The Extraterritoriality of U.S. Employment Laws: A Story of Illusory Borders and the Indeterminate Applications of U.S. Employment Laws Abroad

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This survey traces the extraterritorial extension of U.S. employment laws before and after Congressional amendments explicitly allowing for extraterritorial application. Specifically, this survey offers an analysis of Title VII, the ADA, and the ADEA as applied in the United States and abroad. Historically, the U.S. Supreme Court adopted a strict territorialism approach, meaning that U.S. law did not extend outside its territorial boundaries. In the mid-1900s, the Court promoted a more flexible conflict of laws approach that considered the location of the conduct or the place where its effects were felt. The Court’s modern practice uses statutory construction and interpretation focusing on congressional intent.

External forces such as technological advances and globalization helped create a world where intercontinental employment is a common practice. But a critical problem quickly arose: U.S. law did not extend to U.S. nationals employed abroad nor did it apply consistently to foreign nationals. Congress responded to this shortcoming by amending Title VII, the ADA, and the ADEA. I will discuss four key components of the amendments to each of these laws in this survey. Title VII, the ADA and the ADEA were each amended to: (1) define “employee” as an individual who is a citizen of the United States and employed in a foreign state”; (2) extend to U.S./U.S.-controlled foreign employers operating abroad; (3) explicitly not apply to wholly foreign employers operating abroad regardless of whether they employ U.S. nationals or foreign nationals; and (4) include a foreign law

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defense which allows foreign employers to escape liability if compliance with U.S. law would cause them to violate local law.

These amendments were praised as a success because they protected employees across borders. However, several issues remain, many of which deserve clarification from Congress. Without such clarification, lower courts do not have guidance on how to interpret and apply ambiguous parts of the amendments, such as the applicability of the foreign law defense, what it means to be under control of a U.S. corporation, and the conflict in applying a law to a U.S. national but not to a foreign national employed abroad by the same U.S./U.S.-controlled foreign employer.

The main purpose of this survey is to highlight the gaps in how the law is applied abroad and to underscore the premise that the resulting scenarios are discriminatory based on alienage. This survey does not recommend a solution to remedy these resulting inconsistencies; however, it does illuminate the current state of the law. The goal is to create solutions and eliminate the unfortunate and unfair outcomes that have been brought to light by this survey.
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I. INTRODUCTION

In today’s globalized world, it is rewarding, exciting, and common to work abroad. But factors such as citizenship or an overseas employer’s connection to the United States may cut off a worker’s ability to rely on U.S. employment law protections. In the past, U.S. workers outside the United States were denied these protections entirely. Fortunately, Congress remedied many of these shortcomings by extending U.S. laws to protect U.S. nationals employed abroad. This survey examines such scenarios with particular emphasis on Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act (“ADA”), and the Age Discrimination in Employment Act (“ADEA”) (collectively, “the Acts”). The major changes in the amendments include: (1) redefining an “employee” to include a U.S. citizen working abroad, (2) extending the Acts to apply to U.S./U.S.-controlled foreign employers, (3) the inapplicability of the amendments to wholly foreign employers, and (4) the status and strength of the foreign law.


2. See Stulberg & Shulman, supra note 1, at 422 (asserting that U.S. anti-discrimination laws “may or may not protect American citizens employed abroad” and listing several factors that this determination can be based on, such as “the type of discrimination alleged; the structure of the corporate employer; the residence of the affected employee; the nature of the foreign assignment; and/or the locus of the discriminatory acts.”).


5. See id. § 109(b)(2) (codified as amended at 42 U.S.C. § 12112(c)(1) (2012)).
Unfortunately, many loopholes remain, such as the Acts’ applicability to foreign nationals employed abroad by U.S. companies, U.S. nationals employed abroad by foreign employers, and U.S. permanent legal residents employed abroad. Additional complications arise when courts try to determine what it means for a U.S. company to “control” a foreign company or what it means for a foreign employer operating abroad to use the foreign law defense to escape liability. These loopholes will be explained in greater detail below. But lower courts are still without clear guidance on the extraterritorial extension of the Acts simply because the language in the amendments is not clearly articulated and defined.

II. BACKGROUND AND HISTORY

A statute’s reach can have domestic and international implications. Several anti-discrimination statutes that started with a domestic force have taken on an international dimension, as Part II demonstrates.

A. Outline

This survey proceeds in the following order: Part II describes the background of extraterritoriality—where U.S. law is applied to foreign conduct—as well as the extraterritorial application of domestic and international authority. It briefly introduces the concept of extraterritoriality and the presumption against extraterritoriality. Part III explores the evolution of extraterritorial applications of law generally and in the employment context. As will be demonstrated, U.S. practice has moved from an approach of territorialism—which was heavily against extraterritoriality—to an approach that readily embraces the extensions of U.S. law abroad. Part III then describes pre-amendment U.S. case law and the extraterritorial application of Title VII, the ADA, and the ADEA, followed by an examination of the Foley Bros. and Aramco decisions. These two Supreme Court decisions cut back on extraterritorial applications by adopting the modern approach of statutory construction and interpretation focusing on congressional intent. These decisions also prompted Congress to amend the Acts.

Part IV introduces the text of the amendments and provides examples of subsequent caselaw interpreting them. The inconsistencies in the lower courts caused by the lack of clear standards in the amendments will be described in this part. Part V outlines the main arguments for and against the extraterritorial application of U.S. law. Part VI first discusses the implications and unintended consequences resulting from the congressional
amendments, such as the types of plaintiffs that are not covered under the amendments, the potential manipulation by employers, and infringement on state sovereignty. It proceeds to describe the difficulties with applying laws extraterritorially due to ambiguities in terms such as “U.S. employer” and “foreign employer”, the control requirement, and the foreign law defense.

Part VII summarizes potential suggestions with the extraterritorial application of U.S. anti-discrimination statutes. The aim of Part VII is not to offer one concrete solution but to highlight the current deficiencies in extraterritorial applications and to encourage Congress to make the law more consistent for U.S. national and foreign claimants. Lastly, Part VIII concludes.

B. Sources of Authority for the Extraterritorial Application of Laws under Domestic and International Law

1. Extraterritoriality

What is the difference between territorial and extraterritorial statutes? Territorial statutes regulate where “the conduct and the effects of an activity occur entirely within a single state.” Extraterritoriality is “the application of federal and state law to conduct that takes place at least partially outside the territory of the United States . . . .” It occurs when “the conduct, the effects, or both occur outside the regulating state . . . to at least some degree.” The differences between territorial and extraterritorial application of a country’s laws can be substantial.

2. Domestic Law

Congress has the power to enact legislation that extends beyond the U.S. borders. This authority includes the power to pass laws that “ignore, or even to directly violate, international law” without needing to consider their

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9. Dodge, supra note 7, at 87–88; see also Barela, supra note 1, at 890 (”[W]hen a state extends its jurisdiction over persons or activities in a foreign land based on nationality, or another non-territorial basis of jurisdiction, the state is acting extraterritorially.”).
effects. In fact, it is very easy for Congress to do so, as it sometimes does after it disagrees with a judicial holding. However, Congress rarely enacts legislation with clearly articulated standards that will adequately protect everyone.

3. International Law

International law allows a country to assert jurisdiction on a variety of bases. The Restatement (Fourth) of Foreign Relations states that there are six bases of prescriptive jurisdiction. These bases are referred to as: (a) subjective territorial principle, (b) objective territorial principle, (c) nationality principle, (d) protective principle, (e) passive personality principle, and (f) the universality principle. The Restatement limits the use of prescriptive jurisdiction to what is set forth by Constitution and requires that the United States “take[] account of the legitimate interests of other nations as a matter of prescriptive comity.”

The United States can regulate foreign conduct, foreign nationals, and can bring suit against U.S. nationals for conduct abroad so long as this conduct complies with the U.S. Constitution. Though completely legal, the
implications regarding possible infringements of a foreign country’s sovereignty from U.S. extraterritorial applications are not without consequence.20

C. The Presumption Against Extraterritorial Application

The presumption against extraterritoriality has been an important principle within the international community since the early nineteenth century21 and has been justified on various grounds.22 It was initially justified by international law principles such as international comity. Now the justifications are two-fold: (1) “[the presumption] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord” and (2) Congress is “primarily concerned with domestic conditions.”23 U.S. courts interpret federal statutes to apply within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary.24 However, this is only a presumption, and it can be rebutted. If there is no indication from Congress as to the provision’s geographic scope, courts will determine the focus of the provision at issue to see if it involves a domestic or extraterritorial application.25 If the statute focuses on conduct that occurred in the United States, the provision’s application “is deemed domestic and is permissible.”26 On the other hand, if the statute focuses on conduct that did not occur in the United States, then the provision’s application “is deemed extraterritorial and is not permissible.”27

The question now is, what evidence can be used to rebut this presumption against extraterritorial application of U.S. law? Is it solely a clear statement rule or can the courts look at context as well? Is there a

20. See infra Section V.0.
21. See Dodge, supra note 7, at 85 (noting that the presumption “has been around for nearly as long as there have been federal statutes”).
22. See Curtis A. Bradley, Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int’l L. 505, 513–16 (1997) [hereinafter Bradley, Extraterritorial Application of U.S. Intellectual Property Law]. Professor Curtis A. Bradley notes five justifications for the presumption against extraterritoriality: (1) international law, (2) international comity, (3) choice-of-law principles, such as consistency with state law, (4) likely congressional intent, and (5) separation-of-powers considerations. Regarding the fifth justification, the separation of powers principle asserts that the Constitution gives the policy decisions regarding foreign affairs to the political branches and not the judiciary because the judiciary is incompetent to handle these issues. Id.
24. See Restatement (Fourth) of Foreign Relations Law § 404
25. Id. § 404 cmt. b, c.
26. Id. § 404 Reporter’s Note 8
27. Id.
difference between civil and criminal statutes? Professor William S. Dodge suggests that because the presumption’s purpose is to determine congressional intent, “all ... evidence of that intent should be considered, including the statute’s language, purpose, and legislative history.” He also suggests that the presumption should be defeated when it is clear that Congress was not concerned solely with domestic conditions when drafting the law. However, if the law is domestically focused, the legislation should nevertheless apply to conduct that affects domestic conditions and not just conduct in the United States.

III. The Evolution of Extraterritorial Application

A. Extraterritorial Application Generally

While extraterritorial regulation is legal now, this was not always true. In the Prize Cases, concerning seized ships in times of hostility, the Supreme Court dealt with sensitive foreign policy issues for the first time. These cases were often dismissed based on international law, strong theories of sovereignty, and comity. The Schooner Exchange, decided in 1812, is often cited for the theory that a state’s authority within its jurisdiction is “exclusive and absolute” and “susceptible of no limitation not imposed by itself.” The question presented in The Schooner Exchange was “whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.” The Court, in an opinion by Chief Justice Marshall, contended that “nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.” Here, because the Exchange was a public armed ship in the service of France and had entered an American port, a friendly

28. See United States v. Bowman, 260 U.S. 94, 98 (1922). The Supreme Court in Bowman held that the presumption and same rules of interpretation “should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government’s jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.” Id. The Supreme Court here implied that extraterritorial applications in these circumstances can be inferred and need not be supported by a clear congressional indication in the statute. See id.
29. Dodge, supra note 7, at 123.
30. Id. at 124 (“Congress’ focus on domestic conditions does not mean that its legislation should be applied only to conduct that occurs within the United States. Rather it should be applied to conduct that affects those conditions, regardless of where that conduct occurs.”) (emphasis added).
31. See generally The Brig Amy Warwick (The Prize Cases), 67 U.S. (1 Black) 635, 671–72 (1862) (holding that the President had the authority “to institute a blockade of ports in possession of the States in rebellion.”).
34. Id. at 135.
35. Id. at 144.
power, the Court found it entered “under an implied promise . . . she should be exempt from the jurisdiction of the country.”

