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CORRECTING CULTURE: EXTRATERRITORIALITY AND U.S. EMPLOYMENT DISCRIMINATION LAW

Kathy Roberts*

PREFACE

A U.S. corporation hired Vladimir Shekoyan, a legal immigrant residing in the United States, as a “Training Advisor” to fulfill a contract with the United States Agency for International Development (U.S.A.I.D.) in the Republic of Georgia. He claimed his contract was not renewed because of his national origin. Federal courts refused to intervene because Vladimir was not a U.S. citizen and his workplace was outside the United States.¹

Luis Reyes-Gaona applied for a job to work in North Carolina as a farm worker, but the North Carolina Growers Association would not accept him because he was over forty years old. Federal courts again refused to intervene, in this case because Luis was not a U.S. citizen, and he had applied for the job in Mexico.²

Garland Denty, a U.S. citizen, worked for a Pennsylvania corporation for several years. He claimed he was denied a promotion based on his age. Yet again, federal courts refused to intervene since the job he was denied was outside the United States, with his employer’s parent corporation, which was British.³

Federal courts denied a hearing in each of these cases based on the apparent limitations of civil rights law outside U.S. territory. One might be surprised, then, to learn that Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), and the

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2. Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 863-64 (4th Cir. 2001).
Americans with Disabilities Act (ADA), all carry extraterritorial provisions that apply to foreign employers in the United States and to U.S. employers abroad. While federal courts' reluctance to intervene in each of these cases may seem reasonable taken one at a time, viewed together in the context of what Thomas Friedman terms the increasingly "flat" global economy, they suggest that the hard-won prohibitions against discrimination in this country are at risk. Congress and the courts are rightly reticent to offend the sovereignty of any nation by regulating foreign employers in foreign countries. However, this reticence risks becoming an excuse to avoid grappling with the realities of modern employment, which include email, outsourcing, a 24-hour global workday, and a host of economic and technological innovations that scatter work and employment across time and space in an unprecedented fashion. Not only are federal courts failing to intervene where they should, that is, in all workplaces within the territorial United States, 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.

Part I of this article traces the contours of employment discrimination law as it applies outside U.S. borders, with a particular emphasis on Title VII of the Civil Rights Act. It will consider two landmark Supreme Court cases in this emerging area, the second of which resulted in the rapid passage of the 1991 amendments that gave this statute explicit extraterritorial reach. With this background, it turns


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to the most recent EEOC Enforcement Guidance, which explains the application of the law and begins to shed light on some of its implementation. This section closes with some considerations of the problems that emerge from declining to extend employment discrimination law under the guise of extraterritorial exclusion.

Part II considers the legality of extending jurisdiction for employment discrimination protections under international law. It examines the traditional bases of jurisdiction recognized both under international law and in U.S. courts. This requires exploration of the act of state doctrine and principles of comity. While employment discrimination law may be unprecedented in U.S. law, it does not raise serious concerns for international law or comity. In fact, international law would allow the United States to regulate its citizen companies abroad much more than it currently does. Thus, this section concludes, worries about judicial intervention into workplaces abroad under Title VII and other civil rights legislation cannot derive from international law or comity, though such worries may emerge from ethical and political convictions rooted in respect for foreign cultures.

Part III examines the ethical and political issues extraterritorial intervention in the workplace raises. These issues stem in part from the remedial nature of employment discrimination law and from the troubled history of the U.S. anti-caste ideal. Recent works by Richard Rorty and Seyla Benhabib provide two prominent philosophical engagements with the meanings of foreign equality promotion and respect for foreign cultures. While the tension between these values raises serious concerns, these concerns arise in a context where cultural exchange and unequal power relations are already at work. In this context, a context in which the person who takes your order at a drive-thru window may be hundreds of miles away, a context in which your accountant may send your tax returns to India to be completed while she sleeps, a context in which more and more immigrants are being recruited for jobs in the United States, a more robust extraterritorial application of anti-

discrimination law in employment would mark a positive and important step forward.

