textsuperscript{55}

The exercise of extraterritorial jurisdiction by a state, even when reasonable in itself, may conflict with another state's jurisdiction based on principles such as territoriality.\textsuperscript{56} Section 403(3) of the Restatement (Third) has adopted a balancing approach to resolve such conflicts.\textsuperscript{57} Under this approach, a state should evaluate its own interest as well as the interests of other states in exercising its jurisdiction in light of factors listed in subsection (2). Furthermore, if it is clear that another state's interest is greater, the acting state should defer to the exercise of jurisdiction by that other state. One of the defects in this approach is the difficulty of balancing interests. It is especially difficult for domestic courts to evaluate another state's interest.\textsuperscript{58} Moreover, under this approach courts are required to evaluate political factors, such as the importance of the regulation to the international political order, without appropriate guidelines.\textsuperscript{59} In this situation domestic courts might be compelled to make their own foreign policies for their country.\textsuperscript{60} Some courts have declined to adopt this approach,\textsuperscript{61} but other courts have relied on it.\textsuperscript{62}

\textsuperscript{53} \textit{Id.} at 611-12.
\textsuperscript{54} \textit{E.g.}, \textit{Mannington Mills, Inc. v. Congoleum Corp.}, 595 F.2d 1287, 1297-98 (3d Cir. 1979); \textit{Montreal Trading Co. v. Amax, Inc.}, 661 F.2d 864, 869 (10th Cir. 1981), \textit{cert. denied}, 455 U.S. 1001 (1982).
\textsuperscript{56} Such a conflict of jurisdiction occurs when what one state requires is prohibited by another state. However, if one state requires what another state does not prohibit and it is possible to comply with both regulations, there is no conflict of jurisdiction. \textit{Restatement (Third)} § 403, comment e, states that this situation is governed by the reasonableness principle set forth in subsection (2), not by subsection (3).
\textsuperscript{57} \textit{Restatement (Third)} provides:

When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state is expected to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2); and to defer to the other state if that state's interest is greater.

\textit{Restatement (Third)} § 403(3).
\textsuperscript{59} \textit{See Restatement (Third)} § 403(2)(e).
\textsuperscript{61} \textit{E.g.}, \textit{Laker Airways, Ltd. v. Sabena, Belgian World Airlines}, 731 F.2d 909 (D.C. Cir. 1984).
\textsuperscript{62} \textit{E.g.}, \textit{Timberlane Lumber Co. v. Bank of Am., Nat'l Trust & Sav. Ass'n}, 549 F.2d 597, 613-15 (9th Cir. 1976); \textit{Mannington Mills, Inc. v. Congoleum Corp.}, 595 F.2d 1287, 1297-98 (3d Cir. 1979).
b. Foreign Compulsion Defense

With all the limitations stated above, jurisdictions of two or more countries may still overlap. Thus, when one state requires conduct by a person which would result in violation of the laws of another state, that person is presented with a serious dilemma. But, it is recognized that a U.S. citizen caught in such a dilemma may raise the defense that such illegal conduct was compelled under the laws of the foreign country where it was carried out. The Restatement (Third) also recognizes this foreign compulsion defense.

Case law has required actual compulsion for the establishment of this defense: neither mere approval nor authorization by the foreign government is sufficient. The defendant should make a reasonable effort to avoid a violation of foreign laws. The defendant must also prove that the violation of a foreign law would result in severe sanctions, either criminal or civil. Finally, this defense is generally available only when the conduct in question was carried out or will be carried out within the territory of the country that compelled or would compel the conduct.

B. Construction of Municipal Laws

1. Role of International Law in Interpreting Municipal Laws

Whether a specific U.S. statute applies to conduct outside of U.S. territory is a question of the interpretation of that statute within the U.S. domestic legal system. It does not directly depend on the question of whether an exercise of such extraterritorial jurisdiction violates international law. Because Congress has power to override international law, a statute that fails to meet such requirements is not void in itself. Thus, even if a statute with extraterritorial reach has

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63 Although many courts have accepted this principle in dicta, there are few decisions which have held that otherwise illegal activities were permissible under this principle. See, e.g., Interamerican Refining Corp. v. Texas Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).
64 Restatement (Third) § 441(1) states:
[A] state may not require a person . . . to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national . . . or . . . to refrain from doing an act in another state that is required by the law of that state or by the law of state of which he is a national.

Restatement (Third) § 441(1).
65 Mannington Mills, Inc., 595 F.2d at 1293.
68 Restatement (Third) § 441 cmt. c. See United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968) ("mere absence of criminal sanctions abroad [does not] necessarily mandate obedience to a subpoena [issued by U.S. courts]").
69 Restatement (Third) § 441 cmt. b.
70 E.g., South Afr. Airways v. Dole, 817 F.2d 119, 126 (D.C. Cir.), cert. denied, 484 U.S.
an insufficient jurisdictional basis in international law, it may still be valid in a domestic legal system, although breach of international law would expose the state to international liability.\footnote{71}

However, Chief Justice Marshall, in Murray v. Schooner Charming Betsy,\footnote{72} set forth an important canon of statutory construction: "[a]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."\footnote{73} The Restatement (Third) also provides that "where fairly possible, a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States."\footnote{74} This is known as the Charming Betsy principle, which is said to be based on the notion of international comity. According to one U.S. Supreme Court decision, the observance of this principle is "essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations."\footnote{75} Thus, in interpreting the geographical coverage of a U.S. statute, courts should avoid constructions which would violate jurisdictional principles of international law,\footnote{76} as long as other constructions are possible or at least fairly possible.

2. Presumption Against Extraterritoriality

a. Bases for Presumption

In Blackmer v. United States,\footnote{77} which addressed the issue of the jurisdiction of U.S. courts over an American citizen abroad with respect to the enforcement of a subpoena, the Supreme Court held that "the legislation of Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States."\footnote{78} Although the Court in Blackmer found congressional intent for the exercise of extraterritorial jurisdiction, a series of subsequent decisions have rejected the extraterritorial application...
of U.S. statutes, relying on the presumption against extraterritoriality. To support the presumption, courts have often relied on the Charming Betsy principle, stating that statutes should not be construed to violate international law if any other possible construction remains.

There is another basis for the presumption against extraterritoriality, however. Even when a state may exercise its prescriptive jurisdiction without violating international law, the state, through legislative discretion, usually limits the coverage of the statute to its own territory. In Foley Bros., Inc. v. Filardo, the Supreme Court indicated that another basis for the presumption is "the assumption that the Congress is primarily concerned with domestic conditions" when it engages in legislation. This assumption should be distinguished from the Charming Betsy principle, because it derives from congressional concern for domestic matters and not from international law. Thus, the Court in Steele v. Bulova Watch Co., while acknowledging that there was no international law question in applying the Lanham Trade-Mark Act to the conduct of U.S. nationals abroad based on the nationality principle, still addressed and

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79 E.g., Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953). See also Benz v. Compania Naviera Hidalgo, S.A., 953 U.S. 138, 147 (1957); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); Airline Dispatchers Ass'n v. National Mediation Bd., 189 F.2d 685, 690 (D.C. Cir. 1951). However, Professor Turley points out that there is some difference in reliance on this principle depending on the subject matter of legislation. See Turley, supra note 27, at 603-37 (arguing that courts have applied a less stringent presumption concerning market legislations like antitrust or security regulation than labor and environmental legislations).


81 E.g., Foley Bros., 336 U.S. at 295; Lauritzen, 345 U.S. at 578 (1953); McCulloch, 372 U.S. at 21. McCulloch expressly refers to an international law principle. Id. See also Steinhardt, supra note 70, at 1140. Courts have also relied on the Charming Betsy principle in order to avoid statutory interpretations which would raise constitutional questions. E.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979). Justice Marshall's dissenting opinion in ARAMCO suggests that the separation-of-powers doctrine may be another basis for the Charming Betsy principle, stating that "[t]he strictness of the McCulloch and Benz presumption permits the Court to avoid, if possible, the separation-of-powers and international-comity questions...." ARAMCO, 111 S.Ct. at 1239.

82 336 U.S. at 281.

83 Id. at 285. Since this case was concerned with the liability of U.S. contractors for overtime wages under the Eight Hours Law, ch. 174, 37 Stat. 137 (1912) (repealed 1962), which were claimed by their employees who worked in Iraq and Iran, the application of the Eight Hours Law has its basis in the nationality principle. See supra notes 37-40 and accompanying text.


85 344 U.S. 280, 285-86 (1952). In this case, the U.S. Supreme Court held that the Lanham Trade-Mark Act applied to a U.S. citizen who engaged in the infringement of a trade mark registered under U.S. law, even when the infringement took place in Mexico.

answered affirmatively the question of whether there is congressional intent sufficient to rebut the presumption against extraterritoriality.\textsuperscript{87}

\textbf{b. Strength of Presumption}

Taken literally, the holding of the \textit{Charming Betsy} case leads to a very strong presumption against extraterritoriality: if a statute is interpreted to apply beyond U.S. territory and the exercise of such extraterritorial jurisdiction would violate international law principles, such interpretation ought to be avoided unless no other interpretation is "possible" or at least "fairly possible."\textsuperscript{88} Some courts require statutory language that expressly indicates extraterritoriality.\textsuperscript{89} However, other courts look to legislative history for evidence of congressional intent for extraterritoriality, because legislative history may be relevant in deciding whether there is a "fairly possible" interpretation consistent with principles of international law.\textsuperscript{90} But, the inference needs to be so strong that a court can safely say that no other "fairly possible" construction remains.

One of the decisions that relied on this presumption is \textit{McCulloch v. Sociedad Nacional de Marineros de Honduras}\.\textsuperscript{91} In this case, the Supreme Court held that there must be an "affirmative intention of

\textsuperscript{87} The presumption based on the \textit{Charming Betsy} principle is sometimes distinguished from the presumption against extraterritoriality, and classified as a separate category under statutory construction. Boureslan \textit{v. ARAMCO}, 892 F.2d 1271, 1275 n.1 (5th Cir. 1990) (King, J., dissenting), \textit{aff'd sub nom.}, EEOC \textit{v. ARAMCO}, 111 S.Ct. 1227; \textit{ARAMCO}, 111 S.Ct. at 1239 (Marshall, J., dissenting). \textit{But see Steinhardt, supra note 70, at 1140-43; Turley, supra note 27, at 606. Apart from categorization, it is important to note the difference in the basis for these presumptions.}

\textsuperscript{88} Under \textsc{Restatement} (Third), section 114, the "fair possibility" would be required. \textit{See supra note 74 and accompanying text.}

\textsuperscript{89} \textit{E.g.}, Boureslan \textit{v. ARAMCO}, 857 F.2d 1014, 1019 (5th Cir. 1989) (requiring "clear expression of congressional intent"), \textit{aff'd en banc}, 892 F.2d 1271, \textit{aff'd sub nom.}, EEOC \textit{v. ARAMCO}, 111 S.Ct. 1227. \textit{See also ARAMCO, 111 S.Ct. at 1288 (Marshall, J., dissenting) (the strong presumption would "foreclose inquiry into extrinsic guides to interpretation").}

\textsuperscript{90} The Supreme Court in \textit{McCulloch} looked into the legislative history. \textit{See infra note 94 and accompanying text. Moreover, where the Court relies on the \textit{Charming Betsy} principle in order to avoid the issue of the constitutionality of a statute \textit{(see supra note 81)}, it explored the legislative history of the statute at issue. \textit{See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Bldg. & Constr. Trades Council, 485 U.S. 568, 583-88 (1988) (rejecting an interpretation that handbilling to urge customers of a shopping mall to boycott neutral employers violates section 8(b)(4) of the NLRA, because such an interpretation would raise a serious issue of First Amendment violation). Justice Marshall's dissenting opinion in EEOC \textit{v. ARAMCO} cites Dellmuth \textit{v. Muth}, 491 U.S. 225 (1989), as a precedent that rejected inquiry into extrinsic materials for Congress' intent under the stronger presumption. \textit{ARAMCO, 111 S.Ct. at 1288. But the issue in that case is whether a federal statute may abrogate the states' Eleventh Amendment immunity, and the Court in Dellmuth stated that Congress may abrogate the states' immunity "only by making its intention clear in the language of the statute." Dellmuth, 491 U.S. at 228 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 294, 242 (1985)). Thus the reliance on Dellmuth is misplaced.}

\textsuperscript{91} 372 U.S. 10 (1965).
the Congress clearly expressed"\(^92\) in order to rebut the presumption based on international law. Faced with the issue of whether the National Labor Relations Act applied to a foreign flag ship employing alien seamen when the ship was in U.S. waters, the Court relied on the "well established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship."\(^93\) Since it failed to find any such clear expression in the language of the National Labor Relations Act or its legislative history,\(^94\) the Court refused to extend the coverage of the Act to the foreign flag ship.