In 1818 the Supreme Court interpreted the geographic reach of a statute in a case involving a foreign ship on international waters in *United States v. Palmer*. Here, the defendants were charged with robbery on a foreign ship on the high seas. The Court held that although the Constitution grants Congress the power to define and punish piracy—even where such pirates are foreigners who have not committed any offense against the United States—the question is whether “the legislature enacted such a law.” Chief Justice Marshall for the Court interpreted the words “any person” and declined to read the statute literally, holding that “no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.” Therefore, the Act did not apply to U.S. national defendants on a foreign ship for acts against foreign nationals on international waters.

In *Apollon*, decided in 1824, the French owner of the *Apollon* sued the District of St. Mary’s, where the ship was anchored, to recover the vessel and the cargo that was seized. The Supreme Court held that “[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.” Justice Story was careful to note that “however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.” Here, the Court added an exception to the exclusive and absolute jurisdiction for U.S. citizens. The foreign-vessel cases demonstrate the tendency of courts in this era to dismiss cases based on strict territorialism and sovereignty.

Therefore, legislation in this era was restricted in an attempt to “uphold[] the right of nations with regard to retaining absolute sovereignty within their

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36. *Id.* at 147.
37. *Id.* at 136.
39. *Id.* at 626.
40. *Id.* at 630.
41. *Id.* at 629, 633–34.
42. *Id.* at 626–27; 634–35.
44. See *id.* at 370.
45. *Id.*
own borders."46 The territorial principle, jurisdiction under international law granted based on objective and subjective conduct and effects in U.S. territory, was generally used by courts to limit the application of federal laws abroad.47 This was demonstrated in 1909 in American Banana, a case involving provisions of the Sherman Act. Specifically, the case involved a dispute between two American corporations over the defendant’s monopolistic acts to hinder competition in the banana trade in Panama.48 Justice Holmes held in American Banana that the Sherman Act does not extend extraterritorially to foreign conduct.49 In doing so, he adopted a conflicts of law analysis focusing on the location where conduct occurred.50 Justice Holmes noted that “to treat [the actor] according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations . . . .”51 The conspiracy and conduct by the defendant designed to disrupt plaintiff’s business took place “outside the jurisdiction of the United States and within that of other states.”52 Because of this, jurisdiction based on the territorial principle could not be maintained.53

But soon after American Banana, U.S. courts began shifting toward extraterritorial application to regulate foreign activities abroad.54 Professor Jonathan Turley credits this shift to the fact that Congress’s concerns were no longer purely domestic, to the expansion of extraterritorial regulation, and to the increase in statutes regulating transnational issues.55

About twenty years after American Banana, in 1932, the Supreme Court in Blackmer casted doubt on American Banana’s restrictive reading of sovereignty.56 While this case concerned the contempt of an American citizen in France for the failure to respond to subpoenas, Chief Justice Hughes’s analysis of the relationship between congressional authority, sovereignty, and its nationals is informative:


48. Id. at 354–55.

49. Id. at 357–58.

50. Id. at 356 (“The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done”).

51. Id.

52. Id. at 355.

53. Id. at 359 (“A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.”).

54. See Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 HASTINGS L.J. 185, 236 (1993) (“Although it was once extraordinary to regulate activities abroad, Congress’s regulatory concerns are no longer clearly territorial or domestic . . . . It is now common for courts to resolve conflicts with foreign jurisdictions.”)

55. Id.

56. See Blackmer v. United States, 284 U.S. 421, 437 (1932) (noting that extraterritorial application is not a question of legislative power, as American Banana had previously endorsed).
While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power . . . . Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen . . . . And the Congress may provide for the performance of this duty and prescribe penalties for disobedience.57

Additionally, the Court in Blackmer cautioned against possible infringements of sovereignty.58 However, this was not a problem based on the facts in Blackmer, which was “in no sense an invasion of any right of the foreign government.”59 Thus, it appeared that the strict notion of sovereignty and territorial borders was not as absolute as the Court in American Banana had outlined. A more liberal interpretation of congressional statutes to include extraterritorial application was on the horizon.

In fact, a little over a decade later in 1945, the Second Circuit expanded on the American Banana analysis in United States v. Aluminum Co. of America (“Alcoa”).60 In Alcoa the claim against the defendant was for monopolizing interstate and foreign commerce and entering into conspiracies in restraint of trade regarding the manufacture and sale of aluminum ingot.61 Writing for the Court, Judge Learned Hand emphasized an objective territorial justification for jurisdiction accounting for the effects felt in the United States even where conduct took place abroad. This provided a basis for jurisdiction over the defendant in Alcoa and a basis for U.S. courts to assert jurisdiction over defendants in similar circumstances. While agreeing with American Banana that “[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States,” Judge Hand concluded that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders . . . .”62 Thereafter, courts analyzed cases of transnational character based on the domestic effects of the foreign conduct, not the location where the conduct occurred.63

57. Id. at 437–38 (emphasis added).
58. Id. at 439 (noting that “[w]hile consular privileges in foreign countries are the appropriate subjects of treaties, it does not follow that every act of a consul . . . must be predicated upon a specific provision of a treaty” since the “consul was not directed to perform any function involving consular privileges or depending upon any treaty relating to them, but simply to act as any designated person might act for the Government in conveying to the citizen the actual notice of the requirement of his attendance”).
59. Id. at 439; see also Bunting, supra note 46, at 262 (asserting that the Blackmer Court warned that an “Act of Congress should be weighed by the compelling interests of having the act so construed, against the other nation’s interest in having its own laws apply”).
60. See United States v. Aluminum Co. of America (“Alcoa”), 148 F.2d 416 (1945)
61. Id. at 421.
62. Id. at 443.
The Ninth Circuit decided *Timberlane Lumber Co. v. Bank of America* in 1976, which also involved alleged violations of the Sherman Act.64 *Timberlane* is significant because it balances foreign interests65 and criticizes *Alcoa*: “*Alcoa*’s assertion has been roundly disputed by many foreign commentators as being in conflict with international law, comity, and good judgment.”66 To counter these criticisms, Judge Choy adopted a multi-part analysis that included an inquiry into whether the United States should assert extraterritoriality as “a matter of international comity and fairness.”67 This is another form of the presumption against extraterritoriality.

**B. Extraterritorial Application in The Employment Context**

1. Extraterritoriality and U.S. Employment Regulation

      Congress vested the Equal Opportunity Employment Commission (E.E.O.C.) with the power to enforce the employment laws of the United States.68 However, many claimants resort to the judicial system to resolve disputes.69 Courts resist70 applying employment laws extraterritorially. There are various reasons for this including that employment regulation is a local matter and that its international dimension only took force within the past few decades.71 Judicial reluctance to extend U.S. employment laws abroad is in sharp contrast with the extraterritorial application of securities and antitrust law, which have been applied broadly abroad.72

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65. *Id.* at 614.
66. *Id.* at 610.
67. *Id.* at 615 (emphasis added).
69. *See* Bailey, *supra* note 68, at 421 (describing the process a claimant takes to remedy an alleged discrimination violation starting with the filing of a grievance (complaint) with the EEOC, to the EEOC’s attempt to remedy the situation, and then, possibly, leading to the employee/claimant’s dissatisfaction with the result by the EEOC and filing of a civil action in federal court).
70. *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 288 (1949); *see also* Bailey, *supra* note 68, at 424 (describing case law prior to *Aramco*, most notably the *Foley Bros.* opinion, where the Court’s refusal to extend the law abroad was based on a reluctance to imply that Congress would have wanted such a broad application of the law).
71. *See* Bailey, *supra* note 68, at 424 (noting that such reluctance by the courts to extend a labor law abroad was based on the fact that the host country was the primary regulator and enforcer of labor regulations).
Despite the reluctance of courts to apply employment laws extraterritorially, some employment activities occurring outside the United States still have domestic effects. Recognizing this, some courts have interpreted congressional statutes that are silent as to their geographic reach to include extraterritorial application.73 The problem with this, as Professor Mark Gibney observes, is that “with very rare exception, Congress gives little guidance” on the scope and extent of a statute’s reach and thus, the “judiciary has been no more consistent . . . than Congress.”74

Furthermore, the pre-amendment U.S. anti-discrimination statutes were silent as to the application abroad.75 The most important anti-discrimination statutes in the United States are Title VII, the ADA, and the ADEA. Title VII and ADA cases have traditionally been analyzed together due to their similarities in scope76 Before 1991, Title VII cases in the lower courts discussed extraterritoriality but were inconsistent as to its geographic reach. It was not until 1991 when the Supreme Court decided Aramco that it addressed the issue of the extraterritoriality of Title VII.77

Before examining cases on the pre-amendment Acts, consider Benz v. Compania Naviera and McCulloch v. Sociedad Nacional, two Supreme Court cases analyzing labor statutes as applied to foreign vessels and foreign seamen.78 In Benz, decided in 1957, the issue before the Court was whether the Labor Management Relations Act extended to a controversy for damages from the picketing of “a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port.”79 In concluding that it did not extend, Justice Clark stated that there is no indication of congressional intent in either the Act or the legislative history


74. Id. at 301.

75. See Stulberg & Shulman, supra note 2, at 423, 426 (observing that “[a]s originally enacted, the ADEA did not explicitly permit or preclude extraterritorial application” and “[l]ike the ADEA, Title VII and the ADA, as originally enacted, did not expressly authorize or preclude extraterritorial application of those statutes”).

76. See Smith, supra note 68 at 197–98 (noting how section 109 in the Civil Rights Act of 1991 amends both Title VII and the ADA).


79. Benz, 353 U.S. at 139.
to bring these disputes within the Act’s coverage.80 The Court also noted that this case involved a dispute “between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation;” the only connection to the United States was that the dispute arose while the ship happened to be “transiently in a United States port” and “American labor unions participated in its picketing.”81 Thus, the Supreme Court in Benz refused to read such intent into the Act and, for them to do so in this “delicate field of international relations,” would require clear intent from Congress.82

In McCulloch, decided six years later in 1963, the question presented was whether the National Labor Relations Act (“NLRA”) extended to maritime operations of vessels owned by a foreign subsidiary of a U.S. corporation that flew the flag of a foreign state and carried a foreign crew.83 The Court concluded that neither the legislative history nor the text of the NLRA demonstrated congressional intent to extend its provisions to foreign-flag vessels employing foreign seamen.84 In doing so, Justice Clark noted “[t]he presence of such highly charged international circumstances” and that for the Court to extend the Act “under such conditions in this ‘delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.”85 This ruling still holds true, courts have not extended U.S. laws to regulate conduct on a foreign vessel, even if that foreign vessel is passing through U.S. territorial waters.