I. EXTRATERRITORIAL APPLICATION OF TITLE VII

In two landmark decisions, Sumitomo Shoji America, Inc. v. Avagliano (Sumitomo), 7 in 1988, and EEOC v. Arabian American Oil (Aramco), 8 in 1991, the Supreme Court apparently gave Title VII broad application against foreign employers operating within U.S. territory and then contained the statute’s application entirely within the same territorial borders. 9 Shortly after the latter decision in 1991, Congress amended the Civil Rights Act and the ADA to extend extraterritorial protection to U.S. citizens working for U.S. employers abroad. 10 Perhaps unfortunately, Congress did not provide courts with much guidance as to the new provision’s application or to its defenses, and there is very little legislative history on this amendment. 11 The Supreme Court has not directly confronted the new constellation of extraterritorial employment discrimination law, much less the new constellation of extraterritorial employment practices. Until that time comes, the EEOC’s Enforcement Guidance provides the most comprehensive approach to understanding this increasingly important area of civil rights jurisprudence. 12

This section will review the Supreme Court’s decisions in Sumitomo and Aramco, passage of the 1991 statute, the current EEOC Guidance, and practical considerations relating to this legal constellation. This examination will show that foreign employers have little room to discriminate on otherwise forbidden grounds when they are operating within the territory of the United States. U.S. and U.S.-controlled employers, on the other hand, have free rein to do so in foreign lands, so long as their victims are not U.S. citizens. While at first

9. Sumitomo, 457 U.S. at 181, 189 (holding that “Sumitomo is not a company of Japan and thus is not covered” by a treaty exempting Japanese companies from anti-discrimination laws in upper management).
11. 42 U.S.C. § 2000e(f) (2000); Miller, supra note 6, at 443. The amendment used the same language as that which extended extraterritorial application to the ADEA. Id.
12. Miller, supra note 6, at 443.
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blush this America-first asymmetry may appear unproblematic, in practice it has led to a situation in which, for example, employers operating within the United States may legally discriminate on otherwise forbidden bases in hiring, so long as their decisions are made abroad and their applicants are non-U.S. citizens. Foreign employers operating in the United States may discriminate against U.S. citizens in this way. Further, the law creates a worrying hierarchy in foreign workplaces where U.S. citizens maintain more rights against discrimination and harassment than their local counterparts.

A. Sumitomo, Aramco, and the Civil Rights Act of 1991

In *Sumitomo Shoji America, Inc. v. Avagliano (Sumitomo)*, the Supreme Court never reached the merits of the claim that the wholly owned subsidiary of a Japanese company had hired “only male Japanese citizens to fill executive, managerial, and sales positions.” Its holding, in fact, was quite narrow, ruling that the defendant New York corporation was a domestic corporation for the purposes of applying Title VII law. Justice Burger’s reasoning, however, has led lower courts to enforce Title VII broadly against foreign employers operating in the United States, with narrow exceptions for discrimination in favor of a home country’s nationals.

The Court’s holding was based on its interpretation of the Friendship, Commerce and Navigation (FCN) Treaty between the United States and Japan. The language of the treaty at issue provided that “[c]ompanies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.” The Court noted that the United States has FCN treaties with many other countries, most of which contain similar provisions on which the United States insisted. In a key passage, Burger noted that the primary purpose of such provisions “was to give corporations of each signatory legal status in the territory of the other party, and to allow

15. *Id.* at 176.
16. See EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2231-32.
19. *Id.* at 181 n.6.
them to conduct business . . . on a comparable basis with domestic firms." To do that, the parties had to address the fact that their corporations had no legal existence outside the country of their incorporation. By allowing each other’s nationals to create domestic corporations in their territories, the parties did not "give foreign corporations greater rights than domestic companies, but instead [assured] them the right to conduct business on an equal basis." Burger insisted that this conclusion did not rule out the possibility that branches (incorporated in foreign countries) would have greater rights than subsidiaries (incorporated within U.S. territory), but such rights would only be those "conferred by [treaty]." Since the question of which rights those might be was not at issue, Burger never spelled them out. His reasoning would suggest that the rights conferred by the FCN Treaty provisions would, at most, confer on foreign branches a negative right against discrimination on the basis of their being foreign. This reading, however, has not carried the day.