On the other hand, the presumption based only on the congressional concern for domestic matters is not as strong as the presumption based on the *Charming Betsy* principle. This is because the need to avoid international law violations, which underlies the latter presumption, is not involved in the former presumption. Thus, the former presumption can be rebutted using "conventional techniques of statutory interpretation,"\(^95\) by inferring that Congress intended to apply the statute beyond U.S. territory, and without being forced to choose other possible interpretations which would avoid the violation of international law principles.

A case that illustrates this is *Vermilya-Brown Co. v. Connell*.\(^96\) In this case, certain U.S. citizens were employed by U.S. corporations which had contracted to work for the U.S. government on a Bermuda base. The base was obtained by the United States under a lease agreement with the British government. The employees brought suit against their employers under section 216(b) of the Fair Labor Standards Act (FLSA or the Act) for recovery of overtime compensation for their overseas work. Thus, the question was whether the FLSA applied to employers doing business on the Bermuda base. The coverage of the FLSA was determined with reference to commerce "among several States or from any States to any place outside thereof."\(^97\) "State" in turn means "any State of the United States or the District of Columbia or any Territory or possession of the United States."\(^98\) Therefore, the question turns on whether "possession of

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\(^92\) *Id.* at 21-22.
\(^93\) *Id.* at 21. For the international law principle that the flag state may exercise its jurisdiction over the internal affairs of the ship, see *Restatement* (Third) § 502.
\(^94\) *McCulloch*, 372 U.S. at 19.
\(^95\) *ARAMCO*, 111 S.Ct. at 1237 (Marshall, J., dissenting). Justice Marshall also states that "a court is not free to invoke the [weaker] presumption . . . until it has exhausted all available indicia of Congress' intent" on the issue of extraterritoriality. *Id.* at 1240. Although his understanding that the presumption on the basis of the *Charming Betsy* principle excludes the inquiry into legislative history may overstate the strength of this presumption, the "conventional technique of statutory interpretation" may not be invoked under this strong presumption against extraterritoriality.
\(^96\) 335 U.S. 377 (1948).
\(^98\) *Id.* § 203(c).
the United States" includes U.S. leaseholds such as the Bermuda base.

The Court, relying primarily on Blackmer v. United States, acknowledged at the outset the general principle that the United States has the power to regulate the conduct of its citizens abroad. The FLSA contained no clear expression of its applicability to conduct that occurred on foreign soils, including foreign military bases, and the legislative history was also silent on this issue. However, the Court inferred congressional intent to apply the Act in such an instance as this based on the fact that the Act had been applied to U.S. territories like Puerto Rico, Guam, and Samoa, which, like the Bermuda base, have their own local economies, as long as the United States has the power to control their labor relations. Noting that the provisions of the lease agreement with the British government indicate that the United States does have such power, the Court concluded that the FLSA applied to employment on the Bermuda base.

In sum, the strength of the presumption against extraterritoriality varies according to the basis for the presumption: jurisdictional principles of international law or Congress' concern with domestic matters. Therefore, when interpreting the geographical coverage of a statute, courts must determine the basis and strength of the presumption under the statute.

III. Extraterritoriality in Fair Employment Laws

In analyzing the geographical coverage of fair employment laws, this Article discusses three basic statutes. The FLSA, and therefore the Equal Pay Act, contains a statutory provision that exempts foreign workplaces from its regulation. On the other hand, the Age Discrimination in Employment Act (ADEA) was amended in 1984 to have a certain extraterritorial reach. Finally, Title VII, which has an ambiguous provision that exempts aliens employed abroad, was denied extraterritoriality by the U.S. Supreme Court.

A. Fair Labor Standards Act/Equal Pay Act

The Equal Pay Act, which prohibits wage discrimination on the basis of sex, was enacted in 1963 as a part of the FLSA. While no

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99 284 U.S. 421 (1932). This is a leading case for the nationality principle. See supra notes 37-40 and accompanying text.
100 Connell, 335 U.S. at 381.
101 The Court stated that "our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of legislation with the present situation in mind." Id. at 388.
102 Id. at 385, 388.
103 In 1957, Congress amended the FLSA to exclude extraterritorial applicability. See infra notes 106-07 and accompanying text.
decision has been reported on the extraterritoriality of the Equal Pay Act, case law under the FLSA provides a relevant source for interpreting the geographical coverage of the Equal Pay Act.

Before its amendment in 1957, the FLSA had limited extraterritorial reach with respect to the "possessions" of the United States. As stated above,104 the Supreme Court in *Vermilya-Brown Co. v. Connell*105 held that the FLSA applied to employment relations between U.S. employers and their American employees on a Bermuda military base. In 1957, however, Congress amended the FLSA to overrule this decision and specifically exclude the possibility of its extraterritorial application by adding section 213(f).106 This section provides that the FLSA shall not apply "with respect to any employee whose services during the workweek are performed in a workplace within a foreign country."107 The consideration that led Congress to add this provision was that applying the FLSA to foreign countries would distort their local economies, which operate on a different scale than the U.S. economy.108 For example, paying minimum wages as provided by the FLSA may result in paying local workers wages several times higher than the local standard, drawing them away from other vital jobs in those areas.109 In addition, concern was expressed about possible political problems with foreign governments as a result of such distortion.110

However, this amendment raised the issue of what are the "services . . . performed in a workplace within a foreign country."111 In *Wirtz v. Healy*,112 the District Court for the Northern District of Illinois held that this exemption provision was inapplicable to a tour escort of a U.S. travel agency who spent a part of the workweek in the United States and the rest of the workweek in Canada escorting tours,113 while another escort who performed all of his services during any workweek exclusively in a foreign country came within the

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104 See supra notes 96-103 and accompanying text.
105 335 U.S. 377 (1948).
107 The entire subsection reads as follows:

(f) The provisions of section 6, 7, 11, and 12 [29 U. S. C. 206, 207, 211, 212] shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone.

109 Id. at 1757.
110 Id.
113 Id. at 129.
exemption provision.\textsuperscript{114} On the other hand, in \textit{Hodgson v. Union de Permisionarios Circulo},\textsuperscript{115} the District Court for the Southern District of Texas dismissed an action to enjoin a Mexican bus company that operated buses between a city in Mexico and another city in Texas from violating the FLSA, because its employees performed only a minor part of their services in the United States and spent the majority of their working time in Mexico. In applying the exemption provision, the court pointed out that forcing the company to pay the minimum wages provided by the FLSA could result in such problems as fare increases and, ultimately, the discontinuance of the bus service.\textsuperscript{116}

These two decisions may seem inconsistent. While the \textit{Wirtz} court rejected the application of the exemption provision to employees who worked outside U.S. territory for a part of their workweek, the employees in \textit{Hodgson} who drove buses within U.S. territory were held to come within the exemption provision. But, the interpretation of the term "workplace" helps to distinguish these cases. In \textit{Wirtz}, although the tour escort visited foreign countries on business, his workplace or employment base remained in the United States. Thus, applying the FLSA would not distort the local economy of the foreign country. However, the employees in \textit{Hodgson} who drove buses within U.S. territory were still part of the operation of their Mexican workplace, even when they were outside Mexican territory. Forcing the employer in this situation to pay minimum wages under the FLSA could distort the operation of its business as well as the local economy in Mexico.

Relying on these cases, the Equal Employment Opportunity Commission (EEOC) issued a policy statement that the Equal Pay Act, although without extraterritorial reach, may cover workers whose "work station" or "employment base" is within the United States.\textsuperscript{117} This view will be analyzed in detail in Part IV of this Article.

\begin{itemize}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} 381 F. Supp. 1119 (S.D. Tex. 1971).
\item \textsuperscript{116} Id. at 1122. Following \textit{Wirtz} and \textit{Hodgson}, the Department of Labor took the position that the travel time spent abroad during a part of workweek is compensable under the FLSA when the employee works within U.S. territory for the rest of the workweek, while the travel time spent abroad for the whole workweek is not compensable. Foreign Travel, Opinion WH-510 (by Deputy Wage Hour Administrator Henry T. White, June 29, 1981), 6A Lab. Rel. Rep. (BNA) Wage Hour Manual 93:211.
\end{itemize}
B. Age Discrimination in Employment Act

1. Before 1984 Amendment

   a. Issue of Extraterritoriality

A number of lower courts agree that the ADEA, prior to its amendment in 1984, had no extraterritorial effect.118 These courts rely principally on section 7(b) of the ADEA, which provides that provisions of the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in section . . . 216 . . . of [the Fair Labor Standards Act] (except for subsection (a) thereof)."119 According to subsection (d) of section 216 of the FLSA, "no employer shall be subject to any liability or punishment on account of his failure to comply with any provision of such Act (1) with respect to work . . . performed in a workplace to which the exemption in section 213(f) . . . is applicable."120 Section 213(f) in turn provides that the FLSA "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country . . . ."121 Thus section 7(b) of the ADEA, by incorporating section 213(f) of the FLSA, excludes foreign workplaces from its coverage.

Relying on this statutory language, the lower court decisions rejected the argument that substantive provisions of the ADEA are modeled after Title VII,122 which was held to have extraterritorial coverage when these decisions were rendered.123 According to these decisions, Title VII is distinguishable from the ADEA. Title VII contains a provision exempting employers with respect to the employment of aliens outside the United States, which, as discussed below,124 may bring about a negative inference that it applies to American citizens employed abroad.125

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120 Id. § 216(d).
121 Id. § 218(f).
123 See infra note 155 and accompanying text.
124 See infra notes 156-57 and accompanying text.
b. Foreign "Workplace"

In *Pfeiffer v. WM. Wrigley Jr. Co.*, the Court of Appeals for the Seventh Circuit suggested that the ADEA would apply to employees working abroad when they continue to belong to their work station in the United States. The opinion by Judge Posner set forth a hypothetical case in which an employer sent its employee abroad temporarily to get around the ADEA and then fired that employee while abroad. He stated that in this situation the employer cannot avoid liability under the ADEA. The statutory ground for this position may be that the services of the employee here are not those which are "performed in a workplace within a foreign country" under section 213(f) of the FLSA, as incorporated into the ADEA. This theory is in line with *Wirtz v. Healy*, which held that the exemption provision under section 213(f) did not apply where an employee of a U.S. travel agency spent part of the workweek in foreign countries escorting tours. Thus, these cases suggest a flexible interpretation of the foreign "workplace" exemption, so that the ADEA applies to business travelers whose work stations are located in the United States.