2. Extraterritoriality of Pre-Amendment Title VII, ADA, and ADEA

In Love v. Pullman, decided in 1976, the U.S. District Court for the District of Colorado held that Title VII did not reach discriminatory acts that occurred in Canada.86 In Pullman, Canadian workers sued a U.S. employer operating in Quebec under Title VII.87 Relying on the alien exemption clause,88 the court stated that when Congress exempted aliens not employed in the United States, it was implied that U.S. employees abroad would be

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80. Id. at 142–44 (“Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees.”)
81. Id. at 142.
82. See id. at 146–47 (“[Congress] alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.”)
84. Id. at 21–22.
85. Id. (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)).
87. Id. at *2–5.
88. Id. at *5, n. 4 (“Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered under the act”).
covered under the Act. Here, because the plaintiffs were foreign nationals, the court ruled that Title VII did not apply to them.

Similarly, in Griggs v. Duke Power Company, the Supreme Court held that the extraterritorial application of Title VII enhances the statute’s goal of “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification” by prohibiting U.S. employers from engaging in discriminatory employment practices when they are operating in foreign states. Fifteen years later, the court in Seville Martin Marietta Corporation agreed, concluding that U.S. workers employed outside the United States are entitled to the protections of Title VII.

Pre-amendment ADEA cases have been more restrictive. U.S. nationals were typically denied protection for discriminatory conduct that occurred while they were employed overseas. In Cleary v. United States, the court rejected the extension of the ADEA to cover U.S. nationals employed abroad by U.S. employers. The plaintiff, a 64-year-old U.S. national, was terminated from his employment in England and brought an ADEA claim against his employer. The plaintiff alleged that since his termination order came from the U.S. parent corporation, the ADEA applied to him. The court disagreed, holding that “because the ADEA does not apply extraterritorially . . . Where the discriminatory decision may have taken place is of no consequence.” Even though the plaintiff’s claim was dismissed in Cleary, the court expressed both confusion and disagreement as to “why this country’s laws against age discrimination should not apply to American citizens employed by American companies abroad.”

That same year, in Zahourek v. Arthur Young, another ADEA claim was brought by a U.S. national working in Honduras. The plaintiff claimed he was terminated because of his age in violation of the ADEA. The court held that his claim was not covered by the ADEA because his “workplace”
was in Honduras, not the United States when he requested the transfer. Thus, the ADEA was inapplicable to the plaintiff.

Consider the Supreme Court case *Vermilya-Brown Co. v. Connell* in 1948. *Vermilya-Brown* concerned the extraterritorial application of the Fair Labor Standards Act (“FLSA”). The issue was whether the FLSA applied to employees on a Bermuda military base, which had been leased to the United States by the United Kingdom. Specifically, since the FLSA covers commerce among the States, for which “State” means “any State of the United States or the District of Columbia or any Territory or possession of the United States,” the task for the court was to determine the congressional intent behind this word “possession.” In a five-to-four decision, the Supreme Court found extraterritorial application appropriate, marking the first time the Supreme Court permitted the extraterritorial application of a U.S. employment law. The Court interpreted the word “possession” concluding that Congress intended the provisions of the FLSA to apply to leases for military bases in Bermuda. Therefore, the leased property was deemed to be a possession of the United States. While the Supreme Court allowed extraterritorial application in *Vermilya-Brown*, it changed its position a year later in the *Foley Brothers v. Filardo*.

C. Foley Bros.

Extraterritoriality was severely curtailed in the mid-twentieth century. In 1949, the Supreme Court decided *Foley Brothers v. Filardo*, where it limited the extraterritorial reach of the Federal Eight Hour Law by reviving the *American Banana* presumption against extraterritoriality. The Petitioner contracted to build a public works project on behalf of the United States in the East and Near East, particularly in Iraq and Iran. The petitioner agreed to abide by all applicable U.S. laws. Respondent, a U.S. citizen, worked

101. *Id.* at 1454–55, 1457 (“I find, however, that the discriminatory effect was on Zahourek’s place of employment—Honduras, and as such, the ADEA does not apply to him. . . . Where the plaintiff is employed in a foreign country, as Zahourek was, the ADEA does not provide him protection from invidious discrimination on account of age.”).


103. *Id.* at 378.

104. *Id.* at 378–79.

105. *See id.* at 379.

106. *Id.* at 390; Zimmerman, *supra* note 10, at 113.

107. *See Vermilya-Brown*, 335 U.S. at 390 (“We think these facts indicate an intention on the part of Congress in its use of the word “possession” to have the Act apply to employer-employee relationships on foreign territory under lease for bases.”).

108. *Id.*


111. *Id.* at 283.

112. *Id.*
for the petitioner and frequently worked more than eight hours a day.\textsuperscript{113} The respondent requested and was refused overtime he sued under the Eight Hour Law. The issue before the Court was whether the Eight Hour Law applied to employees working for private contractors contracting with the U.S. government for work outside the United States.\textsuperscript{114}

Justice Reed, writing for the majority, started the opinion by acknowledging that Congress has the power to extend the Act to foreign countries; the issue to be decided was whether “Congress intended to make the law applicable to such work.”\textsuperscript{115} Quoting Blackmer, the Court noted that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”\textsuperscript{116} This canon serves to ascertain the “unexpressed congressional intent” and assumes that “Congress is primarily concerned with domestic conditions.”\textsuperscript{117}

The Supreme Court noted that there is nothing in the Act nor the legislative history that would support a finding of extraterritorial congressional intent as set forth by respondent.\textsuperscript{118} In doing so, Justice Reed Court distinguished Foley Bros. from Vermilya-Brown, where the Court found that Congress intended the FLSA to be applied abroad to cover “‘possessions’ of the United States.”\textsuperscript{119} Here, Reed contended, there is nothing in the language of the Eight Hour Law that evinces a congressional purpose to extend its application beyond the United States.\textsuperscript{120}

The Court moved on to underscore how the legislative history of the Act reveals a “concern with domestic labor conditions.”\textsuperscript{121} Justice Reed rejected the argument that the term “every contract” was meant to include work performed in foreign countries.\textsuperscript{122} Furthermore, administrative interpretations of the Act provided no assistance in determining the geographic reach of the Eight Hour Law.\textsuperscript{123} In conclusion, the Eight Hour Law was held wholly inapplicable to contracts between the United States and private contractors for construction work in foreign countries.\textsuperscript{124}

\textsuperscript{113.} Id.
\textsuperscript{114.} Id. at 282.
\textsuperscript{115.} Id. at 284–85.
\textsuperscript{116.} Id. at 285 (quoting Blackmer v. United States, 284 U.S. 421, 437 (1932))
\textsuperscript{117.} See id. at 285.
\textsuperscript{118.} Id.
\textsuperscript{119.} Id.
\textsuperscript{120.} Id. at 285–86. Justice Reed also noted that the Act does not provide a distinction between citizen laborers and alien laborers, meaning that its scope can only cover labor conditions of citizens and alien employees that are “a probable concern of Congress.” Id. at 286. Thus, “an intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.” Id.
\textsuperscript{121.} Id. at 286.
\textsuperscript{122.} Id. at 287.
\textsuperscript{123.} Id. at 288.
\textsuperscript{124.} Id. at 290 (concluding that “the Eight Hour Law is inapplicable to a contract for the construction of public works in a foreign country over which the United States has no direct legislative control . . . .”).
D. From Foley Bros. to Aramco (1949-1991)

Foley Bros.’s impact spread quickly in lower court decisions and scholarly writings. Analyses of transnational employment cases started with the basic assumption from Foley Bros. that Congress is primarily concerned with domestic conditions. In fact, courts do not generally extend extraterritoriality to labor laws absent express provisions from Congress to the contrary. Cases following Foley Bros. applied the presumption against extraterritoriality to other federal laws.

The Court adhered to the presumption during this period and Foley Bros. though this case marked the beginning of an expansive and flexible use of it. Even though the Foley Bros. Court relied on Blackmer’s more restrictive holding regarding extraterritorial applications, a “more receptive view of extraterritorial reach” was set forth by Foley Bros.. Although sometimes this view did not yield success stories for extraterritorial applications, its acknowledgement was critical in this period because it served as an acceptance that the United States has a duty to protect its citizens beyond its own sovereignty, especially in a world where territorial restraints made less sense.

Although liberal extraterritorial application of U.S. law protects U.S. nationals abroad and adheres to the intent of Congress, there have been some instances outside the employment context where judicial interpretation of silent statutes has been excessive. For instance, in the latter half of the twentieth century, the presumption against extraterritoriality began to lose its force. Extraterritorial application expanded in areas such as antitrust law, securities law, and international trade law, arguably infringing on foreign

125. See Bailey, supra note 68, at 425 (noting that after Foley Bros., the Court has reaffirmed the power of Congress to enact legislation with extraterritorial effect when regulating the conduct of U.S. nationals).
126. See Foley Bros., 336 U.S. at 285.
127. See Zimmerman, supra note 10, at 113.
128. See, e.g., Smith v. United States, 507 U.S. 197 (1993); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); see also Bailey, supra note 68, at 425 (describing how the courts have applied this reasoning from Foley Bros. to other statutes such as the Lanham Trademark Act); Arlene S. Kanter, The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does it Leave Students with Disabilities Studying Abroad, 14 STAN. L. & POL’Y REV. 291, 294–95 (2003) (“Following the Court’s decision in Foley Bros., courts applied the presumption against extraterritoriality to other federal laws, such as the Federal Torts Claims Act and environmental protection laws.”).
129. See Bunting, supra note 46, at 263 (“The decisions of Blackmer and Foley Brothers signaled the virtual death of the absolutist view of territorial restraints on jurisdiction espoused by Chief Justice Marshall and employed by the Court for over a century.”).
130. Id. (“The traditional view of sovereignty has yielded to the emergence of a belief that the United States must maintain relations with those citizens beyond its geographic borders.”).
131. See Bradley, Extraterritorial Application of U.S. Intellectual Property Law, supra note 22, at 512 (noting the “erosion of the presumption in other areas of law” prior to Aramco).
132. See Kanter, supra note 128, at 295 (acknowledging that the presumption “began to lose its place of prominence in American jurisprudence” at this time and observing the simultaneous increase in courts applying federal laws extraterritorially).
states’ sovereignty. This expansion was justified by the desire to protect American interests abroad. The presumption against extraterritorially did not regain force until the 1990’s and early 2000’s in Aramco, Empagran, and Morrison. The Court interpreted statutes involving express congressional intent and international comity concerns.

In conclusion, the U.S. has gone back and forth on the presumption against extraterritoriality. Each stage has been characterized by different considerations. The stages begin with the Schooner Exchange Era (early 1800’s-1930’s), the American Banana Era (1930’s-1949), and then the Foley Bros. Era (1949-1991). The prominent considerations from each era are explained below.