In EEOC v. Arabian American Oil Co. (Aramco), the Supreme Court held that Title VII did not apply to any workplace abroad. In Aramco, Mr. Boureslan, a U.S. citizen, had been employed by two U.S. companies, one located in Saudi Arabia. He claimed to have been harassed and ultimately discharged on the basis of his race, religion, and national origin. In denying that federal courts had subject-matter jurisdiction to hear such claims, Justice Rehnquist’s majority opinion relied particularly on Foley Bros., Inc. v. Filardo and Benz v. Compania Naviera Hidalgo to support the idea that although Congress has the power to legislate beyond U.S. borders, courts must assume its

20. Id. at 186.
21. Id. at 182, 186.
22. Id. at 187-88.
23. Id. at 189.
24. Id. at 188.
25. See, e.g., Fortino v. Quasar Co., 950 F.2d 389, 391-93 (7th Cir. 1991) (holding that the FCN Treaty with Japan confers a right on a domestic but wholly owned subsidiary of a Japanese company to discriminate in favor of Japanese citizens). But see EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2231-32.
26. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246-47 (1991); see also Miller, supra note 6, at 441-42 (discussing Aramco, 499 U.S. at 246); Poznanski Cook, supra note 6, at 137 (discussing Aramco, 499 U.S. at 258-59).
27. Aramco, 499 U.S. at 247.
28. Id.
targets are domestic unless it makes an extraterritorial intention clear. The petitioners and the Equal Employment Opportunity Commission (EEOC) argued that because the statute explicitly excluded “aliens [employed] outside any State” from protection, the statute must have been intended to apply abroad. The Court found this evidence to be insufficient, partly because the alien exemption provision could be read to extend coverage to employers in U.S. territories, which are not states, and partly because it read “employer” not to be limited to U.S. employers. Thus, the Court reasoned, allowing this petitioner’s claim to survive summary judgment would invite suit by any U.S. citizen employee against any employer in the world.

The Court did not defer to the EEOC’s interpretation of the law because it found the EEOC interpretation did not meet the standards set out in General Electric Co. v. Gilbert. Under Gilbert, the EEOC is entitled to deference based on the thoroughness of its interpretation, its logical validity, its consistency over time, and on “all those factors which give it power to persuade.” The EEOC’s guidelines failed to incorporate extraterritorial application until twenty-four years after the statute’s enactment, and the Court did not find this interpretation to be supported by the statute’s plain language. Ultimately, as it denied jurisdiction, the Court invited Congress to amend Title VII.

Congress was quick to respond to the Court’s invitation. Within months, it effectively overruled Aramco, extending both Title VII and the ADA to foreign contexts. Section 109 of the 1991 Civil Rights Act broadens the term employee to include citizens employed abroad: “With respect to employment in a foreign country, such term includes an

31. Aramco, 499 U.S. at 248. But see id. at 262-65 (Marshall, J., dissenting) (noting that the Foley Bros. decision took account of the entire “scheme of the Act” and did not require a clear statement of Congressional intent, and that Benz and other cases requiring a clear statement are concerned with extraterritorial application to non-U.S. citizens, which raises more serious issues of international comity).
32. Id. at 253 (majority opinion).
34. See id. at 255 (stating that if the statute applied to employers overseas, “a French employer of a United States citizen in France would be subject to Title VII – a result at which even petitioners balk”).
38. Id. at 258-59.
individual who is a citizen of the United States." It protects employees so long as they are employed by U.S. employers or U.S. employer-controlled employers. The new section also identifies several factors for determining whether an employer is U.S. employer-controlled: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the corporation. It allows employers an exemption if compliance with Title VII or the ADA "would cause [an employer] to violate the law of the foreign country in which such workplace is located."