Another issue regarding the foreign "workplace" arises when an employee working abroad attacks an employment decision that was made in the United States. In such a case the employee may argue that even if the ADEA does not cover foreign soils it would apply to decisions made within U.S. territory. A few lower court decisions have addressed this issue and have held that the place of decision is irrelevant. In *Cleary v. United States Lines, Inc.*, for example, the employee insisted that the decision to discharge him was made in the United States, not in London where he had performed his job, and that the employer's liability does not depend on the extraterritorial application of the ADEA. The court rejected this argument, stating that "[t]he language of section 213(f) . . . looks to the place of employment, not the place where the decision was made." *Zahourek v. Arthur Young & Co.* also rejected the place of decision test. In addition to the language of the FLSA, the court relied on the proposition that the discriminatory effect of dismissal was in the employee's place of employment, Honduras, where the ADEA did not apply.

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126 755 F.2d 554 (7th Cir. 1985).
127 Id. at 559.
128 Id.
130 Id. at 129.
131 See infra notes 258-78 and accompanying text.
132 728 F.2d 607 (9th Cir. 1984).
apply.\textsuperscript{135}

However, if the effect of the employment decision were to be a determinative factor as to the applicability of the ADEA, it could not apply even when the employer sends its employee abroad temporarily and fires that employee to avoid its liability under the ADEA, since the effect of such discharge would be on foreign soil. This is contrary to Judge Posner's opinion in \textit{Pfeiffer}.\textsuperscript{136} Moreover, for certain decisions such as discharge of an employee, the place of decision seems to have the most significant connection with the regulation under the ADEA.\textsuperscript{137} Thus, it is necessary to put some limitation on the concept of "workplace."

In \textit{Lopez v. Pan Am World Services, Inc.},\textsuperscript{138} the court extended the foreign "workplace" exemption to a situation where a U.S. citizen residing in the United States was denied an application to a U.S. corporation for employment in Venezuela. The court, after rejecting the argument that the ADEA should have extraterritorial reach, held that the workplace for the applicant's job would have been Venezuela and not the United States, where the decision was made.\textsuperscript{139}

However, if the place of decision test is to be adopted, the court should apply the ADEA. In addition, when no actual employment has ever taken place, there is no reason to exempt the employer from regulation under the ADEA. This is because conflict with local regulations, which was the consideration that led Congress to add the foreign workplace exemption to the FLSA (and the ADEA), will not occur in this situation.\textsuperscript{140} Indeed, Title VII has been applied to similar cases without reference to its extraterritoriality. In \textit{Kern v. Dynlectron Corp.},\textsuperscript{141} the plaintiff was employed by the defendant to work as a helicopter pilot in Saudi Arabia. The plaintiff was discharged because he refused to convert to the Moslem religion. Saudi Arabian law prohibits, under penalty of death, the entry of non-Moslems into Mecca, where the plaintiff's job required him to fly. Although his place of employment, according to the \textit{Lopez} case, would have been Saudi Arabia, the court applied Title VII\textsuperscript{142} without addressing the issue of extraterritoriality.\textsuperscript{143}

\textsuperscript{135} \textit{Id.} at 1457.
\textsuperscript{136} \textit{See supra} notes 126-28 and accompanying text. In addition, in certain cases where a decision to discharge is made in the United States, it may cause some chilling effect on elder workers as to their employment opportunities abroad. \textit{See infra} notes 215-18 and accompanying text.
\textsuperscript{137} \textit{See infra} notes 279-80 and accompanying text.
\textsuperscript{138} 813 F.2d 1118 (11th Cir. 1987).
\textsuperscript{139} \textit{Id.} at 1120.
\textsuperscript{140} \textit{Id.} at 1121 (Hatchett, J., dissenting).
\textsuperscript{141} 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd, 746 F.2d 810 (5th Cir. 1984).
\textsuperscript{142} \textit{Id.} at 1198. The court held that the requirement of conversion to the Moslem religion in this case was a bona fide occupational qualification. \textit{Id.} at 1202.
\textsuperscript{143} The court in Abrams v. Baylor College of Medicine also held that a U.S. hospital's refusal to send its Jewish anesthesiologists to Saudi Arabia for cardiovascular services be-
These decisions on the "foreign workplace" exemption have raised the issue of the scope of territorial application, which will be discussed in Part IV of this Article.

2. 1984 Amendment

In 1984, Congress amended the ADEA to extend its coverage to U.S. citizens employed by a U.S. employer in foreign countries. As amended, section 11(f) of the ADEA provides that "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." Moreover, this amendment made the ADEA applicable to foreign corporations controlled by U.S. employers, borrowing a four-factor test from the National Labor Relations Act (NLRA) case law which was used to treat separate business entities as a single employer.

Section 4(h) provides that:

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the:

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

According to its legislative history, the purpose of this amendment is to "insure that citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the [ADEA]." This amendment does not apply to foreign employees or to foreign corporations which are not controlled by American employers. This is due to the "well-established principles of sovereignty... that no nation has the right to impose its labor standards on another country."

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148 Id. For criticism of this amendment, see James Michael Zimmerman, Extraterritorial Application of Federal Labor Laws: Congress's Flawed Extension of ADEA, 21 CORNELL INT'L L.J. 103 (1988) (criticizing the amendment on the basis that it would cause international political problems).
consideration was also a factor in the amendment to section 4(f) of the ADEA, which allows an employer a foreign compulsion defense.\footnote{See supra notes 63-69 and accompanying text.} This section provides that:

It shall not be unlawful for an employer, employment agency or labor organization -
(1) to take any action otherwise prohibited . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.\footnote{29 U.S.C. § 623(f)(1) (1988).}

A recent case has presented the question of whether a German court order upholding a labor-management agreement which requires mandatory retirement at age 65 may be a defense under section 4(f).\footnote{EEOC v. Radio Free Europe & Radio Liberty, C.A. No. 89-0153 (filed Jan. 23, 1989) cited in Joy Cherian, Current Development in Transnational Employment Rights, 40 Lab. L.J. 259, 261 (1989).} Although the court has not yet rendered judgment, the EEOC asserts that such a court order is not a German law and therefore should not be relied on as a defense.\footnote{Id. Contra, Chris Lauderdale, Recent Developments, Age Discrimination-Extraterritorial Application of the Age Discrimination in Employment Act—Equal Employment Opportunity Commission Determines That a United States Corporation in West Germany Is Subject to Suit Under the Age Discrimination in Employment Act—Employer’s Defense Based on Compliance with West German Law Rejected, 20 Ga. J. Int’l & Comp. L. 207, 219 (1990) [hereinafter Recent Developments, Age Discrimination].} This position is consistent with lower court decisions as to foreign compulsion in other areas. In the context of antitrust law, for example, \textit{Timberlane Lumber Co. v. Bank of America, N.T. & S.A.}\footnote{549 F.2d 597 (9th Cir. 1976).} held that “mere governmental approval or foreign governmental involvement which the defendant had arranged does not necessarily provide a defense.”\footnote{Id. at 606.}

\section{C. Title VII of the Civil Rights Act of 1964}

\subsection{1. Lower Courts in Conflict}

Lower courts were in sharp conflict over the extraterritoriality of Title VII. Several U.S. district courts agreed that Title VII applies to American citizens employed by U.S. employers in foreign countries.\footnote{Bryant v. International Sch. Serv., Inc., 502 F. Supp. 472 (D.N.J. 1980), rev’d on other grounds, 675 F.2d 562 (3d Cir. 1982); Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986); Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), aff’d on other grounds, 569 F.2d 1074 (10th Cir. 1978).} These courts mainly relied on a so-called “alien exemption” provision, which provides that Title VII “shall not apply to an employer with respect to the employment of aliens outside any State,”\footnote{40 U.S.C. § 2000e-1 (1988).} drawing a negative inference that U.S. citizens employed
abroad are covered by Title VII. However, in Boureslan v. ARAMCO, the panel majority of the Fifth Circuit held that Title VII has no extraterritorial reach. On rehearing en banc, the majority opinion affirmed this conclusion, with five judges dissenting. Following this decision, one district court also denied extraterritorial coverage of Title VII, while another district court refused to follow the Fifth Circuit. Subsequently, the U.S. Supreme Court granted certiorari in the ARAMCO case.

2. Supreme Court in EEOC v. ARAMCO

The plaintiff in ARAMCO is a U.S. citizen who was born in Lebanon. After being hired as an engineer by one of the subsidiaries of the defendant, ARAMCO, he was transferred, at his own request, to Saudi Arabia to work for the defendant. Although the defendant is a Delaware corporation, its principal place of business is in Saudi Arabia. About four years later, the plaintiff was discharged allegedly because of his race, religion, and national origin. Affirming the decision of the Fifth Circuit, the majority of the Supreme Court in EEOC v. ARAMCO denied the extraterritorial application of Title VII.

a. Presumption Against Extraterritoriality

The majority opinion, written by Chief Justice Rehnquist, acknowledges that “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.” However, the opinion stresses the presumption against extraterritoriality, stating that “[i]t is a long-standing principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” The basis for this presumption is, according to the majority, the concern over “unintended clashes between our laws and those of other nations which could result in international discord.” The majority opinion, citing Benz v. Compania Naviera Hidalgo, S.A., requires “the affirmative intention of the Congress

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157 E.g., Bryant, 502 F. Supp. at 482.
158 857 F.2d 1014 (5th Cir. 1988), aff’g, 653 F. Supp. 629 (S.D. Tex. 1987).
159 892 F.2d 1271 (5th Cir. 1990) (en banc).
164 Id. (citing Foley Bros., Inc. v. Filardo, 356 U.S. 281, 285 (1949)).
165 Id.
clearly expressed" to rebut this presumption.\textsuperscript{167}

The dissenting opinion by Justice Marshall, joined by Justices Blackmun and Stevens, describes the majority opinion as improperly invoking a "clear statement rule."\textsuperscript{168} Justice Marshall insists that the presumption against extraterritoriality is not a rule which requires a clear statement for extraterritoriality.\textsuperscript{169} Rather, he states, "a court may properly rely on this presumption only after exhausting all of the traditional tools 'whereby unexpressed congressional intent may be ascertained.'"\textsuperscript{170} On the other hand, Justice Marshall continues, the clear statement rule would "foreclose inquiry into extrinsic guide to interpretation, . . . and even compel courts to select less plausible candidates from within the range of permissible constructions."\textsuperscript{171} According to the dissenting opinion, the majority "overstates the strength of presumption by drawing on language from cases involving a wholly independent rule of construction: 'that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'"\textsuperscript{172} This is a statement of the \textit{Charming Betsy} principle.\textsuperscript{173}

\textbf{b. Rebuttal of Presumption Rejected}

\textit{(1) "Employer" and "Commerce"}

The majority holds that there is no "sufficient affirmative evidence" to rebut the presumption against extraterritoriality of Title VII.\textsuperscript{174} First, the majority rejects the argument of the EEOC and Boureslan that the provisions defining "employer" and "commerce" indicate a congressional intent for extraterritoriality. Title VII applies to an employer who has fifteen or more employees for a specific period and is "engaged in an industry affecting commerce."\textsuperscript{175} "Commerce" means "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof."\textsuperscript{176} According to the EEOC and Boureslan, this broad language evinces congressional intent to apply Title VII abroad since an employer who affects trade "between a State and any place outside thereof"\textsuperscript{177} is covered by

\textsuperscript{167} \textit{ARAMCO}, 111 S.Ct. at 1230.
\textsuperscript{168} Id. at 1237 (Marshall, J., dissenting).
\textsuperscript{169} Id.
\textsuperscript{170} Id. (citing Foley Bros. Inc., v. Filardo, 336 U.S. 281, 285 (1949)).
\textsuperscript{171} Id. at 1238.
\textsuperscript{172} Id. at 1239.
\textsuperscript{173} See supra notes 72-73 and accompanying text.
\textsuperscript{174} \textit{ARAMCO}, 111 S.Ct. at 1236.
\textsuperscript{175} 42 U.S.C. § 2000e(h).
\textsuperscript{176} Id. § 2000e(g).
\textsuperscript{177} The EEOC and Boureslan argue that "any place outside thereof" refers to areas
these provisions. The majority responds that these provisions are "ambiguous and [do] not speak directly to the question," and refers to statutes which contain similarly broad language but have never been held to apply abroad. The majority also points out that case law under the Federal Employers Liability Act and the NLRA denied these statutes' applicability in spite of their broad jurisdictional language.