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As displayed above, The Schooner Exchange era focused on the sovereignty of nations and international law. American Banana and its progeny embraced a conflict of laws approach and focused on the location where the conduct took place. Lastly, Foley Bros. articulated a statutory construction framework that analyzed congressional intent. The next

133. See Bunting, supra note 46, at 264–66. Bunting notes that “federal courts have acted with little restraint in expanding the broad language of congressional regulations to control the conduct of American actors overseas” in these areas of law. Id. at 264. For instance, using American antitrust law to regulate American actors abroad “has evolved from the prohibitive doctrines espoused by the Justice Holmes in American Banana Company to broad jurisdictional mandates ordered by courts acting on the vague language of the American antitrust regulations.” Id. With the securities laws, courts have “displayed a great deal of ingenuity in their attempts to regulate the overseas affairs of both American and foreign business entities” and have “perceived[d] the threat of an adverse effect on American markets directly or indirectly, as being the event which triggers the justifiable application of American securities law.” Id. at 265. Lastly, courts have broadly construed statutes pertaining to foreign trade to regulate “both American and foreign actors abroad.” Id. at 266.

134. See Kanter, supra note 128, at 295 (describing this practice as occurring “particularly when American interests were at stake.”).

135. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244 (1991) (declining to extend Title VII abroad without a clear indication from Congress as to the statute’s reach).

136. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 156 (2004) (declining to extend the Sherman Act abroad without congressional intent where the conduct at issue was purely foreign).

monumental decision in this evolution was Aramco and the subsequent congressional response.

E. Aramco

In the early 1990’s the Supreme Court decided a series of cases that dramatically altered the extraterritorial application of U.S. law and statutory interpretation generally. The Supreme Court decided E.E.O.C. v Arabian American Oil Company ("Aramco") in 1991.138 Petitioner Ali Boureslan was a naturalized U.S. citizen born in Lebanon.139 The respondents were two Delaware corporations, Arabian American Oil Company ("Aramco") and its subsidiary, with their principal place of business in Saudi Arabia and Texas, respectively.140 Petitioner worked in Texas and transferred to Aramco’s Saudi Arabia location.141 Four years later, Petitioner was discharged and filed a discrimination complaint with the E.E.O.C. and brought suit in the District Court for the Southern District of Texas.142 The heart of Petitioner’s complaint was that he was “harassed and ultimately discharged by respondents on account of his race, religion, and national origin.”143 The issue for the Supreme Court was whether Title VII applies extraterritorially to regulate the employment of U.S. employers who employed U.S. citizens abroad.144

In an opinion by Chief Justice Rehnquist, the Court reiterated its stance from Foley Bros. that “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”145 The relevant question was whether Congress had done so.146 He also noted “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”147 When interpreting a statute courts look for “any indication of a congressional purpose” to extend the law beyond U.S. borders.148 This canon of construction “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord”149 and demonstrates that courts are to assume that Congress “is primarily concerned with domestic conditions.”150

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139. See Aramco, 449 U.S. at 247.
140. Id.
141. Id.
142. Id.
143. Id. (emphasis added).
144. Id. at 246.
145. Id. at 248
146. Id.
147. Id. (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
148. Id.
149. Id.
150. Id. (quoting Foley Bros., 336 U.S. at 285).
Chief Justice Rehnquist proceeded to dismiss all of Petitioner’s arguments. The first argument asserted that the statute’s terms “employer” and “commerce” were sufficiently broad to encompass U.S. companies that employ U.S. citizens abroad. In rejecting this “boilerplate language,” the Court held that the petitioner did not demonstrate congressional intent to extend the law extraterritorially.

Petitioners also argued that the “alien exemption” clause in the statute created a negative inference that Congress intended to protect U.S. citizens employed abroad from discrimination. This provision states that the statute “shall not apply to an employer with respect to the employment of aliens outside any State.” The Court found that if the petitioner’s view was correct there would be “no way of distinguishing in its application between United States employers and foreign employers.

Finally, petitioners argued that the Court should defer to the position of the EEOC, which previously stated that Title VII applied abroad. The Court disagreed, holding that the position taken by the EEOC contradicts an earlier position by the EEOC stating that “the statute was limited to domestic application.”

The Court affirmed the judgment for the respondents holding that Title VII did not apply extraterritorially.

Justice Scalia wrote a short concurrence agreeing with the majority on all aspects except its decision that the EEOC was not entitled to Chevron deference. Instead, Scalia asserted that he would assume the EEOC was entitled to deference but that the Court had a responsibility to “accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.” Thus, because of the “presumption against extraterritoriality” and the requirement that the intent to rebut the presumption be “clearly expressed,” the EEOC’s interpretations were not reasonable.

Justice Marshall wrote a heated dissent in which he argued that Congress intended for Title VII to protect U.S. citizens from discriminatory

151. Id. at 248–49.
152. Id. at 250, 252–53 (holding that “[i]f we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.”).
153. Id. at 249.
154. Id. at 253.
155. Id. at 255.
156. Id. at 249.
157. Id. at 257.
158. Id. at 259; see also Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843–44 (1984) (holding that an agency’s interpretation of a statute where Congress left a gap is entitled to deference unless “arbitrary, capricious, or manifestly contrary to the statute”).
159. Aramco, 449 U.S. at 260 (Scalia, J., concurring).
160. Id.
employment practices by U.S. employers abroad. First, Marshall disagreed with the majority’s characterization of the presumption against extraterritoriality as a “‘clear statement’ rule,” arguing that the Court in *Foley Bros.* considered “the entire range of conventional sources,” such as legislative intent to determine congressional intent.161 He asserted that clear statement rules are less likely to reveal actual congressional intent and highlighted instances where the Court did not utilize the clear statement rule in discerning congressional intent to apply other statutes abroad.162

Next, Marshall argued that the majority “overstate[d] the presumption. . . .”163 He contended that *Foley Bros.* court’s analysis is more appropriate where “a court is not free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress’ intent on this subject.”164 Additionally, the dissent found that the terms “employer” and “commerce” were broad enough to include discrimination by U.S. employees abroad.165

Justice Marshall was satisfied that the language in the “alien exemption” was sufficient to rebut the presumption and that its history confirms the congressional intent to apply Title VII abroad.166 He reasoned that there would be no need for a clause exempting aliens abroad from coverage if Title VII had no extraterritorial application. Marshall’s dissent also noted that applying U.S. law abroad to U.S. nationals is not the same as applying U.S. law to foreign nationals, the latter of which raises more serious issues of international comity.167 Thus, he concluded that the same statute could apply to U.S. nationals abroad and not to foreign nationals.168

Lastly, Marshall criticized the majority’s approach in ignoring the language and vast legislative history of the statute as well as the administrative interpretations on the matter.169 The EEOC’s interpretations, according to Marshall, need only be reasonable to receive deference.170 In support of this assertion, he noted that the EEOC’s interpretations were reinforced the Department of Justice’s interpretations.171 All these reasons,

161. Id. at 261–63 (Marshall, J., dissenting).
162. Id. at 263 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286–87 (1952) as an example of where the Court has used a “broad jurisdictional grant” to conclude that Congress intended that the Lanham Act to be applied extraterritorially).
163. Id. at 264.
164. Id. at 266.
165. Id.
166. Id. at 267–68 (“And because only discrimination against aliens is exempted, employers remain accountable for discrimination against United States citizens abroad”).
167. See Id. at 274.
168. Id.
169. Id. at 275.
170. Id. at 276.
171. Id.
according to Marshall, were more than sufficient for a finding of congressional intent for Title’s VII’s applicability abroad.

F. The Lasting Effects of Aramco

Because Aramco significantly curtailed extraterritorial application through its formalistic holding, scholars have grappled with its implications on issues such as citizenship and statutory construction and interpretation. Aramco stood for the proposition that federal statutes would not be applied extraterritorially unless there was express Congressional intent to the contrary. Thus, prior to the 1991 congressional amendment, Title VII did not protect U.S. citizens employed abroad by American companies. Professor Dodge contends that Aramco was notorious not only for reinvigorating the presumption, but also because of the “apparent strength of the presumption it applied.”

Although the Court could have found the required congressional intent to apply Title VII abroad, it refused to do so. The Court required a “clear statement” of congressional intent, though it did not provide examples of what would be sufficient to rebut the presumption. Instead, the Court concluded that Title VII “was designed with only a domestic focus in mind,” and the petitioner in Aramco did not satisfy this prerequisite. Dodge suggests that the presumption does not turn on where the conduct occurred but instead depends on “where the effects of that conduct are felt.”

Returning to the facts of Aramco there is an argument that this was not a traditional foreign case. The case questioned whether Title VII applied to a U.S. employee employed U.S. company. Thus, the issue was not really one of infringing on a foreign state’s sovereignty. The only aspect of the case suggesting that Title VII should not apply was that all the alleged discriminatory actions took place in Saudi Arabia.

To guard against clashes with foreign sovereigns and adhere to the wishes of Congress, several canons of construction were developed in U.S. jurisprudence. For example, even though Congress has the ability to

172. Azman, supra note 77, at 531–32.
173. Dodge, supra note 7, at 86.
174. Id. (pointing out how the legislative history of the Act, E.E.O.C. and DOJ interpretations, and the “alien exemption” clause in the text of the statute all pointed to intent to apply Title VII abroad, but “none of this was enough for Chief Justice Rehnquist, who suggested that only a ‘clear statement’ in the language of the statute itself would be sufficient to overcome the presumption.”).
175. Id. at 93.
176. See Bunting, supra note 46, at 283.
177. See Dodge, supra note 7, at 94.
178. Turley, supra note 54, at 237 (observing that the conflict in Aramco “was not between the United States and a foreign country, but between the United States and a United States citizen.”).
179. Aramco, 499 U.S. at 247.
180. Bunting, supra note 46, at 258, 263 (tracing the evolution of the presumption against extraterritoriality as beginning with the “Doctrine of Absolute Sovereignty,” where courts would uphold
legislate beyond the borders of the United States, courts begin with the assumption that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” 181 Thus, because there was no clear indication in Title VII regarding extraterritorial application in Aramco, Chief Justice Rehnquist rejected all of Petitioner’s arguments in concluding that Title VII does not extend extraterritorially.

Justice Rehnquist was adamant about the requirement of clear Congressional intent to extend a statute extraterritorially. 182 If we accept this requirement, it would have been impossible for the petitioner to have overcome this hurdle since Title VII—prior to its amendment—was silent as to the regulation of foreign conduct. 183 However, some of the majority’s and dissent’s arguments contain serious flaws and leave future claimants unaccounted for.

The Court rejected the petitioner’s “alien exemption clause” argument based on the negative inference claim based on concern for the implications it would have on international law. 184 However, it would be more logical to extend protections to American employees abroad regardless of the employer’s citizenship status. This proposition is easily justified based on the American employer’s consent to employ American employees abroad. This is supported by the nationality principle within international law. 185 However, the parties to the litigation did not make this argument and the takeaway appears to be that there will always be uncertainty when Congress is silent or ambiguous on a particular statutory provision.