**B. The EEOC Enforcement Guidance**

The current EEOC Enforcement Guidance (the Guidance) offers direction to EEOC officers in Title VII enforcement both with regard to the liability of foreign employers for discrimination that occurs within U.S. territory and with regard to the liability of U.S. employers and U.S. employer-controlled employers for discrimination that occurs abroad. The Guidance begins by reviewing the history of the *Aramco* decision and the 1991 amendments to Title VII. It reminds its officers that although aliens working outside the United States are excluded from coverage, aliens working inside the United States are protected.

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43. *EEOC Guidance, supra* note 13, § 605, ¶ 2169, at 2223.

44. *Id.* at 2223-24.

45. *Id.* at 2224 n.2 (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973)). Although the ADA does not contain a similar exclusion of aliens employed abroad, the Guidance takes the position that "the standards governing coverage of aliens [working inside the United States] are the
noted above, EEOC guidelines do not bind federal courts; however, their interpretations are accorded persuasive deference.\textsuperscript{46}

1. Foreign Employers in Domestic Workplaces

According to the Guidance, “[i]t is well settled that, absent constraints imposed by treaty or by binding international agreement, Title VII applies to a foreign employer when it discriminates within the United States.”\textsuperscript{47} This is justified by the same reasoning as personal jurisdiction generally: If the employer availed itself of the benefits of U.S. laws, it can reasonably expect that it could be held accountable under those laws.\textsuperscript{48} So, the bulk of the Guidance’s discussion focuses on the exception for treaties. It notes that Friendship Commerce and Navigation (FCN) treaties are likely to be invoked as a defense.\textsuperscript{49} The Guidance advises its officers to determine: “(1) whether the respondent is protected by the treaty; (2) if so, whether the employment practices at issue are covered by the treaty; and (3) if so, the impact of the treaty on the application of Title VII.”\textsuperscript{50}

Regarding the first determination, the Commission asserts that under \textit{Sumitomo}, only companies incorporated in Japan are entitled to the protection of the FCN Treaty with Japan.\textsuperscript{51} It further notes that in that decision, the Supreme Court did not interpret other FCN treaties and different negotiating histories and texts might lead to different conclusions.\textsuperscript{52} It acknowledges the Seventh Circuit’s interpretation of \textit{Sumitomo}, that it remains an open question as to whether a U.S. subsidiary may invoke its parent company’s rights under the Treaty when its discrimination was dictated by that parent.\textsuperscript{53} On the Seventh Circuit’s reading, the Treaty confers a right to discriminate in favor of the home country’s citizens if the parent dictated the discrimination in

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\textsuperscript{47} EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2229-30.

\textsuperscript{48} Id. at 2230; see also Int’l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (holding that a corporation that exercises the privileges of conducting business within a state is also subject to any obligations within that state).

\textsuperscript{49} See, e.g., Papaila v. Uniden Am. Corp., 51 F.3d 54, 56 (5th Cir. 1995) (allowing treaty defense).

\textsuperscript{50} EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2230.

\textsuperscript{51} Id. at 2231.

\textsuperscript{52} Id. (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. at 176, 185 n.12).

\textsuperscript{53} Id. (citing Fortino v. Quasar Co., 950 F.2d 389, 393 (7th Cir. 1991)).
question.\textsuperscript{54} The Guidance rejects this reading, invoking instead the Fifth Circuit’s opinion that subsidiaries may not invoke the parent company’s rights, since to do so would allow them to circumvent the holding in \textit{Sumitomo}.\textsuperscript{55} Thus, the EEOC applies this standard to subsidiaries of Japanese companies outside the Seventh Circuit.