(2) Alien Exemption Provision

The next provision that the EEOC and Boureslan rely on is the "alien exemption" provision, under which an employer is exempted from Title VII "with respect to the employment of aliens outside any State." They assert that this provision provides a negative inference that U.S. citizens employed outside the United States are covered by Title VII. To counter this, ARAMCO offered two alternative interpretations. First, ARAMCO contended that the purpose of this provision is to exempt aliens employed in the possessions of the United States outside its territory. Second, ARAMCO contended that the provision confirms that aliens in the United States are covered by Title VII. Choosing neither of these alternatives, the majority opinion rejects the "negative inference" argument of EEOC and Boureslan. Since this provision does not distinguish between foreign employers and U.S. employers, the majority states, the extraterritorial application of Title VII would inevitably cover foreign employers, and this would lead to "difficult issues of international law" by imposing U.S. discrimination laws on employment relations abroad.

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Beyond the territory of the United States. It must be noted that the "state" includes Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act, as well as Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. 42 U.S.C. § 2000e(i) (1988).

ARAMCO, 111 S.Ct. at 1231.


Steele v. Bulova Watch Co., 344 U.S. 280 (1952), which the petitioners relied on, was distinguished in that the Lanham Trade-Mark Act, which was held to apply to conduct abroad in that case, contains more specific language for the congressional intent of extraterritoriality. ARAMCO, 111 S.Ct. at 1232-33. Under the Lanham Act, "commerce" is defined as "all commerce which may lawfully be regulated by Congress." 15 U.S.C. § 1127 (1988).

ARAMCO, 111 S.Ct. at 1232.


ARAMCO, 111 S.Ct. at 1254.
The dissenters accept the petitioners' "negative inference" argument.\textsuperscript{186} ARAMCO's alternative argument, that the alien exemption provision is meant to exempt aliens in the possessions of the United States, was rejected because foreign soils and such possessions are subject to the same jurisdictional rule of construction.\textsuperscript{187} In other words, if such possessions are covered by Title VII, foreign soils will be equally covered. The argument that the provision merely confirms that Title VII applies to aliens in the U.S. territory was also rejected. According to the dissenting opinion, since the protection of aliens in the United States is predicated on the provision prohibiting discrimination against "any individual,"\textsuperscript{188} the interpretation suggested by ARAMCO would make the alien exemption provision superfluous.\textsuperscript{189} Moreover, the dissenters rely on the legislative history of this provision. They refer to a statement in the House Report\textsuperscript{190} on an earlier Civil Rights bill,\textsuperscript{191} which contained the alien exemption provision and was incorporated into the bill\textsuperscript{192} that eventually became the Civil Rights Act of 1964. According to this House Report, the purpose of the alien exemption provision is "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."\textsuperscript{193} The dissenters argue that this provision is meant to insulate Title VII from the possible problems that might result from its extraterritorial application.\textsuperscript{194} On the other hand, the majority does not examine the legislative history or make any comment on the statement in the House Report.

\section*{(3) Domestic Focus of Title VII}

The majority opinion draws attention to some sections of Title VII which, in their view, display concern only with domestic matters. The majority first points to the provisions on the avoidance of undue interference with state laws.\textsuperscript{195} For example, one section states that provisions of Title VII shall not be construed to indicate congressional intent to preempt state employment discrimination laws,\textsuperscript{196}

\begin{itemize}
  \item \textsuperscript{186} Id. at 1240-41.
  \item \textsuperscript{187} Id. at 1242.
  \item \textsuperscript{189} \textit{ARAMCO}, 111 S.Ct. at 1242.
  \item \textsuperscript{191} Id.
  \item \textsuperscript{195} EEOC v. \textit{ARAMCO}, 111 S.Ct. 1227, 1241 (1991).
  \item \textsuperscript{196} Id. at 1234.
  \item \textsuperscript{197} 42 U.S.C. § 2000h-4 (1988).
\end{itemize}
but no corresponding provision is found which indicates concern over possible problems with its extraterritorial application. Moreover, the majority continues, Title VII lacks an overseas enforcement mechanism over venue and the EEOC’s investigatory authority or subpoena power. Justice Marshall’s dissent counters that the alien exemption provision is the very provision that is based on the concern over conflict with foreign laws. He also suggests that the “principal office” venue under Title VII is available for actions against American employers doing business abroad and that the limitation on the territorial reach of subpoena power does not prevent EEOC’s investigation in other ways.

(4) Deference to Administrative Interpretation

The majority rejects the EEOC’s argument that the judiciary should pay deference to its interpretation declaring the extraterritoriality of Title VII. Since the EEOC has no rulemaking authority, the majority states, its interpretation carries less weight than that of agencies with rulemaking power, and whether to defer to the agency depends on the thoroughness of consideration, consistency with its earlier and later interpretations, and so on. According to the majority, since the EEOC’s current interpretation is inconsistent with its earlier position and has no statutory support, the Court should not defer to its interpretation. The dissenting opinion denies that the EEOC’s interpretations are inconsistent, pointing out that its earlier interpretation was issued in a context irrelevant to extraterritorial application.

198 ARAMCO, 111 S.Ct. at 1234.
199 “If the [employer] is not found within any district,... an action [as to the employer’s discrimination] may be brought within the judicial district in which the [employer] has his principal office.” 42 U.S.C. § 2000e-5(f)(3).
200 ARAMCO, 111 S.Ct. at 1243-44. Justice Marshall in his dissent points out that there are some extraterritorial statutes which lack overseas subpoena power. Id. at 1244.
203 29 C.F.R. § 1606.1(c) (1971) (“Title VII... protects all individuals, both citizens and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex or national origin”).
204 ARAMCO, 111 S.Ct. at 1235.
205 In addition to the EEOC’s interpretation, the dissenting opinion draws attention to the interpretation of the Department of Justice to the same effect. Id. at 1245 (Marshall, J., dissenting).
206 Id. at 1246 (stating that the EEOC’s earlier interpretation was concerned with national origin discrimination against non-citizens in the United States and that the extraterritorial...
3. Analysis of the Court Opinion
   a. Strength of Presumption

The principal question involved in determining the geographical coverage of Title VII is whether Congress intended to apply Title VII beyond U.S. territory. The contrary conclusions reached by the majority and the dissent stemmed from their different approaches to discerning congressional intent under the presumption against extraterritoriality. Under the “clear statement rule” as described by the dissent, the majority focused on whether Title VII contains a provision expressing an intent for extraterritoriality without exploring, as the dissent did, its legislative history, especially that of the alien exemption provision. Although it is unclear whether the presumption against extraterritoriality should be, as the dissenters argued, distinguished from the presumption based on the Charming Betsy principle, it must be noted that there is a difference in the strength of the presumption depending on the basis for the presumption. Under the stronger presumption of the Charming Betsy principle, courts must search for congressional intent for extraterritorial application, which should be so clear as to preclude any other “possible” or “fairly possible” constructions that may avoid violations of international law. Under the weaker presumption, on the other hand, the inquiry for such alternative interpretations is not required, and courts may infer congressional intent for extraterritoriality by relying on conventional methods of statutory construction.

According to Justice Marshall’s dissenting opinion in ARAMCO, the majority’s understanding of the presumption against extraterritoriality supplies the “driving force” of its analysis. Id. at 1237 (Marshall, J., dissenting).

See supra note 168 and accompanying text.

See supra notes 88-103 and accompanying text. Judge King’s dissenting opinion in the en banc decision in Boureslan v. ARAMCO, 892 F.2d 1271 (5th Cir. 1990) (King, J., dissenting), aff’d sub nom. EEOC v. Aramco, 111 S.Ct. 1227 (Marshall, J., dissenting), describes the difference as follows: [W]e are guided by a presumption that acts of Congress are intended to apply only within the territory of the United States unless there is a clear expression of congressional intent to the contrary. . . .

892 F.2d at 1275. The court continues in footnote 1:

There is a second, and distinct, presumption that Congress does not intend to violate international law. A statute may not be construed to violate international law unless Congress has, by an “affirmative expression” of its intent, required such a construction. . . . The less stringent standard of the presumption against extraterritorial application of a federal statute does not require an explicit, affirmative statement of Congress. Instead, the Supreme Court has said that the presumption “is a valid means whereby unexpressed congressional intent may be ascertained.” Foley Bros., 336 U.S. at 285 (emphasis added by the Judge).

892 F.2d at 1275 n.1.

See supra notes 88-94 and accompanying text.

See supra notes 95-103 and accompanying text.
Though the majority expresses concern over "unintended clashes between our laws and those of other nations which could result in international discord," violation of specific jurisdictional principles of international law resulting from the extraterritorial application of Title VII is not expressly mentioned in the majority opinion. Nonetheless, if Title VII covered foreign employers doing business abroad, its extraterritorial application would have an insufficient basis in jurisdictional principles of international law. If Title VII applied only to U.S. employers doing business abroad, such extraterritorial jurisdiction could be based on the nationality principle. However, its application to overseas discrimination by foreign employers needs another basis in international law.

It may be argued that the effects doctrine provides this basis. Judge King's dissenting opinion in the Fifth Circuit panel decision in ARAMCO suggested that discrimination abroad would have adverse effects on minorities and women since foreign assignments, which are often necessary steps on the corporate ladder, could mean the loss of protection of Title VII and limit their employment opportunities in the United States. But, as Judge King concedes, "[t]he personal injury caused by employment discrimination cannot readily be characterized in terms of their 'effects... .'" Moreover,

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212 ARAMCO, 111 S.Ct. at 1230.
213 Rather, the majority states that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." Id.
214 Janelle M. Diller, Note, Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise, 73 Geo. L.J. 1465, 1488 (1985) [hereinafter Title VII and the Multinational Enterprise]; William A. Shutkin, Notes, Same Boss, Different Rules: An Argument for Extraterritorial Extension of Title VII to Protect U.S. Citizens Abroad by U.S. Multinational Corporations, 30 Va. J. Int'l L. 479, 499-500 (1990) [hereinafter Notes, Same Boss, Different Rules]. For the nationality principle, see supra notes 37-40 and accompanying text. It has sometimes been questioned whether a U.S. corporation and one of its foreign subsidiaries constitute a single employer so that the subsidiary's conduct may be subject to the extraterritorial regulation of Title VII. To determine the single employer status, several lower court decisions have engaged in a four-factor test, which originated from the case law under the NLRA and was incorporated into the 1984 amendment of the ADEA. E.g., Mas Marques v. Digital Equip. Corp., 637 F.2d 24, 27 (1st Cir. 1980). For the content of the four-factor test, see supra notes 145-46 and accompanying text.
215 See supra notes 24-30 and accompanying text.
216 This suggestion was made in the context of the reasonableness of the extraterritorial application of Title VII. See infra notes 224-32 and accompanying text.
217 As proposed in Part IV, a foreign assignment may be covered by the territorial application of Title VII if (1) such an assignment is a business trip abroad or (2) the challenged decision to discharge and refuse to hire employees was made in the United States. See infra notes 258-99 and accompanying text.
219 Boureslan, 857 F.2d at 1026. Judge King does not rely heavily on the effects doctrine for her conclusion that the extraterritorial application of Title VII is not unreasona-
although such effects may be found with respect to discrimination by U.S. employers, it may be difficult to find these effects in U.S. territory in a case where a foreign employer discriminated against its employee abroad—the very case that needs reliance on the effects doctrine. Some commentators also argue that the passive personality principle may be a basis for the extraterritorial application of Title VII. However, this principle has generally not been accepted as a basis for extraterritorial jurisdiction.