Marshall asserted in his dissent that “the same statute might be construed to apply extraterritorially to United States nationals but not to foreign nationals.” 186 The problem with this reasoning is that the overseas employer would be able to discriminate against foreign employees but not the U.S. employees. Only the U.S. employee would be able to maintain an action

the rights of nations to retain their sovereignty within their own borders and transforming into an approach that expanded upon a statute’s extraterritorial reach by “signal[ing] the virtual death of the absolutist view of territorial restraints on jurisdiction” and discarding the traditional view of sovereignty).


182.  See Bailey, supra note 68, at 433–35 (describing in detail how Justice Rehnquist rejected all of the claimant’s arguments and refused to find extraterritorial application appropriate based on either ambiguity or insufficient evidence to defer to the EEOC).

183.  EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 250–51 (1991) (discussing how the [pre-amendment] Acts did not contain clear language of extraterritorial application in rejecting petitioner’s arguments that such intent can be found by context).

184.  See id. at 255 (“If petitioners are correct that the alien-exemption clause means that the statute applies to employers overseas, we see no way of distinguishing in its application between United States employers and foreign employers. Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk.”).


against the overseas U.S. employer. Marshall expressed no issue with this in his dissenting opinion.

Congress subsequently amended Title VII and the ADA in 1991 and ADEA in 1984 to allow for extraterritorial application. Although these amendments were supposed to provide the clarity and fairness pre-amendment statutes lacked, inconsistencies nevertheless remained after the amendments. All that can be gathered is that Aramco’s requirement of a “clear indication” from Congress requires more than “that which a court could deduce from the language of the statute by negative inference.” These resulting inconsistencies from uncertain Supreme Court holdings suggest that the state of affairs for extraterritorial regulation of U.S. employment law is not as consistent as Aramco’s adherence to the presumption or Congress’ subsequent amendments make it appear.

Following Aramco the Supreme Court decided an admiralty law case involving prize and foreign cruise ships, Spector v. Norwegian Cruise Line, in 2005. Interestingly, in this case the Court held that the ADA does apply to foreign-flagged cruise ships, except to the foreign vessel’s internal affairs. In Spector, defendant Norwegian Cruise Line Ltd. (“NCL”) was a Bermuda corporation with its principal place of business in Florida. NCL’s passengers were mostly U.S. residents, NCL advertised in the United States, and NCL agreed to abide by U.S. law. However, NCL’s cruise ships were registered in other countries. At issue in this case was a suit by person with a disability asserting ADA violations against two NCL cruise ships registered in the Bahamas.

The Court in Spector interpreted the ADA provisions as demanding a clear statement rule only to regulate the international affairs of foreign vessels. However, the Court held that this clear statement rule should not

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188. See Bailey, supra note 68, at 445.
189. See Kanter, supra note 128, at 298 (noting that “[t]he Aramco decision and its strong dissent have created not only a split in the circuit courts but also an indication of the increasing vulnerability of the presumption against extraterritorality itself”); infra IV.0-Error! Reference source not found. for a discussion of the amendments and subsequent caselaw afterwards, especially the discussion of the circuit split following Aramco.
191. Id. at 125.
192. Id. at 126.
193. Id.
194. Id.
195. See id. at 130 (“This Court has long held that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake.” (quoting Cunard S. S. Co. v. Mellon, 262 U.S. 100, 127 (1923))).
be similarly extended to all the Act’s provisions to foreign-flagged vessels.\footnote{Id. at 125.}

The distinction here was based on the ability of the United States to extend its laws abroad to regulate its citizens or acts that affect its territory, or to matters that “concern the security and well-being of United States citizens or territory.”\footnote{Id.} Following the approach used in Foley Bros. and Aramco, the Court utilized a statutory construction and interpretation analysis:

It is reasonable to presume Congress intends no interference with matters that are primarily of concern only to the ship and the foreign state in which it is registered. It is also reasonable, however, to presume Congress does intend its statutes to apply to entities in U.S. territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility the United States, even if those entities happen to be foreign-flag ships.\footnote{Id. at 121.}

As shown above, this case is markedly different from prior foreign-vessel cases that dismissed such claims. The Court here analogized the “internal affairs clear statement rule” to Aramco’s principle that “general statutes are construed not to apply extraterritorially.”\footnote{Id. at 139.} What then explains this broad approach? The congressional amendments—expanding the extraterritorial application of U.S. law—appear to be the reasons that the Supreme Court in Spector chose to extend U.S. law abroad.

IV. STATUTORY AMENDMENTS TO TITLE VII, THE ADA, AND THE ADEA AND THE SUBSEQUENT JUDICIAL DECISIONS

This part briefly explains congressional amendments to the anti-discrimination statutes. Congress amended these statutes after courts interpreted the statutes to restrict extraterritorial application. Nevertheless, lower courts continued to grapple with many issues after the amendments, such as the amendments’ applicability to foreign nationals and the control requirement. This Part elaborates upon the extent to which the amendments have produced additional inconsistencies.

A. The Congressional Amendments to the Anti-Discrimination Statutes

territory of the United States. The ADEA was amended in 1984 after the 
Cleary decision held that the provisions of the ADEA were limited to the 
United States. 203 Title VII and the ADA were modified after the Aramco 
decision refused to extend Title VII abroad. 204 Under all three statutes, 
“employee” is defined as an individual employed in a foreign state who is a 
citizen of the United States. 205 The amendments to Title VII, the ADA, and 
the ADEA have been made applicable to U.S./U.S.-controlled employers 
operating abroad but do not apply to wholly foreign employers operating 
abroad. 206

Additionally, the amendments provide a set of factors to determine 
whether a foreign corporation is under control of the U.S. corporation and 
whether a foreign corporation will be treated as a U.S. employer under the 
amendments. 207 The factors for this analysis include the (1) interrelation of 
operations; (2) common management; (3) centralized control of labor 
relations; and (4) common ownership or financial control. 208 Furthermore, the 
amendments contain a foreign law defense, which provides that a foreign 
employer may engage in action otherwise prohibited by U.S. law if 
compliance would cause that foreign employer to violate the laws of the 
foreign country in which such workplace is located. 209

B. Subsequent Caselaw and Developments

Caselaw after Aramco and the congressional amendments is no more 
consistent than pre-amendment cases. Courts have struggled with issues such 
as (1) whether Title VII applies to foreign nationals that have a strong nexus 
to the United States; (2) what it means to be “employed” in the United States; 
(3) how much control is sufficient for the U.S. control requirement of foreign 
employers; (4) how or if these congressional responses can be analogized to 
other areas of law/statutes; and (5) the current status of both Aramco’s clear 
indication rule and the force of the presumption against extraterritoriality.

For instance, can a U.S. nexus be a sufficient basis for a foreign national 
to assert a Title VII action? In other words, can the employee asserting the 
claim be considered employed within the United States? In this area, courts

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208. Id.
have used one of two tests to determine if Title VII reaches their claims: (1) the “primary workstation” test or (2) the “center of gravity” test.\(^\text{210}\)

In *Shekoyan v. Sibley International Corporation* in 2002, the U.S. District Court for the District of Columbia (and D.C. circuit which affirmed on appeal)\(^\text{211}\) utilized the “primary workstation” test.\(^\text{212}\) The plaintiff, a foreign national who was hired, trained, and reported in the United States but whose primary workstation was in the Republic of Georgia, asserted that this nexus was sufficient for Title VII to reach his claim.\(^\text{213}\) In disagreeing, the district court noted that “an individual whose ‘primary workstation’ is abroad, cannot characterize otherwise extraterritorial employment as domestic solely because employment decisions were made and the training occurred for such jobs in the United States.”\(^\text{214}\)

However, in *Herrera v. NBS, Incorporated* in 2010, the U.S. District Court for the Western District of Texas found a plausible claim for the extension of Title VII to protect a Mexican national.\(^\text{215}\) Here, the plaintiff, a citizen of Mexico, demonstrated that he worked at least 50% of his time in El Paso, Texas.\(^\text{216}\) The court agreed that he satisfied the requirement that the United States be the *primary workstation* for Title VII extension.\(^\text{217}\) The claimant here also satisfied the “center of gravity” test.\(^\text{218}\)

The “center of gravity” test, used for the same purpose as the “primary workstation” test, was elaborated upon in *Torrico v. International Business Machines Corporation* in 2002.\(^\text{219}\) *Torrico* was an ADA case. The claimant was a Chilean national who worked in New York for many years but was temporarily assigned to Chile before being terminated.\(^\text{220}\) The court criticized the “primary workstation” test as oversimplified and articulated the multifactor “center of gravity” test.\(^\text{221}\) This test looks to the totality of the circumstances by considering the entire scope of the “employment


\(^{213}\) *Id.* at 62–63.

\(^{214}\) *Id.* at 68.


\(^{216}\) *Id.* at 860, 866.

\(^{217}\) *Id.* at 866.

\(^{218}\) *Id.* (noting that “[p]laintiff also meets the ‘center of gravity’ test because “his contract was formed in Texas . . . half of his working time was spent in Texas, and . . . his supervisors (and thus his reporting relationship) were located in Texas”).


\(^{220}\) *Id.* at 393–94.

\(^{221}\) *Id.* at 401, 403 (asserting that primary workstation test cases “appear to present simpler factual scenarios distinguishable from the present case, and perhaps for that reason, oversimplify the analysis of what constitutes ‘employment in a foreign country’”).
relationship." Using this test the court concluded that the plaintiff stated a plausible claim that the protections of the ADA should extend to his claim.

While IBM eventually prevailed, this case is important because it demonstrated that a claim can be stated by a foreign national based on his or her employment in the United States, even if he or she is temporarily working abroad. However, this case did not set a strong precedent, as subsequent courts continued to use the “primary workstation” test or discussed both in their analyses. Instead, it simply articulated another test that courts may use to analyze whether the case is domestic enough for a claim to be stated under U.S. employment laws. Such tests are all too fact-specific and tend to vary with no clearly defined rules. Torrico thus failed to address the citizenship issue and missed an opportunity to define an area of law where the Supreme Court has not yet weighed in.

In 2007 the U.S. District Court for the Western District of Texas decided a similar case, Gomez v. Honeywell International, Inc. Gomez concerned allegations brought under Title VII and the ADEA. The defendant, a foreign national who worked in Mexico, argued there was an insufficient nexus to the United States under the “primary workstation” test. The court instead applied the “center of gravity” test concluding there was “a question of material fact as to whether Plaintiff was employed in the United States.” Furthermore, the plaintiff had some ties to the United States, she reported, lived, and received her salary in the United States.