Regarding the second and third determinations of whether the conduct at issue is covered by a treaty and what the treaty’s impact is on the application of Title VII, the Commission reiterates the point that this determination will depend on the facts of the conduct at issue and the language and intent of the treaty.\textsuperscript{56} It notes in the Guidance that “[m]ost courts construing the scope of particular FCN treaties have further determined that the protection they extend is only the right of foreign companies covered by the treaty to prefer citizens of their own countries for executive, management, and other identified positions.”\textsuperscript{57} This suggests that FCN treaties typically assert a very narrow privilege to foreign companies to discriminate within the United States in favor of their home country’s citizens. In other words, a Japanese company operating in the United States may have a right to prefer Japanese nationals in its executive positions, but the treaty does not confer a right to prefer the nationals of any other country. As noted above, the Seventh Circuit extends these treaty rights to U.S. subsidiaries of foreign companies.\textsuperscript{58} Further, the Seventh Circuit, unlike other circuits, suggests that an FCN treaty may confer “blanket immunity” on foreign or foreign-controlled companies.\textsuperscript{59} The Commission flatly rejects this notion that such treaties confer a right “to prefer people on bases prohibited by Title VII, the ADA or the ADEA.”\textsuperscript{60}

To sum up, the EEOC Enforcement Guidance finds a certain amount of tension in the law with respect to foreign employers operating domestic workplaces. Title VII applies to all U.S. companies operating within the United States. It applies equally to foreign corporations when they do business in U.S. territory, with exceptions as provided by treaty. Such exceptions may allow for discrimination in favor of a home country’s nationals, and they may or may not extend to U.S.

\begin{itemize}
\item \textsuperscript{54} \textit{Fortino}, 950 F.2d at 393.
\item \textsuperscript{55} \textit{EEOC Guidance}, supra note 13, § 605, ¶ 2169, at 2231 (citing Spiess v. C. Itoh & Co., 725 F.2d 970, 973 (5th Cir. 1984)).
\item \textsuperscript{56} \textit{Id.} at 2232.
\item \textsuperscript{57} \textit{Id.} at 2233.
\item \textsuperscript{58} \textit{Id.} at 2231 (citing \textit{Fortino}, 950 F.2d at 393).
\item \textsuperscript{59} \textit{See id.} at 2231, 2233.
\item \textsuperscript{60} \textit{Id.} at 2233 n.19.
\end{itemize}
corporations that are controlled by a foreign parent. The EEOC rejects the idea that treaties might allow discrimination on otherwise forbidden bases such as national origin, religion or gender, noting that some courts have expressly left the question of such blanket immunity open.

2. Domestic Employers Abroad

The current Enforcement Guidance also directs its investigators and officers on how to approach claims alleging discriminatory conduct abroad.

Assessing the nationality of employers is key to determining whether Title VII applies in a foreign workplace. Of course, if an employer is incorporated in the United States, the act applies. However, the Commission says U.S. nationality may be determined by other factors having to do with "the totality of that company's contacts with the United States." These include "the company's principle place of business, . . . the nationality of dominant shareholders and/or those holding voting control . . . and . . . the nationality and location of management." Thus, a company that is incorporated abroad, but does its primary business in the United States, will be considered a U.S. national for the purposes of Title VII when an employee in a foreign office brings suit.

Application of Title VII is more complicated when the charged employer is considered a foreign national under the act. Such a company's employment practices will be subject to liability if it is controlled by a U.S. employer. Factors for determining such control are specified in the act, and they are the same as those used for determining whether two or more companies can be considered an "integrated enterprise" in the domestic setting. Thus, "[a] foreign entity will be found to be controlled only if it is, in effect, an integrated enterprise with an American employer." Factors to consider include the interrelation of

61. Id. at 2225 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1987); id. reporters' note 5).
62. Id.
63. Id.
64. See id. Naturally, the charged party must also be an employer within the meaning of Title VII: It must be "engaged in an industry affecting commerce and must employ 15 or more employees in each of twenty weeks in the current or preceding calendar year." Id. at 2225 n.5 (citing 42 U.S.C. § 2000e(b) (2000)).
65. Id. at 2226.
66. Id.
67. Id. at 2226 n.6.
operations, common management, centralized control of labor relations, and common ownership or financial control of the two entities. The Commission notes that no single factor is dispositive, not even a finding that a foreign employer is the wholly owned subsidiary of a U.S. company. Thus, it is entirely possible that a U.S.-owned foreign subsidiary or multinational enterprise may not be subject to U.S. civil rights law. If, after this fact-intensive inquiry, an employer is found to be controlled by a U.S. company, the Commission recommends its officers charge both companies with the violation.