Judge King’s dissenting opinion in the Fifth Circuit panel decision relied on the reasonableness test under the Restatement (Third) as a means of adjustment between the extraterritorial application of domestic laws and interests of foreign countries. Judge King concluded that the extraterritorial application of Title VII is not unreasonable in light of the following factors: the adverse effects of discrimination abroad on the employment opportunities of minorities and women in the United States; the connection between the United States and persons to be regulated or protected by Title VII; the importance and desirability of having the regulation promote the generally accepted principle of anti-discrimination; the justified expectations of American employees working abroad of protection from discrimination; and the elimination of possible conflicts with regulations of host countries by the alien exemption provision. As to the last factor, the bona fide occupational qualification and foreign compulsion defenses are also available if com-

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220 Id. at 1026-27. See also Kenneth Kirschner, The Extraterritorial Application of Title VII of the Civil Rights Act, 34 LAB. L.J. 394, 401 (1983) ("the enforcement of Title VII outside the United States would have no real domestic impact").

221 In such a case, neither territorial nor nationality principle may afford a basis for U.S. jurisdiction. See Title VII and the Multinational Enterprise, supra note 214, at 1488.

222 See supra notes 41-42 and accompanying text.

223 Civil Rights in Employment and the Multinational Corporations, supra note 218, at 97; Notes, Equal Employment Opportunity Abroad, supra note 215, at 1294.

224 See supra note 42 and accompanying text.

225 Bouneslan v. ARAMCO, 857 F.2d 1014, 1025-31 (5th Cir. 1988). See also Note, Same Boss, Different Rules, supra note 214, at 501-10.

226 See supra notes 215-18 and accompanying text. This can be a factor listed in Restatement (Third) § 403(2)(a).

227 See Restatement (Third) § 403(2)(b). When Judge King referred to this factor, she presupposed that Title VII applies only to U.S. employers. Boureslan, 857 F.2d at 1027.

228 Restatement (Third) §§ 403(2)(c), (e), (f).

229 Id. § 403(2)(d).

230 See id. § 403(2)(h).


it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of his religion, sex or national origin... where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise...
pliance with Title VII brings about conflicts with foreign laws.\textsuperscript{232}

Although several circuits in antitrust cases have relied on the reasonableness test or "jurisdictional rule of reason" test,\textsuperscript{233} these courts have found that the activities at issue had their "effects" on the U.S. domestic economy.\textsuperscript{234} Thus, these cases may be distinguished in that the courts invoked this test where the U.S. extraterritorial jurisdiction could have been based on the effects doctrine, which the employment discrimination cases may not always invoke.\textsuperscript{235}

\textit{b. Rebuttal of Presumption}

If the extraterritorial application of Title VII covers foreign employers, it does not conform to the principles of jurisdiction in international law, and the stronger presumption under the \textit{Charming Betsy} principle applies. The question is whether there is clear congressional intent for such extraterritorial application that precludes any other fairly possible interpretation of Title VII, including the alien exemption provision. The most plausible alternative interpretation is that Title VII applies extraterritorially only to U.S. employers abroad. The majority opinion rejected this interpretation without exploring the legislative history of the alien exemption provision.\textsuperscript{236} However, as discussed in Part II,\textsuperscript{237} the strong presumption under the \textit{Charming Betsy} principle does not mean that courts need not consider the relevant legislative history. In \textit{McCulloch v. Sociedad Nacional de Marineros de Honduras},\textsuperscript{238} where the stronger presumption applied, the Court searched the legislative history of the NLRA for an expression of congressional intent to apply the NLRA abroad. Thus, the legislative history of the alien exemption provision is relevant in determining whether any other fairly possible interpretations which allow Title VII to apply only to U.S. employers are foreclosed.

The House Report on the early Civil Rights bill, from which the alien exemption provision originated, contained a statement that the provision was meant "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."\textsuperscript{239} This indicates that the alien exemption provision presupposed that the extraterritorial application of Title VII would

\textsuperscript{232} See infra notes 308-42 and accompanying text.
\textsuperscript{233} See supra notes 48-50 and accompanying text.
\textsuperscript{235} See supra notes 219-20 and accompanying text.
\textsuperscript{236} See supra notes 190-94 and accompanying text.
\textsuperscript{237} See supra note 90 and accompanying text.
\textsuperscript{238} 372 U.S. 10, 19 (1963).
\textsuperscript{239} H.R. REP. NO. 570, supra note 190, at 4 (emphasis added). See also S. REP. NO. 867,
cover only U.S. employers abroad. In light of this legislative history, the interpretation which limits the extraterritorial coverage of Title VII to U.S. employers abroad may not be foreclosed. Although the majority seems to suggest that such a distinction is impossible under the language of Title VII, the Court made such a distinction in Steele v. Boluva Watch Co. In Steele, the Court interpreted the Lanham Trade-Mark Act, which on its face does not distinguish U.S. citizens from foreigners, to apply extraterritorially only to U.S. citizens.

Since an interpretation distinguishing U.S. employers from foreign employers with respect to the extraterritorial application of Title VII is "fairly possible," the next question is whether, under the weaker presumption against extraterritoriality, there is congressional intent to apply Title VII to U.S. employers abroad. Because this is the weaker presumption based on congressional concern for domestic matters, it may be rebutted by an inference of congressional intent under traditional techniques of statutory construction, without inquiry of other "fairly possible" interpretations. In view of the legislative history indicating that the purpose of the alien exemption provision is to avoid conflict of laws with foreign countries, the most natural inference from this provision is that Congress intended to apply Title VII overseas only with respect to the employment of U.S. citizens abroad. The interpretation that this provision merely confirms that Title VII protects aliens within the U.S. territory is less plausible because the purpose of this provision is to avoid "conflicts of law . . . in the employment of aliens outside the United States."
The third interpretation, that this provision is meant to exempt employers with respect to aliens employed in the possessions of the United States, is also inconsistent with the legislative history because the statement of the purpose of the provision does not refer to the “possession.”

IV. Limits of Territorial and Extraterritorial Application of Fair Employment Laws

The Supreme Court in *ARAMCO* seems to have resolved one of the major issues surrounding the geographical coverage of U.S. fair employment laws. However, two important issues remain: first, whether territorial statutes may cover employment abroad that has certain connections to U.S. territory; and second, whether defenses that limit the extraterritorial application of fair employment laws are available when such application conflicts with foreign laws and customs.

A. Limits of Territorial Application: Applicability of U.S. Territorial Laws to Employment Abroad

1. Business Trip Abroad

   a. Classification of Employment Abroad

   Since the Equal Pay Act and, according to the Supreme Court Title VII, apply only territorially, the distinction between territorial and extraterritorial application is an important one to make. This distinction is not necessarily clear, however. For example, the FLSA, which has an exemption provision for foreign workplaces, was held to apply to the tour escort in *Wirtz v. Healy* who spent a part of his workweek in Canada escorting tours, while the bus drivers in *Hodgson v. Union de Permisionarios Circulo*, whose base of employment was in Mexico, were held to be exempted by the FLSA even when they were driving in U.S. territory. In view of the occupations of the employees in these cases, a tour escort and bus driver, it is helpful to analyze the common types of employment abroad.

   Employment abroad takes place in various forms. One commentator classified U.S. citizens working abroad into three categories: (1) resident U.S. employees traveling abroad, (2) expatriates on assignments abroad, and (3) U.S. citizens living abroad. The

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253 “Expatriates” are defined as Americans who “work in the U.S. for the corporation and then are sent abroad for a period of time to work at one of the corporation’s subsidiar-
nexus between a U.S. employer and its employee abroad varies according to the category of employment. In analyzing the coverage of extraterritorial statutes it is helpful to consider these variations.

When an employee of a U.S. corporation goes on a business trip abroad from the corporation's domestic base, the nexus between the corporation and the employee is very strong. The control of the U.S. corporation over the employee is most likely to remain unchanged. Moreover, the employee's duty abroad may be just an extension of the business activities of the corporation within the United States. Therefore, in such cases, the employee may well be considered to be working at the U.S. workplace. In other words, the employee's ordinary workplace is extended abroad. On the other hand, expatriates are likely to be more independent from the operation and control of their employers or parent corporations in the United States. Even though they are to return to the United States when their assignment is over, they often are closely connected to local workplaces while on assignment. Although it is sometimes difficult to do so, the expatriate and the business traveller may be distinguished from one another according to such factors as continuing control from the employer in the United States and the relation between the employee's job and the employer's operation in the United States. Finally, the nexus between U.S. citizens residing and working abroad and their workplaces in the United States is much more tenuous. These citizens are not usually in a position to transfer to the United States, are embedded in their local workplaces, and are treated like local employees.

254 Id. at 14-18. Based on this classification, Professor Bellace concludes that Title VII should apply when "an American company is operating what is essentially an 'American workplace' in a foreign country." Id. at 18. Although the concept of the "extended U.S. workplace" described below has much in common with Professor Bellace's notion of the "American workplace" in foreign countries, this Article does not necessarily agree with her apparent understanding that an application of Title VII in such a manner is to recognize its extraterritorial reach.

255 Professor Bellace lists several factors to determine whether the employee works at an "American workplace," including the proportion of employees in terms of citizenship in the employee's job, the duration of employment abroad, and the language which employees in the job class use at the foreign workplace. Id. Although this Article stresses the continuing control of the employer in the United States over the employee abroad and the close relationship of the employee's job to the employer's business activities, the factors that Professor Bellace lists may be relevant under the proposed standard to determine whether the employee is under the continuing control of the employer in the United States.

256 Id.

257 The classification discussed above concerns U.S. citizens working abroad for U.S. corporations. But there remains the issue of the regulation of local labor and employment relations: the relations between foreign citizens and foreign corporations. Although the direct U.S. regulation of such local relations are unlikely, the Omnibus Trade and Compet-
b. Applicability of Territorial Statutes

Among these three categories, employees on business trips abroad should be covered by U.S. fair employment laws, even if these laws have only territorial reach, as long as they are working at the extended U.S. workplaces. In contrast to other types of employees working abroad, such employees may well be deemed to be working at the extended U.S. workplaces, and the application of U.S. laws to them should not be treated as extraterritorial application. Indeed, there is no reason to treat employees on business trips abroad differently from other employees working within U.S. territory. For example, sexual harassment of a female employee by a male colleague travelling with her should be subject to Title VII, wherever the sexual harassment may occur.

Cases decided under the FLSA illustrate this point. In Wirtz, where the FLSA was applied to a tour escort working for part of the workweek abroad, the tour escort was in a position equivalent to a business trip abroad and was still working at his U.S. workplace in an extended sense. On the other hand, the employees in Hodgson who were driving buses between their Mexican base and the U.S. station belonged to the extended Mexican workplace, even when they were within U.S. territory. Thus, they were subject to the exemption provision under the FLSA. Furthermore, Judge Posner's dicta in Pfeiffer v. WM. Wrigley Jr. Co. indicates that an employer in the United States may not escape liability under the ADEA when it sends its employee abroad temporarily and discharges him/her.

This may not be the case with all U.S. statutes regulating employment relations. For example, most of the regulations over occupational safety and the health of workers should not be enforced as to those who are on business trips abroad, since these regulations are conditioned on their physical presence at the workplaces in U.S. territory. In addition, it must be noted that there may be special regulations with respect to business travellers due to their special status. Furthermore, Judge Posner's dicta in Pfeiffer v. WM. Wrigley Jr. Co. indicates that an employer in the United States may not escape liability under the ADEA when it sends its employee abroad temporarily and discharges him/her.