Boustany v. Xylem Inc., decided in 2017, is a case where the “center of gravity” test was insufficient to support an extension of Title VII to a foreign national. The plaintiff worked in Lebanon, reported to a citizen of Lebanon, and was paid in Euros. The court held these factors were insufficient to form a U.S. nexus. Furthermore, the plaintiff’s “business trips” and “several complaints” to the New York office were not sufficient to establish

222. Id. at 403–04. (examining “whether any employment relationship had, in fact, been created at the time of the alleged discrimination, and if so, where that employment relationship was created and the terms of employment were negotiated; the intent of the parties concerning the place of employment; the actual or contemplated duties, benefits, and reporting relationships for the position at issue; the particular locations in which the plaintiff performed those employment duties and received those benefits; the relative duration of the employee’s assignments in various locations; the parties’ domiciles; and the place where the allegedly discriminatory conduct took place”).
225. See generally id.
226. Id. at 422.
227. Id. at 423–24.
228. Id.
230. Id. at 488, 495–96.
231. Id. at 496.
the United States as her place of employment under the “center of gravity” test.232

Denty v. SmithKline Beecham Corporation discusses what it means for a U.S. corporation “to have control” or “to be in control” of a foreign corporation.233 In Denty, decided in 1997, the court was faced with the issue of what control really means. The plaintiff, a U.S. national, was employed by a U.S. subsidiary of a British parent company.234 When he was denied a transfer to the British parent company he brought suit alleging violations of the ADEA, asserting he was denied the transfer because of his age.235 He argued that the ADEA should extend to protect him against the alleged foreign discriminatory practices because the British parent company and the U.S. subsidiary were “highly integrated.”236 The court did not find this argument compelling. The court held it was the U.S. subsidiary that was controlled by the British parent company, not vice versa as the plaintiff contended.237 Thus, the ADEA was inapplicable to the conduct of the British parent company.238 The takeaway is that subsidiary corporations may be deemed corporations of the state of incorporation as their parent corporations because the subsidiary is under control of the parent.

Denty shows how post-amendment cases may not always protect U.S. citizens. Thus, U.S. citizens may be dismayed to learn that the laws of their home country may not be available to protect them against certain discriminatory conduct when they are employed overseas.

Furthermore, the ADEA does not extend to foreign nationals who reside in the United States but are looking for employment abroad. In Hu v. Skadden, decided in 1999, the court refused to extend the ADEA to a Chinese national living in the United States who applied for employment in Beijing and Hong Kong, even though the alleged discriminatory conduct, the New York interview and the decision not to hire him occurred in the United States.239 Also, under the ADEA, a foreign national who applies for employment from a foreign state for work in the United States is not protected.240 In Reyes-Gaona v. N.C. Growers Association, decided in 2001, a Mexican national sought employment in North Carolina and applied in Mexico but was denied because he was over 40 years old.241 He alleged age

232. Id.
234. Id. at 881.
235. Id.
236. Id. at 885.
237. Id. (concluding that the facts presented by the plaintiff case actually “leads to the unsurprising conclusion that the American subsidiary is controlled by its English parent”).
238. Id. at 885–86.
240. See Reyes-Gaona v. N.C. Growers Ass’n, 250 F.3d 861 (4th Cir. 2001).
241. Id. at 863.
discrimination under the ADEA but the court rejected his claim, holding that “[t]he simple submission of a resume abroad does not confer the right to file an ADEA action” since such an expansion would “exponentially increase the number of suits filed and result in substantial litigation costs.”  

Thus, under the ADEA, the location where the misconduct occurred appears to be wholly irrelevant.

Contrastingly, courts have placed importance on the presumption against extraterritoriality. For example, the presumption has been applied to other statutes such as the Securities Exchange Act of 1934, the Alien Tort Statute, and the Racketeer Influenced and Corrupt Organizations Act (“RICO”).

*Morrison v. National Australia Bank* specifically articulated a two-step framework in 2010 for applying the presumption to statutes to determine whether they applied extraterritorially. The first step asks whether there is any reference to extraterritorial application in the statute. If there is not, the courts proceed to step two, which asks whether the statute has a domestic focus. If it does, then a claim must allege domestic conduct to proceed.

Professor Dodge asserts that cases following *Aramco* suggest the presumption should be understood as the notion that “acts of Congress are presumed to apply to conduct that causes effects in the United States,” but that such decisions do not reveal whether “acts of Congress should be presumed to apply to conduct that occurs in the United States but causes effects abroad.”

But how strong is this presumption? And what does it mean when combined with the clear indication rule established in *Aramco* and *Morrison*?

Subsequent caselaw and scholarly writings support the view that an absolute clear statement is not required to rebut the presumption and in practice, it has not been utilized. For example, in 1998 the Second Circuit

242. *Id.* at 866 (“If such a step is to be taken, it must be taken via a clear and unambiguous statement from Congress rather than by judicial fiat.”).


246. *See* *Morrison*, 561 U.S. at 255. This framework was further elaborated upon in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100–01 (2016).

247. *See* *Morrison*, 561 U.S. at 255 (“When a statute gives no clear indication of an extraterritorial application, it has none”).

248. *Id.* at 294 (“The Exchange Act’s focus is not on the place where the deception originated, but on purchases and sales of securities in the United States”).

249. *See* Dodge, supra note 7 at 100.

250. *See* *Morrison*, 561 U.S. at 265 (Even though Justice Scalia, writing for the majority, states that “we do not say . . . that the presumption against extraterritoriality is a ‘clear statement rule’ . . . . Assuredly context can be consulted as well,” the majority’s analysis and holding suggests that an express, clear statement from Congress is what the Court will require before applying a statute abroad; *see also* E.E.O.C v. Arabian American Oil Co., *(Aramco)* 499 U.S. 244, 258 (noting “Congress’ awareness of the need to make a clear statement that a statute applies overseas” in its refusal to apply Title VII abroad).
expressed disapproval of the Aramco majority’s stance of the presumption in Kollias:

If the presumption against extraterritoriality were a clear statement rule, reference to legislative history and other extrinsic indicia of congressional intent, including administrative interpretations, would be prohibited. In Aramco itself, however, the Court considered the EEOC’s interpretation of Title VII. Moreover, the Supreme Court has made clear since Aramco that reference to nontextual sources is permissible.251

The Reporter’s Notes in the Restatement (Fourth) of Foreign Relations Law allude to this conclusion as well, maintaining that “[a] court must examine all the evidence courts normally employ in statutory interpretation to determine whether the presumption has been overcome.”252 Thus, the presumption is not as strong as cases such as Aramco and Morrison would suggest.

V. THE COMPETING ARGUMENTS AND THEORIES

This section elaborates on arguments for and against extraterritorial extensions of the U.S. anti-discrimination statutes. As demonstrated below, arguments in favor of extraterritoriality center on globalization and the desire to protect U.S. nationals employed overseas, while arguments against it are supported by theories that extraterritorial regulation infringes on the sovereignty of foreign states.

A. The Pros of Extraterritorial Application of U.S. Employment Laws

There are logical and moral reasons to extend U.S. anti-discrimination laws abroad, most of which focus on protecting U.S. nationals when they work abroad. For example, the extraterritorial application of employment laws “can provide expatriate workers with claims, remedies, discovery and litigation advantages that may be otherwise unavailable.”253 It can also motivate the courts in the United States to become more efficient regulators in the global world when deciding employment cases of a transnational character.254 In other words, because transnational employment litigation is common, courts must adjudicate such cases with the aim of avoiding

252. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: SELECTED TOPICS IN TREATIES, JURISDICTION AND SOVEREIGN IMMUNITY § 404 Reporter’s Note 7 (Am. Law Inst. 2018) (“The presumption against extraterritoriality is not a ‘clear statement rule,’ and the statute need not state expressly that it applies abroad in order to rebut the presumption.”).
253. Stulberg & Shulman, supra note 2, at 433.
254. See Turley, supra note 54, at 238 (noting that “transnational litigation is now a common feature of court dockets” and “institutional legitimacy should, if anything, compel courts to play a more efficient regulatory role . . .”).
international conflict; this creates “institutional legitimacy” because the courts’ efforts in reacting to these changing global circumstances.255 Responding to the arguments that excess extraterritorial regulation can cause foreign resentment, some scholars argue that such concerns do not apply to labor and employment laws. For example, an employment law will only extend to U.S. nationals employed outside the territory of the United States. Furthermore, foreign U.S.-controlled employers will not come into conflict with these laws because the foreign law defense provides an exemption from compliance with U.S. law in those circumstances.256 Some scholars suggest that the courts need to take a more active role in regulating the workplace because Congress’s expansion of the anti-discrimination statutes was not expansive enough.257 This type of regulation is not about instructing other countries on how they should regulate themselves or which laws of the United States will reach the conduct/nationals of a foreign state; it instead concerns the role of the courts to “define the prescribed behavior of United States citizens doing business abroad”258 to provide for fair application with minimal international friction.

On this note, scholars have warned that problems will only arise when the “courts are not sensitive to the obligations placed on employers in foreign countries” and must acknowledge and heed the local laws of the foreign state.259 Extraterritorial regulation may cause some foreign resentment in the short run but “has led in the longer run to a series of agreements between the United States and other countries providing for cooperation.”260 Some scholars note current conflict in an area of law can create an incentive for states to negotiate.261 Usually the U.S. begins by introducing excessive extraterritorial regulations, then other countries respond with “retaliatory legislation” which is followed by “negotiations and international agreements providing for cooperation.”262

B. The Cons of Extraterritorial Application of U.S. Employment Laws

There are also concerns with the practice of extraterritorial regulation of U.S. employment laws abroad. There are more arguments against

255. Id.
256. See Bellace, supra note 1, at 20.
257. See Roberts, supra note 19, at 296 (“Not only are federal courts failing to intervene where they should . . . but the legislative branch would be justified in extending the extraterritorial provisions of antidiscrimination law to protect all employees of U.S. employers abroad, not just U.S. citizen employees.”).
258. Turley, supra note 54, at 237.
259. Bellace, supra note 1, at 22.
260. Dodge, supra note 7, at 122 (providing “antitrust matters” as an example of agreements between the United States and foreign nations regarding cooperation efforts).
262. Id. (using antitrust law as an example of this process).
extraterritorial regulation than for it. Extraterritorial regulation raises concerns with: (1) separation of powers, (2) democracy and accountability, (3) under- and over-regulation, (4) judicial policy-making, (5) the political question doctrine, and (6) international law and sovereignty infringements.

Extraterritorial applications by the judiciary raise possible separation of powers violations. Professor Bradley notes two important concerns on this point: (1) the judiciary is institutionally incompetent to decide the propriety of extraterritoriality and (2) the judiciary does not have the constitutional authority to decide foreign policy matters. Some scholars view extraterritoriality as counter to our system of democracy because creates a situation where the U.S. branches of government become weaker with this approach than they are domestically.

Professor Gibney describes how extraterritorial regulation can be both under and over inclusive. For example, regulation can be under-inclusive because of the “very selective and inconsistent manner in which U.S. law has been applied extraterritorially” and the “unequal treatment of similarly situated individuals.” And over-inclusive because some U.S. statutes can potentially “against the entire world population.” Lastly, Gibney contends extraterritoriality can be both under and over inclusive because such regulation “is applied extraterritorially, in which case it applies to every country in the world notwithstanding the domestic law in particular countries, or else it is not applied extraterritorially, in which case it only applies in the United States.”

Extraterritoriality also raises concerns with judicial policy-making which is seen as undesirable. Before and after Aramco courts have used extraterritoriality to extend statutes abroad even without express congressional approval. But scholars have asserted that when Congress enacts extraterritorial legislation it “cannot require another country to follow th[ose] laws.” But can courts try? Scholars contend that even though

263. See Bradley, Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper, supra note 8, at 550–51 (“[J]udicial activism with respect to extraterritoriality raises at least two sets of separation-of-powers concerns, one relating to competence and the other relating to authority.”).