An employer obligated to abide by civil rights law abroad may invoke the so-called foreign laws defense to escape liability. The EEOC applies the same foreign laws defense test under the ADA, Title VII, and the ADEA. To establish this defense, the employer must prove three elements: "(1) the action is taken with respect to an employee in a workplace in a foreign country, where (2) compliance with Title VII or the ADA would cause the respondent to violate the law of the foreign country, (3) in which the workplace is located." The first and third elements are at least theoretically straightforward: The first element excludes application of the defense when the workplace is located in U.S. territories or states. The third element excludes application of the defense on the basis of the laws of any other country than that of the workplace; for example, it excludes the country where a company’s headquarters are located or where it is incorporated “unless the charging party’s workplace is also located in that country.” These first and third elements will be more or less established in the process of bringing a case; thus, the second element requires the most serious scrutiny for the purposes of adjudicating this defense.

The Guidance breaks the second element into two parts: the employer must prove that a law exists and that compliance with Title VII

68. Id. at 2226 (citing 42 U.S.C. § 2000e-1(c)(3) (2000); 42 U.S.C. § 12112(c)(2)(C) (2000)).
69. Id.
70. Id. at 2227 n.8.
71. For its discussion of the foreign laws defense, the Guidance refers to “employer[s],” but notes that the exact same defense is available to other entities covered under Title VII such as employment agencies and labor organizations. Id. at 2227 n.9; see also 42 U.S.C. § 2000e(b)-(d) (2000) (defining employer, employment agency, and labor organization).
72. See EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2227-28. It also notes that “respondents may assert in some cases that obligations imposed by international treaty dictated their discriminatory conduct abroad.” Id. at 2227 n.9. The Guidance instructs its attorneys to contact the Attorney of the Day, who will then contact the Department of State, in such cases. Id.
73. Id. at 2227.
74. See id. at 2228.
75. Id. at 2229.
would “cause” a violation of that law. What constitutes a “law” for the purposes of this defense is “uncertain.” Borrowing from Mahoney v. RFE/RL, Inc., an ADEA case, the Guidance suggests that neither union contracts nor foreign court decisions enforcing such contracts are “law” for the purposes of Title VII. In Mahoney, the D.C. District Court noted that the mandatory retirement provision of the union contract at issue “had not been mandated by the German government and did not have general applicability beyond the parties to the contract.” The Guidance approvingly notes the court’s reasoning that overseas employers could easily avoid application of such remedial statutes by embedding such provisions in its contracts. This would allow the exception to swallow the rule. The Mahoney court also noted the remedial nature of the ADEA and therefore construed the foreign exception narrowly, excluding foreign practices and policies from “law.” The Guidance notes pre-amendment cases where courts have held that “various gleaned impressions to the effect that the Saudis did not want any Jews in their country” did not satisfy a Title VII defense, and neither did “stereotypes that South American clients would refuse to deal with female executive[s].” Thus, the “law” a defendant may invoke under Title VII must be generally applicable, mandated by government, and probably explicitly codified. To succeed in a foreign laws defense, the employer must not only prove that a law exists in the country of operation, but also that compliance with Title VII would “cause” it to be violated. The Guidance interprets this requirement to mean that “it is impossible to comply with both sets of requirements,” or that compliance with Title