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259 Bellace, supra note 252, at 15.

260 See supra notes 112-14 and accompanying text.

261 In Wirtz, a tour escort who spent the whole workweek abroad was held to be beyond the coverage of the FLSA. The Department of Labor has adopted this position. See supra note 116 and accompanying text. Under the proposed extended U.S. workplace theory, however, there seems to be no reason to refuse the application of the FLSA, so long as his workplace was within U.S. territory.

262 See supra notes 115-16 and accompanying text. See also Wolf v. J. I. Case Co., 617 F. Supp. 858, 863 (D. Wis. 1985), which refused to apply the ADEA prior to its 1984 amendment to an employee who was ordinarily working in France but made a number of business trips to the United States.

263 755 F.2d 554, 559 (7th Cir. 1985).
cause of age. Although he seems to assume that intent to "get around" the ADEA is required, he reasons that in such a case the employee's "work station" would be in the United States. Since the notion of the "work station" is similar to that of the "extended U.S. workplace," Judge Posner's theory may well have broader applicability. In contrast to these cases, the plaintiff in ARAMCO was not on a business trip to Saudi Arabia. After being hired by one of its subsidiaries, he was transferred to work for ARAMCO in Saudi Arabia, where he worked for nearly four years until he was discharged. The holding of the Supreme Court in this case clearly does not cover business travellers abroad.

Moreover, refusal to apply U.S. fair employment laws to employees on business trips abroad may cause a vacuum of protection. For example, most employees visiting Japan on business trips from other countries will probably not be protected by the Japanese Labour Standards Law (the "Law"), which, among other things, prohibits employers from discriminating against their employees because of their nationality, creed, social status, or—with respect to wages—sex. The applicability of the Law turns on whether the employee is "employed" at the "jigyo" (enterprise) located in Japan. The "jigyo" is interpreted by the Ministry of Labour of Japan as "a body of business operation which is carried out continuously as an interrelated organization at a specific place." Thus, the Law does not apply to the U.S. workplace of the employees on business trips to Japan. Moreover, the activities of such employees do not in themselves constitute the "jigyo," since such activities are not "a body of

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264 Id. The "work station" may mean a U.S. workplace as a base of business activities abroad. Under this notion, a business trip abroad will be covered by U.S. laws so long as the employee has his/her employment base in the United States. Although the contour of the "base" is not clear, the application of this notion may lead to similar coverage as to those under the "extended workplace" test that this article suggests.


266 Articles three and four of Rodo Kijun Ho (Labour Standards Law)(Law No. 49, 1947) 60, in LABOUR LAWS OF JAPAN 1990 (Ministry of Labour of Japan & the Japan Institute of Labour eds.). Sex discrimination in general is covered by articles seven through eleven of Koyo no Bunya ni Okeru Danjo no Kinto na Kikai oyobi Taigu no Kakuho to Joshi Rodo Sha no Hukushi no Zoshin ni Kansuru Horitsu (Law Respecting the Improvement of the Welfare of Woman Workers, including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment (Law No. 113, 1972) (so-called Equal Employment Opportunity Law)), in id. at 192. Since this Law regulates conduct of "employers" and protects their "employees," it may not protect business travellers from foreign countries who are not under the direction of their employers in Japan. See infra notes 267-71 and accompanying text.

267 Article 8 of the Labour Standards Law provides, inter alia, that "[t]his law applies to the enterprises and places of business listed in each item below." LABOUR LAWS OF JAPAN 1990, supra note 266, at 38. Although it is not completely clear from the language of this Law, it is taken for granted that the "enterprise and place of business" are those located in Japan.

business operation” nor “carried out continuously . . . at a specific place.” Even if employees carry out their jobs at a workplace in Japan that constitutes a “jigyo,” which includes branches or subsidiaries of foreign corporations, the Law protects them only when they are “employed” by the “jigyo.” To be “employed,” they must be at least under the direction of the “jigyo.” Therefore, the Law does not apply to business travellers from foreign countries unless they work under such direction.

Interestingly, Great Britain has statutorily adopted a similar policy. Under the Employment Protection (Consolidation) Act of 1978, most of the provisions for employment protection do not generally apply to the employee who “ordinarily works” outside Great Britain. Furthermore, under international law, a temporary visitor to a foreign country may be outside the coverage of certain local regul-

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269 See Circular (Kishu) No. 194, Oct. 9, 1968, in RODo KIJUM Ho KAISHAKU SORAN, supra note 268, at 60, which states that “[t]he [Labor Standards] Law shall apply to the enterprises which are operated in Japan and fall onto one of the items of Article 8 of the Law, regardless of the nationality of the employer . . . and the worker, unless special exception provisions under other statutes and treaties apply.” Thus branches and subsidiaries of foreign corporations are covered by the Law, so long as they constitute the “business” or “enterprise.” See id. As for the meaning of the “business” or “enterprise,” see supra note 268 and accompanying text.

270 Article 9 of the Labour Standards Law provides that the “worker,” whom this Law protects, shall mean “one who is employed at an enterprise or place of business . . . and receives wages therefrom, without regard to the kind of occupation.” LABOUR LAWS OF JAPAN 1990, supra note 266, at 62.

271 When an employee who ordinarily works in the United States but is currently on a business trip to Japan is working at one of the Japanese branches or subsidiaries of his/her employer in the United States, it is more likely that the employee is under the direction of that branch or subsidiary. But there may be cases where such an employee is working independently from such direction.

272 The Employment Protection (Consolidation) Act, 1978, § 141 (Eng.) provides in pertinent part:

(1) Sections 1 to 4 [requirement for written particulars of terms of employment] and 49 to 51 [minimum period of notice for termination] do not apply in relation to employment during any period when the employee is engaged in work wholly or mainly outside Great Britain unless the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer.
(2) Section 8 [right to itemized pay statement] and 53 [written statement of reasons for dismissal] and Parts II [guarantee payments, remuneration on medical suspension, trade union membership and activities, time off work], III [maternity protection] and V [right against unfair dismissal] do not apply to employment where under his contract of employment the employee ordinarily works outside Great Britain.
(2A) Part VII [employee’s right on employer’s insolvency] does not apply to employment where under his contract of employment the employee ordinarily works outside the territory of the Member States of the European Communities.
(3) An employee shall not be entitled to a redundancy payment if on the relevant date he is outside Great Britain, unless under his contract of employment the employee ordinarily worked in Great Britain.
(4) An employee who under his contract of employment ordinarily works outside Great Britain shall not be entitled to a redundancy payment unless on the relevant date he is in Great Britain in accordance with instructions given to him by his employer.
lations. According to Professor Mann, a British authority on international law, it would be "unreasonable to allow the local sovereign to regulate the temporary visitor's conduct abroad,"273 because "his conduct outside the territory in which he merely sojourns is of no concern to the local sovereign."274

Conversely, a current trend in the laws of foreign countries is that employees on business trips abroad are subject to the law that applied to them when they were at the workplace in their home countries.275 For example, the Ministry of Labour of Japan has taken the position that the Labour Standards Law, which contains no extra-territoriosity provision, shall apply276 to employees of corporations in Japan who are dispatched to foreign countries if their work abroad is deemed to be merely a part of the operations of the "jigyo" in Japan and not an independent "jigyo" on foreign soil.277 Likewise, under the provisions of the British Employment Protection (Consolidation) Act of 1978, which exempts employees who "ordinarily work" outside Great Britain, employees travelling abroad will be covered since they are not "ordinarily working" outside Great Britain.278

2. Place of Decision Test

In addition to the analysis of the types of employment abroad, it

274 Id. Professor Mann admits that some local laws, such as criminal laws, should apply even to temporary visitors. Id. But labor and employment laws are, except such matters as occupational safety and health, not so strongly connected to the physical presence of workers in the territory as in the case of criminal law. See supra note 258.
276 The Law provides criminal sanctions as well as civil remedies against the employer who violated it. The Ministry of Labour states that the criminal sanctions under this Law may not generally be enforced even when the Law applies to overseas employment, relying on the territorial principle under Japanese criminal law. Circular (Kihatsu) No. 776, Aug. 24, 1950, in Rodo Kijun Ho Kaishaku Soran, supra note 268, at 61. On the other hand, the Ministry admits that the employer shall be subject to those sanctions if the violation is carried out within Japanese territory with regard to the employees working abroad. Id. But the notion that "the violation is carried out within Japanese territory" needs further analysis.
277 Id. See also The Ministry of Labour, Zentei Kaishaku Tsuran Rodo Kijun Ho (Labour Standards Law: Completely Revised Version) 19 (1989); Tadashi Hanami, Kaigai Rodo Mondai no Jittai to Hori (Legal Theory and Practice of Labor Relations concerning Overseas Assignment), in Kaigai Rodo No Jittai to Hori (Legal Theory and Practice of Overseas Assignment) 14 (Tadashi Hanami ed., 1987). Professor Hanami states that a business trip abroad, whether long or short, is covered by the Labour Standards Law as well as training and studying in foreign countries, while an assignment to foreign branches and subsidiaries is not. Id.
278 See Wilson v. Maynard Shipbuilding Consultants, A.B., 1978 Q B. 665, 677 (Eng. C.A.) (an employee "ordinarily works" in Great Britain when he is required to go on a business trip abroad to carry out his contractual duties); See also M. Forde, Transnational Employment and Employment Protection, 7 Indus. L.J. 228, 235-37 (1978); Morgenstein, supra note 275, at 27.
is necessary to consider the issue of how to localize the employer’s conduct, particularly in view of the fact that the places of decision as to employment abroad are often different from the place of performance. As stated earlier, lower court decisions in Cleary, Zahourek, and Lopez indicate that the ADEA, prior to its 1984 amendment, did not protect elder workers when their workplaces, future or present, were located in foreign countries, even if the decision to discharge or not to hire them was made in the United States. On the other hand, Title VII was applied in Kern to the discriminatory discharge of an employee who was supposed to work abroad with no reference to its extraterritoriality if the decision to discharge was made within U.S. territory. These cases present the question of whether territorial application of U.S. fair employment laws may cover the employer’s discriminatory decision in the United States as to the employee whose work has been or is to be performed abroad. In other words, should the place of decision, as opposed to the place of employment, be the appropriate test in determining the applicability of territorial fair employment laws?

The importance of the place of decision may vary with the nature of the employer’s conduct as well as that of the statute regulating such conduct. As to conduct that directly concerns the process of performance of an employment contract, such as conduct affecting the safety and health of workers, the place of decision is less relevant than the place of performance of service. Since the purpose of statutory regulation over these matters is to control actual working conditions which may be harmful to workers, the law of the country where the work is performed should provide such regulations. Similarly, the regulation of working time and wages is so closely related to the economy of the country where the work is performed that the place of performance is more relevant than the place of decision, although it must be remembered that the place of work of an employee on a business trip abroad usually remains the ordinary U.S. workplace. As Judge Posner stated in Pfeiffer, “the wages a worker is paid and the hours he works are unambiguously associated with a place in which the work is done.” Thus, if U.S. laws regulating

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279 See supra notes 132-35, 138-39 and accompanying text.
280 See supra notes 141-43 and accompanying text. See also Abrams v. Baylor College of Medicine, 805 F.2d 528, 530-35 (5th Cir. 1986) (applying Title VII, without reference to the issue of extraterritoriality, where a hospital in the United States denied anesthesiologists an opportunity to participate in a certain medical program abroad). Although the plaintiffs in these cases lived in the United States, this fact seems insufficient to distinguish Cleary from them. Moreover, the plaintiff in Lopez also lived in the United States.
281 See Morganstein, supra note 275, at 35 (“[t]here would seem to be no doubt that the law of the place of the work is ... mandatory” as to occupational safety and health).
282 See id. at 75 (“[t]here is generally no objection to improving [hours of work] ... on the mandatory legislation at the place of work”).
283 See generally supra notes 258-78 and accompanying text.
284 755 F.2d at 556.
these matters were to be applied with regard to employment abroad, they could present conflicts with local labor policies and even distort local economies, even when the relevant decision regarding these matters was made in the United States.