264. See Gibney, supra note 73, at 315 (“What must be restored in the extraterritorial context is some semblance of constitutional balance; one where the political branches are responsible for creating the law, but the courts serve as a check against governmental abuses. At present, the extraterritorial application of U.S. law does not come close to resembling lawmaking in the domestic sphere.”)

265. Id. (“The essential problem is that extraterritoriality is both “underinclusive” and “overinclusive” (and, in some instances, both at the same time), and because of this it is without any coherent guiding principles.”).

266. Id. at 315–16 (“One such example is the extraterritorial application of U.S. antidiscrimination legislation”).

267. Id. at 317.

268. Id. (describing this predicament as an “either/or proposition,” but noting that the problem with this is that “countries differ rather dramatically in terms of the legal protections that they offer.”).

269. See Kanter, supra note 128, at 318.

270. Id. at 319.
“Congress cannot require another country to follow the laws it enacts,” matters change drastically when a U.S. company operates in a foreign country and employs U.S. nationals. Courts attempt to “exercise independent authority to extend federal statutes extraterritorially,” but receive a variety of criticisms. Professor Bradley refers to this phenomenon as “an excess of judicial authority” that produces both “foreign affairs issues” and “bias” because U.S. courts are more likely to favor U.S. interests over foreign interests due to courts’ inability to assess foreign interests. However, Bradley asserts, the presumption reduce some of these problems but it remains uncontested that “conflicts with foreign nations are more likely with respect to extraterritorial applications than with respect to territorial applications.”

Commentators also criticize judicial “[c]ase-by-case balancing,” suggesting that it rarely works out in practice since the considerations courts evaluate tend to “permit several answers and to dictate none.” These balancing factors allow judges to manipulate the analysis and then justify the conclusion. Consider two cases on the extraterritoriality of the Sherman Act: in Hartford Fire the Supreme Court held that the Sherman Act applies extraterritorially to foreign conduct but then asserted about a decade later in Empagran that the Sherman Act does not extend to independent foreign harm. Lastly, the “gap filling” duties that courts undertake present problems because courts try to discern the most reasonable interpretation while understanding that if they are wrong in their interpretation, “Congress can overturn a decision that strays too far afield” by revising the law. This is problematic because it interferes with the separation of powers; courts are, in effect, making law when they fill in these gaps left unaddressed by Congress.

With these considerations in mind, it does not seem so irrational or far-fetched to categorize some of these situations as political questions. Judicial incompetence when it comes to matters of policy and foreign relations has

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271. Id. (explaining that, in these circumstances, “the presumption of extraterritoriality should not provide an excuse for American [companies] to ignore their obligations . . .” to follow the requirements of the U.S. statute that reaches that conduct).


273. Id. at 555–56.

274. Id. at 556.


276. Id. (contending that “judges manipulate the considerations to justify a result reached on other, unarticulated (and often poorly understood) grounds.”).


long been agreed upon, but loopholes are discovered which place this extraterritorial legislating power back in the hands of the judiciary. Professors Bradley and Dodge assert that courts should wait for congressional guidance before applying federal statutes extraterritorially due to the sensitive policy issues that are at stake. This is critical when the statute at issue is silent as to the applicability and extent of extraterritorial regulation.

As a final argument, consider the international and sovereignty infringements that can result from extraterritorial applications. Scholars assert that extraterritorial regulation contravenes the “historical precedent” that “all nations retain absolute authority within their borders” and may imply that Congress, through its silence on the matter, instead demonstrates an intent not to apply the statute extraterritorially. Even though employment laws are traditionally considered a different species of extraterritorial regulation due to their inherently “local” nature, Congress arguably “deviated from this policy” when it amended the employment laws to include extraterritorial application.

VI. THE UNINTENDED CONSEQUENCES OF EXTRATERRITORIAL APPLICATIONS

The United States’ extension of employment laws abroad produces unintended consequences. In fact, the congressional amendments may have

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279. See Alina Veneziano, Should Extraterritoriality in the Midst of Congressional Silence be a Political Question?, 51 N.Y.U. J. INT’L L. & POL. 637, 638 (2019) (“[S]uch situations should be categorized as political questions in order to force the political branches to address the foreign implications of legislation and avoid possible foreign resentment from the overreach of U.S. statutes upon foreign entities.”); see also Austen L. Parrish, Evading Legislative Jurisdiction, 87 NOTRE DAME L. REV. 1673, 1703 (2012) (“Congress, rather than the courts, is better equipped to make the policy and judgment calls . . . .”); Nie, supra note 1, at 1030 (“Courts should not be in the business of amending statutes. Congress speaking with one voice, rather than the courts speaking with several voices, will provide more predictability and uniformity.”); Kun Young Chang, Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction, 9 FORDHAM J. CORP. & FIN. L. 89, 119 (2003) (“Courts are not well suited to analyze these delicate issues and balance the interests of a foreign sovereign against the interests of the United States.”).

280. See Gibney supra note 73, at 315 (noting that extraterritoriality has “prompted our institutions of government to play decidedly different, and inferior, roles . . . .”).

281. See Dodge, supra note 7, at 120 (“It is true that the decision whether to apply federal legislation extraterritorially raises difficult and sensitive policy questions . . . . Courts are not institutionally well-equipped to make these trade-offs.”); see also Bradley, Extraterritorial Application of U.S. Intellectual Property Law, supra note 8, at 556 (noting that because of the judiciary’s inability to assess foreign interests, U.S. courts are likely to favor U.S. interests over foreign interests in making the balance, something that might be entirely proper for a legislator but which raises fairness concerns when done by a court.”).

282. See Bunting, supra note 46, at 266–67 (noting that “Congress has amended certain acts with provisions providing for extraterritorial coverage,” and “that the absence of any such provision in Title VII indicates a congressional intent to limit the jurisdiction of Title VII to domestic claims.”).

made the law less predictable because of the exemptions. While expanding protections is the main goal, caselaw reveals that current standards create gaps in coverage, issues with foreign relations, and problems defining statutory terms, such as employer, the control requirement, or applicability of the foreign law defense. Part VI highlights these shortcomings.

A. The Forgotten Plaintiffs and Employer Manipulation

1. Generally

While the statutory amendments extended coverage to protect more employees working abroad, inconsistencies remain in the type of claimant allowed to bring these claims. This produces unfair results. For instance, the amendments extend protections to U.S. nationals employed abroad, but may not cover foreign nationals employed in the United States or employed abroad by U.S./U.S.-controlled corporations. Thus, employment regulation is dependent not on an employee’s connection to the United States, but on their employer’s connection to the United States or their citizenship.

Because protections extend mainly to U.S. nationals abroad working for U.S./U.S.-controlled companies, there has been litigation determining whether legal permanent residents are included within this category. Consider Sibley once more. In that case, a foreign national who was a legal resident of the United States asserted a Title VII claim. The court rejected this claim concluding that the plaintiff “is considered an alien,” which “means any person not a citizen or national of the United States,” regardless of the plaintiff’s connections to the United States.

Furthermore, since the amendments do not apply to foreign employees who work for U.S. employers abroad, those employers can discriminate against their foreign employees without recourse under U.S. law. U.S. employers operating abroad can discriminate as long as two conditions are met: (1) their discriminatory policies/decisions are carried out outside the

285. Id. at 63, 67.
286. See Renée S. Orleans, Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad, 16 Md. J. INT’L L. 147, 166–67 (1992) ("This international policy has the unfortunate effect of leaving some American workers who work for American companies overseas without Title VII protection. For example, if Kuwait prohibits women from working in certain occupational fields, American employers that are based in Kuwait could refuse to hire a woman in that particular field simply because she is a woman. Of course, if that employer dared to engage in such behavior in the United States, the woman would have a strong Title VII suit against the employer. Another example is a black American employee whose company transfers him to South Africa. If South Africa prohibits blacks from working in the company’s particular field, the company could fire him simply because of his race. What would happen if the company transfers the employee to South Africa knowing that it could fire him in South Africa without being subject to a Title VII suit? According to the amendments, the employee would have no remedy under Title VII.").
United States and (2) those policies/decisions are directed at foreign nationals.287

2. Deciding Whether Employees Are Protected and Whether Employers Are Subject to Liability

An employee working abroad must be a U.S. citizen to be protected by Title VII, the ADA, or ADEA.288 Legal permanent residents working abroad are not covered unless special circumstances demonstrating a “sufficient nexus to the United States,” such as work or training in the United States, are present.289 Even so, for these employees to recover, they must work for a covered employer.

Employers subject to liability under the Acts include those “incorporated in the United States” or those “incorporated outside the United States but is ‘controlled’ by a U.S. company.”290 This control requirement, or “‘integrated employer’ test”291 is hard to define. Courts struggle to determine when to impose liability on a foreign employer.292

As a final point, foreign employers who decide to incorporate in the United States are subject to U.S. anti-discrimination statutes for their U.S. national and foreign national employees.293 Undocumented aliens can be included in these protections as well.294 U.S. and foreign employers have less discretion when operating in the United States compared to in a foreign state.

B. Foreign Resentment and Infringements on Sovereignty

Extraterritoriality also causes resentment by foreign nationals and foreign states as well as infringements upon the sovereignty of a foreign nation. The Supreme Court held that the “presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”295 This prevents the application of U.S. law abroad. This presumption is rebuttable and when it is rebutted, extraterritorial application can “create[] a myriad of problems relating to issues of sovereignty, cultural differences,

287. See Roberts, supra note 19, at 299 (worrying that the current situation creates a “hierarchy in foreign workplaces where U.S. citizens maintain more rights against discrimination and harassment than their local counterparts.”).
289. Id.
290. Id.
291. Id.
293. BAKER & MACKENZIE, supra note 288, at 68
294. Id.
and conflict between United States and foreign laws. This is because U.S. employment laws simply do not account for international sovereignty, cultural bias, and the conflicts of laws.

Extraterritorial applications can be devastating to maintaining healthy foreign relations leading to tension, “diplomatic embarrassment,” and “retaliatory actions,” sometimes causing courts to decline jurisdiction. U.S. courts are hesitant to extend the protections of U.S. employment laws abroad following Aramco. This “hesitation threatens to allow discrimination protections to fall through the cracks between domestic and foreign U.S.-workplace regulation.”

C. Implications of [Un]Successful Extraterritorial Applications


Defining critical terms in the amendments, such as “American,” “American-controlled,” and “foreign law,” has been left to the EEOC because the legislative history is scarce. “Assessing the nationality of employers is key to determining whether Title VII applies in a foreign workplace.” U.S.-incorporated employers fall squarely within the law but foreign-incorporated employers may also be considered U.S. employers under anti-discrimination laws if its “primary business in the United States.” Courts look at that company’s contacts with the United States. A foreign employer operating abroad may also be subject

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296. See Smith, supra note 68, at 193–94 (“The application of United States employment laws abroad also hampers the ability of United States corporations to compete on a worldwide scale”).

297. Id. at 225.

298. See Zimmerman, supra note 10, at 120–24 (noting how unilateral expansions into another sovereign’s territory, regardless of the U.S. control of the foreign entity, have caused these states to “resist[] the export of U.S. regulatory requirements in three ways: political and economic retaliation, statutory measures, and diplomatic protest.”).