On the other hand, the discharge of an employee is more closely connected to the place of decision than to the place of performance. Wherever an employee may work, the employment contract is linked to the place where the decision-making authority over the employment exists. While occupational safety, wages, and hours are matters related to the performance of an employment contract, discharge is the conduct that terminates this link, regardless of the place of performance. Thus, the place of decision has the most significant connection to the issue of discharge. Moreover, when the ordinary statutory remedy for illegal discharge is a reinstatement order or an injunction, as under Title VII and the ADEA, the focus of regulation should be on the authority for decision-making over discharge and reinstatement. Therefore, the United States has a keen interest in regulating decision-making over discharge that takes place within its territory. It may be argued that even discharge is related to the local economy as are wages and working hours. However, even if this argument provides support for the application of local fair employment laws to discharge, it does not negate the importance of the place of decision as a basis for the application of U.S. laws.

The place of decision is also relevant as to the regulation on discriminatory refusal to hire employees, because the refusal to hire concerns the conclusion, not the performance, of an employment contract, and the employer's decision is the most significant factor. In other words, the hiring of employees who are supposed to work abroad forms the link of an employment contract between the employer in the United States and the employees abroad, and it is the employer's decision not to hire such employees that prevents the creation of this link. Thus, when a decision with respect to discharge and refusal to hire is made within U.S. territory, the employer's con-

285 See supra notes 108-10 and accompanying text.

286 See Title VII and the Multinational Enterprise, supra note 214, at 1482.

287 See 42 U.S.C. § 2000e-5(g) (1988) ("[i]f the court finds that the respondent has intentionally engaged in... an unlawful employment practice... the court may enjoin the respondent from engaging in such... practice, and order such affirmative action as may be appropriate, which may include... reinstatement... with or without back pay"). See also 29 U.S.C. § 626(b) ("the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgment compelling employment, reinstatement or promotion").

288 Although the application of U.S. laws under the place of decision test may bring about jurisdictional overlap with foreign laws, such an overlap will often occur with respect to the exercise of jurisdiction based on the subjective or objective territorial principle. If conflict arises from such an overlapping jurisdiction, the same measures as applied to extraterritorial jurisdiction, e.g., a BFOQ and foreign compulsion defenses, may be available. See infra notes 308-42 and accompanying text.

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duct should be deemed to occur in the United States, even if the actual work is performed or will be performed abroad. U.S. fair employment laws should apply to such conduct, even if they do not have extraterritorial reach. On the other hand, the place of work test is appropriate for most other issues which arise in the course of performance of an employment contract and which have closer contact with the place of performance. These issues include working time, wages, occupational safety and health, and harassment of employees.

From this standpoint, the lower court decisions in Cleary, Zahourek, and Lopez, which rejected the place of decision test outright, are questionable. It may be argued that the ADEA has a specific provision that exempts employees whose services are "performed in a workplace within a foreign country." This provision, however, originated in the FLSA, the subject matter of which, working time, minimum wages, and child labor, is appropriate for the place of work test. Thus, the term "workplace" may well be understood to provide the general principle of territoriality rather than to exclude the place of decision test. In the context of employment discrimination law like the ADEA, this provision should not be construed to reject the place of decision test as to discharge and refusal to hire.

As a matter of course, it must be noted that the place of decision may vary from case to case. Generally speaking, however, deci-

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289 Restatement (Third) § 441, reporter's note 2, states that, for the purpose of localizing an act to be covered by foreign state compulsion defense, such localization depends on "the center of gravity of the activity, i.e., on the place with which the act or activity has the most significant connection."

290 See Notes, Same Boss, Different Rules, supra note 214, at 498. In the context of international law, the application of U.S. laws in this manner has its basis in the subjective territorial principle, since the discharge or refusal to hire is commenced within the United States. See supra notes 18-19 and accompanying text.

291 There may be issues that arise in the course of the performance of an employment contract but that are so similar to discharge or refusal to hire that the place of decision test is appropriate. For example, a fundamental change in the content of a contract, such as a transfer to another country, may be subject to the place of decision test. See Abrams v. Baylor College of Medicine, 805 F.2d 528, 530 (5th Cir. 1986) (Title VII was applied to denial of an opportunity to participate in a certain medical program abroad).

292 See supra notes 132-35, 138-39 and accompanying text.


294 See supra notes 281-86 and accompanying text.

295 See Pfeiffer v. WM. Wrigley Jr. Co., 755 F.2d 554, 556 (7th Cir. 1985) (Posner, J.) ("in the case of age discrimination the unlawful act is disconnected from the employee's work"). It must be noted, however, that certain conduct, such as harassment because of age, is not "disconnected from work" and is subject to the place of work test.

296 It may sometimes be difficult to specify the place where the decision took place, especially where the personnel decision-making is carried out in a complex and bureaucratic manner. Although this Article cannot set forth a precise formula to localize the place of decision, the employer's internal rule for decision-making may be given the first weight. It must also be noted that the "decision" to which U.S. laws may apply is an indi-
sions over employment of local workers are usually made at the local level, while decisions regarding expatriates are often made at the principal offices of the business. In ARAMCO, it is not clear where the decision to discharge the plaintiff was made. Since ARAMCO’s principal place of business is in Saudi Arabia, it is more likely than not that the decision was made in Saudi Arabia, whether or not the plaintiff was an expatriate or in a position similar to a local worker. Thus, the Supreme Court did not foreclose the possibility of adopting the place of decision test.

B. Limits of Extraterritorial Application

1. Conflicts with Foreign Laws and Customs

Congress has the power to extend the coverage of territorial statutes for overseas application. For example, the ADEA was amended in 1984 to apply beyond U.S. territory. In response to the Supreme Court’s denial of extraterritoriality of Title VII in the ARAMCO case, a bill to amend Title VII was introduced in Congress to extend its geographical coverage. These extraterritorial statutes, including the possible amendment, would raise the issue of how the conflict, if any, between them and local statutes applying to Americans working abroad should be resolved. For example, the

individually specific decision as to employment, as opposed to a general decision over broad personnel policy, which is often made at the corporate headquarters.

297 See JOHN DOWLING & RANDALL S. SCHULER, INTERNATIONAL DIMENSIONS OF HUMAN RESOURCE MANAGEMENT 25 (1990) (When a U.S. corporation has “come of age” as a multinational, “the PCN [parent country national] workforce remains under the control of the HRM [human resource management] department, but local employees become the responsibility of each subsidiary. Corporate HRM staff perform a monitoring role and intervene in local affairs only in extreme circumstances.”).


299 See Robert Prentice, The Muddled State of Title VII’s Application Abroad, 41 LAB. L.J. 633, 635 n.8 (1990) (distinguishing Abrams v. Baylor College of Medicine from ARAMCO in that the challenged employment decision in Abrams was made in the United States).


301 H.R. Rep. No. 1694, 102d Cong., 1st Sess., (1991). This bill contains the following amendments: (1) the definition of “employee” is changed to include U.S. citizens working in foreign countries, (2) employers are exempted from liability for otherwise prohibited practices if they violate the law of the foreign countries where the workplace of the affected employees is located, (3) discriminatory practices of foreign corporations which are under the control of U.S. employers are presumed to be those of the U.S. employers, and (4) the determination whether the U.S. employer controls a foreign corporation shall be based on “(A) the interrelation of operations, (B) the common management, (C) the centralized control of labor relations; and (D) the common ownership or financial control.” See also H.R. Rep. No. 1741, 102d Cong., 1st Sess., (1991); H.R. Rep. No. 1, 102d Cong., 1st Sess., (1991) (Civil Rights Bill as passed by the House on June 5, 1991). This amendment appears to be modeled on the 1984 amendment of the ADEA. See supra notes 144-50 and accompanying text.

302 Some commentators argue that the extraterritorial application of U.S. labor and employment laws that are inconsistent with the host country’s laws might cause criticism from those countries. See Zimmerman, supra note 148, at 120-24; Notes, Recent Developments-Age Discrimination, supra note 152, at 216-18. But, at least as to laws for equal employ-
Labour Standards Law of Japan prohibits an employer from having a large percentage of its female employees work longer than a certain amount of time on holidays, or at night, from 10:00 p.m. until 5:00 a.m. Moreover, an employer in Japan is prohibited from requiring pregnant workers, or female workers in general, to work certain jobs that are harmful to the functions of pregnancy, childbirth, and nursing, such as those at workplaces with lead exposure. Employement practices of U.S. corporations in Japan conforming to these Japanese regulations would violate the possible amendment to Title VII which would give it extraterritorial reach, especially in view of the recent Supreme Court decision in *UAW v. Johnson Controls*, 1990, supra note 266, at 75. Paragraph 4 of article 64-3, however, provides that the above paragraphs "shall not apply to persons over 18 full years of age, as specified by ordinance, who are in positions involving the ordering and directing of the performance of the work by workers, or who are engaged in work which requires professional knowledge or skills." *Id.* at 76. Article 64-5 provides:

1. An employer shall not employ a pregnant woman or women within one year after childbirth (hereinafter referred to as "expectant and nursing mothers") in the handling of heavy materials, work in places where harmful gas is generated, or work injurious to pregnancy, childbirth, nursing and the like.

2. With respect to work injurious to the function involved in pregnancy and childbirth, the provisions of the preceding paragraph may be applied mutatis mutandis by ordinance to women other than expectant and nursing mothers.

3. The scope of work under the preceding paragraphs and the scope of persons who shall not be employed in such work shall be specified by ordinance.

*Id.* at 77. Under paragraph 2 of this article, coupled with articles 9 and 10 of *Joshi Rodo Kijun Kisoku* (Enforcement Regulation on Labor Standards of Women) (Ordinance of the Ministry of Labour No. 3, 1986), an employer is prohibited from having its female employees work (1) in a job that requires carrying heavy objects and (2) at the workplace where workers are exposed to lead, mercury and other similar injurious substances.
This case held that a fetal protection policy which excludes most of the female workers from jobs involving actual or potential exposure to lead violated Title VII.

In addition, even if foreign laws do not compel discrimination, cultural differences or social norms abroad sometimes induce employers to implement disparate treatment of a particular group of employees. For example, employers may assert that they would refuse promotion of women to positions requiring negotiation with foreign customers who are hostile to female negotiators. What defenses are available for employers faced with such a dilemma?

2. Bona Fide Occupational Qualification
   a. Legal Restriction on the Job

Section 703(e) of Title VII provides that it is not unlawful for an employer to engage in disparate treatment of its employees on the basis of religion, sex, or national origin if these factors are "bona fide occupational qualifications" (BFOQs). The ADEA has a similar provision on age discrimination. Thus, the issue is whether the host country's law requiring discrimination constitutes a BFOQ and therefore provides a defense for the employer. In Kern v. Dynalectron Corp., the U.S. District Court for the Northern District of Texas held that being Moslem is a BFOQ for pilots whose job requires them to fly into Mecca, since Saudi Arabian law provides that non-Moslems who enter into Mecca shall be beheaded. However, the Supreme Court in Johnson Controls declared that the BFOQ defense must be based on the employee's ability to perform the job in question. It is argued that compulsion by foreign laws does not qualify as a BFOQ defense since such compulsion is not related to the ability of an employee.