299. See Roberts, supra note 19, at 317 (“For example, courts may decline jurisdiction when the subject matter of a case is such that ruling on it would require a court to evaluate the act of a foreign state in its sovereign capacity.”).

300. Id. at 313 (“To avoid interference between foreign nationals and foreign nations, and perhaps following the Supreme Court’s lead in Aramco, U.S. courts have been wary of extending employment discrimination protection extraterritorially.”).

301. Id.

302. See Smith, supra note 68, at 225.

303. See Roberts, supra note 19, at 305.

304. Id.

305. See Enforcement Guidance on Application of Title VII and ADA to American Firms Overseas and to Foreign Firms in the United States, 2 EEOC Compl. Man. (CCH) § 605, ¶ 2169.
to liability if they are controlled by a U.S. employer, a requirement that is subject to subjective analysis since "no single factor is dispositive." 

2. Asserting More Than One Independent Claim and the Employers’ Burden of Complying with Laws from Multiple States

An employee who is covered by U.S. anti-discrimination protections may also be protected under anti-discrimination statutes of another sovereign. For instance, a U.S. national employed abroad by a U.S.-controlled foreign employer can bring a claim for discriminatory employment practices against the employer under Title VII and foreign law. While employers may be subject to multiple claims for the same conduct, employees “gain[s] strategic and substantive advantages,” ranging from benefits in damage recovery, settlement negotiations, and discovery.

3. The Foreign Law Defense

All three anti-discriminatory statutes discussed—Title VII, the ADA, and the ADEA—contain a foreign law defense. This defense provides an employer with a defense to, or exemption from the U.S. employment law at issue, if compliance would cause the employer to violate foreign law.

Consider *Mahoney v. RFE/RL, Inc.*, decided in 1995, a case in which the labor contract in Germany trumped the ADEA because compliance with the provisions of the ADEA would have caused the employer to violate German law. In *Mahoney*, the American employer operating in Germany had a valid collective bargaining agreement that mandated retirement at age 65, a

306. See Roberts, supra note 19, at 306; see also id. at 308 (“The totality of a company’s contacts with the United States may qualify it as a U.S. national. Or, a foreign national may be brought under the statute’s umbrella by its integration with a U.S. enterprise”); Zimmerman, supra note 10, at 125 (“Thus, the subsidiary’s country of incorporation does not matter.”).

307. See Stulberg & Shulman, supra note 1, at 422 (“[S]uch victims of discrimination may be able to assert concurrent claims under American and foreign statutes [...]”).

308. Id. (“Assertion of such concurrent claims . . . can broaden an expatriate claimant’s discovery rights, potential damages, and leverage in settlement negotiations.”).

309. See Nie, supra note 1, at 1039.

common practice throughout Germany.\textsuperscript{311} The American employees sued under the ADEA, but the court rejected their claim, holding that “[i]f an American corporation operating in a foreign country would have to ‘violate the laws’ of that country in order to comply with the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1), the company need not comply with the Act.”\textsuperscript{312} In doing so, the court noted that employer’s behavior violated the ADEA but requiring the employer to comply with the Act would cause it to violate the laws of Germany. This is the very essence of the foreign law defense.\textsuperscript{313}

The foreign law defense is justified by the desire to respect foreign sovereignty, especially in employment regulation, which is considered a local matter. Employment regulation is distinct from securities, antitrust, or trade regulations because its extraterritorial application is “more likely to offend the laws, customs and practices of other nations.”\textsuperscript{314} There are competing arguments in favor of such extraterritorial application. Plaintiffs asserting anti-discrimination employment practices of their employer and (2) that their claim does not conflict with foreign law.\textsuperscript{315} Scholars contend “[i]t is one thing to compel a corporation to abate the practices that cause [these] violations, but quite another where it is the laws, customs or general practice of that nation which dictate that these policies be employed.”\textsuperscript{316} Furthermore, the foreign law defense also presents the opportunity for employers to “shield discriminatory employment practices behind the veil of favorable foreign laws.”\textsuperscript{317} This ability by employers is malleable, manipulatable, and undermines the very purposes and goals of extending these protections abroad.

Lastly, because there is little congressional guidance on the foreign law defense its scope is unclear.\textsuperscript{318} Courts have accepted this defense “to avoid the collision of U.S. laws and the laws of foreign nations.”\textsuperscript{319} The extent and magnitude of these concessions by the courts remain to be seen.

\section*{VII. MOVING FORWARD WITH THE EXTRATERRITORIALITY OF THE U.S. ANTI-DISCRIMINATION STATUTES}

What are possible recommendations to repair this approach? The main solution suggested by scholars is Congressional amendment to clarify

\begin{itemize}
  \item \textsuperscript{311} Id. at 447–48, 451.
  \item \textsuperscript{312} Id. at 447–48.
  \item \textsuperscript{313} Id. at 450.
  \item \textsuperscript{314} See Bunting, supra note 46, at 286.
  \item \textsuperscript{315} Id. at 287 (noting that “[v]ictims of discrimination . . . have two foes, the corporate entity and the laws and practices of the nation where it is located”).
  \item \textsuperscript{316} Id.
  \item \textsuperscript{317} Id.
  \item \textsuperscript{318} See Azman, supra note 77, at 543.
  \item \textsuperscript{319} Id. at 546.
\end{itemize}
standards and eliminate uncertainty and gaps. These clarifications “should be designed to alleviate or minimize friction with other sovereigns in the international community.” This survey serves to demonstrate that it is important to understand the local nature of employment regulation (which encompasses the foreign policy goal of reducing infringements of sovereignty when reaching foreign conduct with extraterritorial applications) but also that it is critical to promote consistency in the application of U.S. employment laws in a way that is fair to all in its reach and does not arbitrarily distinguish between an individual’s nationality over his or her domestic contacts. For instance, since the amendments to the Acts specifically provide for extraterritorial jurisdiction only with respect to U.S. nationals, what would be the case with U.S. permanent residents who are not formally U.S. nationals? Under the eyes of the law, that person is a foreign national regardless of their connection to the United States. This demonstrates the arbitrariness of the law’s current application and, in reality, this tends to disadvantage foreign nationals and hinder the mobility of employment.

Professor Dodge suggests an approach focusing on conduct because it is likely that the effects are over-inclusive compared to the conduct. Therefore, extending jurisdiction on the basis of conduct avoids conflicts between state’s laws. Additionally, the United States should strive to adhere to Sections 405 and 406 of the Restatement (Fourth) of Foreign Relations Law which encourage interpretations that are reasonable and consistent with international law to minimize conflicts.

Professors Gibney and Bradley conclude that political branch involvement is needed when dealing with extraterritoriality. Gibney argues that the branches of government play the same role in the international sphere as they do in the domestic sphere. The political branches explain when and why U.S. law will be applied abroad and the judiciary “serve[s] as a check

320. See Smith, supra note 68, at 255 (“Congress must address these issues.”).
321. See Barella, supra note 1, at 917.
322. See Dodge, supra note 7, at 115 (“Because every nation is acknowledged to have jurisdiction to regulate activities that occur within its own borders and because it is more common for the effects of conduct to be felt in more than one nation than it is for the conduct itself to occur in more than one nation, the surest way to avoid having more than one law apply to the same activity is to assign prescriptive jurisdiction exclusively on the basis of where the conduct occurs.”).
323. Id.
324. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: SELECTED TOPICS IN TREATIES, JURISDICTION AND SOVEREIGN IMMUNITY § 405 (Am. Law Inst. 2018) (“As a matter of prescriptive comity, courts in the United States may interpret federal statutory provisions to include other limitations on their applicability.”).
325. Id. § 406, pt. IV, ch. 1 (Am. Law Inst. 2018) (“Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. If a federal statute cannot be so construed, the federal statute is controlling as a matter of federal law.”).
326. See Bradley, Extraterritorial Application of U.S. Intellectual Property Law, supra note 22 at 570; see also Gibney, supra note 73, at 307.
on the extraterritorial actions of the political branches.”

327. Gibney, supra note 73, at 311.

328. Id.

329. See Bradley, supra note 22, at 570, 572, 585.

330. See Smith, supra note 68, at 222.

The political branches must do this because “[t]his is the mandate of Aramco” and it is incumbent on the judiciary to “ensure that even when American law is applied beyond the nation’s borders, that it comports with domestic constitutional standards.”

Bradley discusses executive negotiations with foreign states, such as international agreements and international settlement procedures, to demonstrate additional measures that can be used by the political branches to avoid the unrestrained and inconsistent applications of U.S. law abroad.

Other scholars suggest that should Congress clarify the amendments and include better definitions of employer, the control requirement, the factors that can be considered for these amended sections, and law under the foreign law defense. This would make regulation of employment practices more uniform and fair.

There are several important considerations when crafting solutions. First, amendments should not expand regulation to wholly foreign conduct because there are concerns with sovereignty and international comity. Second, Congress should clarify what it means to be in control of a foreign corporation. The four factors in the statute are hard to apply and highly manipulable. Third, Congress should focus on the inconsistency between U.S. and foreign nationals employed abroad by the same U.S./U.S.-controlled foreign employer. Lastly, Congress needs to elaborate on the foreign law defense. For instance, the judiciary must know what can and cannot be used under this defense. The inconsistencies illuminated in this article underscore the need for a solution.

VIII. CONCLUSION

This article highlights the current deficiencies and loopholes when applying the U.S. anti-discrimination statutes abroad, such as their applicability to foreign employers, to foreign nationals employed by U.S./U.S.-controlled companies and, to U.S. nationals employed abroad by wholly foreign employers. The three major statutes are Title VII, the ADA, and the ADEA. Pre-amendment caselaw generally did not extend the protection extraterritorially on the theory that Congress did not intend to extend it. Following these cases Congress amended these statutes to allow for extraterritorial application. The amendments expanded the definition of “employee” to include U.S. nationals employed abroad, a control requirement that treats U.S.-controlled foreign employers as U.S. employers,
an exemption for wholly foreign employers, and a foreign law defense allowing foreign employers to escape compliance with U.S. law where compliance would cause them to violate the local law.

The deficiencies in the laws' administration persist and may have worsened after the amendments. While the amendments were successful and highly welcomed due to their extended protections when U.S. nationals working abroad, they draw a discriminatory distinction based on alienage. For instance, the amendments protect U.S. nationals employed abroad by a U.S./U.S.-controlled foreign employer but those same regulatory provisions do not extend to foreign nationals. What is most troubling is that this is true even if the U.S. and foreign national work for the same employer and the discriminatory practices targeting the U.S. and foreign nationals arise from the same employer conduct. Additional hurdles result from the malleability of the foreign law defense, the control requirement, and the definition of “employed in the United States.”

Without clarification from Congress, courts are left making difficult decisions and have been accused of judicial law making, such by formulating the “primary workstation” and “center of gravity” tests. This article presented the main loopholes in extraterritorial application. It is the hope that these results prompt Congress to clarify the ambiguous terms and to especially make the law more consistent for U.S. and foreign employees when employed abroad by U.S./U.S.-controlled foreign employers. These clarifications are necessary in a world that is characterized by transitory movement, unpredictability, and diversity.