However, when a foreign law actually forbids an employee to carry out his or her job, the employee lacks the ability to perform the job. Although such legal restrictions may not be related to the attributes of the employee, there is no reason to exclude a legal restriction on the employee's behavior from the concept of "ability." This point is illustrated by several lower court decisions which have acknowledged that the consideration of the privacy interests of third

\[\text{footnotes:}
\begin{align*}
306 & \text{111 S.Ct. 1196 (1991).} \\
307 & \text{This issue arises with regard to statutes that have no extraterritorial reach when they are applied to employment abroad under the place of decision test. See supra notes 279-99 and accompanying text.} \\
310 & \text{577 F. Supp. 1196 (N.D. Tex. 1983).} \\
311 & \text{UAW v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991).} \\
312 & \text{E.g., Notes, Equal Employment Opportunity Abroad, supra note 218, at 1309.}
\end{align*}\]
persons may be a basis for the BFOQ defense. In *Fesel v. Masonic Home*, the court upheld a residential retirement home's defense that its refusal to hire a male nurse was justified by the privacy interests of the female guests whom its nurses were to attend. Although these decisions usually require employers to make reasonable efforts to avoid conflicts between privacy interests and equality in employment, it is clear that restrictions which are based on the law of privacy may provide a basis for a BFOQ.

It must be noted that a BFOQ defense is not always available when a foreign law compels discrimination. For a BFOQ defense to stand, the discrimination must be "reasonably necessary to the normal operation" of the "particular business or enterprise." Thus, the employer must prove not only that it has reasonable cause to believe that all or substantially all within a protected group cannot perform the job at issue safely and efficiently, but also that the job qualification is related to the "essence" of its business. The BFOQ defense is available only when the essence of the business is undermined by hiring the person of the protected group. Thus, a Japanese law restricting women's working time does not always constitute a BFOQ.

Furthermore, courts should consider whether the employer made a reasonable attempt to avoid conflicts between the foreign regulation and equality in employment, as in cases involving a third person's privacy interests. Without this effort, the employer's disparate treatment may not be justified as "reasonably necessary." The *Kern* court upheld the BFOQ defense based on the finding that the essence of the employer's business was to provide pilots whose

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515 E.g., Hardin v. Stynchcomb, 691 F.2d 1364, 1370-71 (11th Cir. 1982).
518 As for wage discrimination because of sex, the Equal Pay Act, as well as the Benett Amendment to Title VII, allows an employer to raise as a defense that the disparate treatment under attack is based on "any other factor than sex." 29 U.S.C. § 206 (d)(1) (1988). See also 42 U.S.C. § 2000e-2(h). Under these provisions, the inquiry whether the disparate treatment is necessary for the essence of the employer's business does not seem to be required, although the "other factor" under the Equal Pay Act and the Benett Amendment must be a "reasonable" factor based on legitimate business reasons. See Kouba v. Allstate Ins. Co., 691 F.2d 873, 876-77 (9th Cir. 1982). Likewise, section 4(f) of the ADEA permits differentiation based on reasonable factors other than age. 29 U.S.C. § 623(f)(1) (1988).
519 See Bellace, supra note 252, at 20 ("[c]ourts should permit evidence to determine (1) whether it would be impossible for the plaintiff to perform the job adequately, and (2) whether the employer could have taken reasonable action to minimize the unfavorable response the plaintiff was expected to encounter").
520 See, e.g., Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), cert. denied, 446 U.S. 966 (1980).
duty was to fly helicopters to Mecca as a means of transportation for a project carried out by another company. Thus, being Moslem was “an absolute prerequisite” for the pilot’s job. On the other hand, in Abrams v. Baylor College of Medicine, in which a U.S. hospital refused to send its Jewish anesthesiologists to Saudi Arabia for cardiovascular services, the Court of Appeals for the Fifth Circuit rejected the employer’s BFOQ argument. This was because the employer did not take the appropriate steps to confirm the actual policy of Saudi Arabia toward Jewish doctors in the program or alleviate the effects of its discriminatory policy.

b. Customer’s Preference

Another issue associated with the BFOQ defense is whether it can be based upon a foreign customer’s preference. In Fernandez v. Wynn Oil Co., the Ninth Circuit rejected such a defense against Title VII claims. In this case the employer argued that its refusal to promote a female administrative assistant to Director of International Operation was due to the hostility of its customers in Latin America toward female executives. Reversing the district court, which upheld the BFOQ defense, the Ninth Circuit followed other circuits in denying that a customer’s preference can constitute a BFOQ in the context of domestic employment.

It is argued that requirements for the BFOQ defense regarding employment abroad should be less strict than requirements regarding domestic employment, so that a foreign customer’s preference may, in appropriate circumstances, constitute a BFOQ. This view stresses that the United States, or employers in the United States, are in no position to change a foreign nation’s discriminatory attitudes as compared to American attitudes which Title VII and other equal employment laws are meant to change. Although such consideration is not without merit, it may be taken into account even under the traditional approach in the domestic context. If a foreign customer’s preference is so strong that all or substantially all

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322 Id. at 1202.
323 Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986).
324 Id. at 535.
325 Id.
326 Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981). Since the place of decision as well as the employee’s residence was in the United States, the court did not address the issue of the extraterritoriality of Title VII.
327 Id. at 1276.
330 Bellace, supra note 252, at 23. See also Kirschner, supra note 219, at 404.
331 Bellace, supra note 252, at 23.
332 See Diaz, 442 F.2d at 389.
of the protected group cannot perform the job in question, and the essence of the employer's business would be undermined by hiring the person of the protected group, then the BFOQ defense may stand.

3. Foreign Compulsion

As stated in Part II, the United States may not require compliance with its laws in another country if the compliance results in the violation of that country's laws. Based on this principle, the 1984 amendment to the ADEA provides an employer with a defense when compliance with the ADEA as to its employees in a foreign workplace "would cause [the] employer . . . to violate the laws of the country in which such workplace is located." The purpose of this provision is, together with the limitation of the ADEA's extraterritorial coverage to U.S. citizens employed by U.S. employers or foreign subsidiaries under their control, to respect sovereignties of foreign countries and avoid conflicts with their laws.

It must be noted that the majority of such conflicts may provide a basis for BFOQs. If a foreign law compels U.S. employers to discriminate against a certain category of employees by reason of factors that are impermissible under U.S. laws, such employees are not qualified to perform their jobs in the foreign country. Since an employer asserting the foreign compulsion defense should prove that the violation of the domestic law was caused by "actual compulsion," the employer is required to make a good-faith effort to avoid viola-

333 The acceptance of the BFOQ defense by the district court in Fernandez has little evidentiary support, since, as the Ninth Circuit correctly pointed out, the testimony it relied on did not show that hiring a female director for business in Latin America would undermine the essence of the employer's business. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981).


335 See supra notes 63-69 and accompanying text.


337 See S. Rep. No. 98-467, supra note 147, at 27, reprinted in 1984 U.S.C.C.A.N. 3000. As for the foreign compulsion defense in general, it is pointed out that, in order for the defense to succeed, the interests of the foreign nation regulating the U.S. national's conduct should be greater than those of the United States. See Comments, Foreign Compulsion, supra note 67, at 375; Pierre Vogelenzang, Foreign Sovereign Compulsion in American Antitrust Law, 33 Stan. L. Rev. 131, 146 (1980). Congress, however, by amending the ADEA, has made this defense available for U.S. employers without engaging in such interest balancing.

338 See Comments, Foreign Compulsion, supra note 67, at 392 n.132 (preferring the foreign compulsion defense to the BFOQ defense, while acknowledging the similarity of analysis between them). See also Title VII and the Multinational Enterprise, supra note 214, at 1491 n.150.
tion of foreign laws. This is almost identical to the requirement for the BFOQ defense based on the conflict with foreign laws, which is that the employer make a reasonable effort to avoid conflicts with foreign regulations.

However, there may be some areas in which only the foreign compulsion defense is available. While the BFOQ defense requires that the employer prove the essence of its business would be undermined without discriminating against the employee, the foreign compulsion doctrine exempts the employer from U.S. laws if the conduct which would otherwise be impermissible under U.S. laws is compelled by foreign laws, regardless of the effect on the essence of the employer's business. For example, suppose Title VII is amended to have extraterritorial effect. When a U.S. employer orders only its male American employees in Japan to work overtime, which women are prohibited from doing under Japanese law, the employer may raise a foreign compulsion defense to the claim of discrimination against its female American employees in Japan with regard to the loss of opportunities for overtime compensation. The employer would not have to prove that such discrimination is reasonably necessary to the essence of its business.

V. Conclusion

In light of the Supreme Court decision in ARAMCO, it appears settled that U.S. fair employment laws do not apply beyond U.S. territory unless congressional intent to the contrary is clearly shown in the statute at issue. However, the majority's reasoning is not persuasive, because it relied on the strong presumption against extraterritoriality without inquiring into the legislative history of Title VII. On the other hand, it is far less settled whether U.S. territorial statutes may apply when an employee is abroad on a business trip or when the decision to discharge or refuse to hire an individual working or supposed to work in a foreign country is made within U.S. territory. This Article answered both of these questions affirmatively, based on the notion of the extended U.S. workplace and the place of decision test respectively. As to the limitation of extraterritorial application, it is similarly unsettled what defense is available to an employer who faces conflicts between U.S. and foreign laws as well as local customs. This Article suggests that such employer may assert a BFOQ defense when the essence of its business would be undermined in the absence of discriminatory conduct, and the employer has made a rea-

340 See supra note 319 and accompanying text.
341 See supra notes 303-04 and accompanying text.
342 This presupposes that the employer has made a reasonable effort to accommodate conflict of laws. In such a case as above, however, there appears to be little room for such accommodation.
reasonable effort to avoid conflicts with foreign norms. Another suggestion is that the employer may assert the foreign compulsion defense when the foreign law constitutes actual compulsion, though the coverage of this defense often overlaps with that of the BFOQ defense.

Although this Article has focused on the coverage of regulatory statutes for fair employment, it must be noted that there is another body of law that may apply to employment relations—the law of employment contract. In general, the issue of which law governs an employment contract in an international context should be discussed under the framework of conflict of laws. This issue is fundamentally different from that of the extraterritoriality of regulatory statutes, though an approach similar to that of conflict of laws has sometimes been taken for the latter issue. In view of the recent remarkable development in employment contract laws in the United States, it is likely that courts will render interesting decisions with respect to conflict of laws in this area, which in turn will provide good opportunities for further analysis of international employment laws.

Postscript

On November 21, 1991, President Bush signed the Civil Rights Act of 1991* into law. Section 109 of this Act amends Title VII and the Americans with Disabilities Act of 1990 to extend coverage beyond U.S. territory with respect to American citizens employed by American employers and foreign corporations controlled by American employers. Entities subject to such extraterritorial application may raise a foreign compulsion defense when compliance causes such entities to violate the law of such foreign countries. These amendments are mostly identical with the provisions of the Age Discrimination in Employment Act regarding its extraterritoriality.

Since the amendments shall not apply to conduct that occurred before the enactment of this Act, the discussion in this Article remains intact with respect to such conduct.

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343 For a comparative research on this topic, see Morgenstein, supra note 275.
344 See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953) (the application of the Jones Act, 46 U.S.C. App. § 688 (1988), to foreign seamen employed on foreign vessels was rejected as a result of balancing of "connecting factors" such as place of wrongful act, law of the flag, nationality of the injured seamen and the shipowner, place of contract etc.). See also Henry J. Steiner & Detlev F. Vagts, Transnational Legal Problems 846-49, 865-82 (3d ed. 1986). But see Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 225 (3d Cir. 1991) ("the applicability of FLSA is a matter of statutory interpretation rather than choice of law analysis").