76. Id. at 2228.
77. Id.
79. EEOC Guidance, supra note 13, ¶ 605, ¶ 2169, at 2228 (citing Mahoney, 818 F. Supp. at 3-4).
80. Id. (citing Mahoney, 818 F. Supp. at 3-4).
81. Id. (citing Mahoney, 818 F. Supp. at 5).
82. Id. (citing Mahoney, 818 F. Supp. at 5).
83. Id. (citing Mahoney, 818 F. Supp. at 3).
84. Id. at 2228 n.12 (citing Abrams v. Baylor Coll. of Med., 581 F. Supp. 1570, 1576-77 (S.D. Tex. 1984), aff’d in relevant part, 805 F.2d 528 (5th Cir. 1986)).
85. Id. (citing Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981)).
86. The foreign laws defense may also be a subset of the older Title VII defense that discrimination may be justified if identity status is a bona fide occupational qualification. See 42 U.S.C. § 2000e-2(e) (2000).
87. EEOC Guidance, supra note 13, ¶ 605, ¶ 2169, at 2229.
VII would make violation of the foreign law inevitable. Investigators are instructed to gather all relevant documentary material available, including the statute itself, case law, and legislative history. They should also consider what steps the defendant might have taken to avoid the conflict or comply with Title VII. As an example of a successful defense, the Guidance notes another pre-amendment Title VII case in which a defendant was not held liable for "requiring helicopter pilots it employed in Saudi Arabia to convert to [the] Moslem religion where Saudi Arabian law provided for beheading of non-Moslems who" flew over Mecca. As an example of a failed defense, the Guidance hypothesizes a law that mandates six weeks of childcare leave for female employees after pregnancy. Compliance with both Title VII and such a law would require that the company give the same six weeks to its male employees. Since both laws could be simultaneously obeyed, no foreign law defense would be available to a company that only obeyed the local law.

In sum, the EEOC finds room for uncertainty in the law as it applies to foreign workplaces. Title VII applies to U.S. companies doing business abroad. Companies not incorporated in the United States may also be subject to Title VII regulation abroad. 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. In either case, such a company may invoke foreign laws as a defense to liability. What constitutes a law under this defense remains uncertain, though it probably requires a generally applicable and explicitly codified government mandate. To succeed as a defense, the EEOC requires that such a law inevitably conflict with Title VII.

C. Some Difficulties in Application

Although the EEOC's Guidance sheds light on the significance of Title VII's extraterritorial reach, much of the law's application remains

88. Id.
89. Id.
90. Id.
91. Id. (citing Kern v. Dynaelectron Corp., 577 F. Supp. 1196, 1200, 1203 (N.D. Tex. 1983) (finding the requirement to be a bona fide occupational qualification), aff'd, 746 F.2d 810 (5th Cir. 1984)).
92. Id.
93. Id.
uncertain. Such uncertainty is to be expected, since applying the act in extraterritorial contexts cannot happen all at once. It will arrive in federal courts in a necessarily piecemeal fashion, as individuals bring complaints in the various forms authorized by the Byzantine structure of Title VII and its jurisprudence. This section will consider problems arising from claims in the context of hiring, promotion, and firing to illustrate that an inconsistent, patchwork approach to Title VII enforcement abroad risks undermining the goals of anti-discrimination law in both foreign and domestic workplaces.

Title VII prohibits discrimination in hiring within the United States, unless there is a treaty exemption, and it prohibits discrimination against U.S. citizens if committed by U.S. employers or U.S. employer-controlled employers abroad, unless there is an inescapable conflict with local law.\footnote{4} Does this mean that a U.S. employer may discriminate in hiring for its domestic workplace so long as it goes abroad to hire aliens? Such was the conclusion of the Fourth Circuit in \textit{Reyes-Gaona v. North Carolina Growers Ass'n} in its application of the ADEA.\footnote{5} Does it mean that foreign companies abroad may discriminate in promoting U.S. citizens working in the United States as long as the promotion involves a workplace abroad? Such was the reasoning of the Third Circuit in \textit{Denty v. SmithKline Beecham Corp.}, applying the same statute.\footnote{6} Does it mean a U.S. company can legally discriminate against a legal permanent resident hired in the United States and then sent abroad to fulfill a federal government contract? So the D.C. Circuit concluded in \textit{Shekoyan v. Sibley International}, applying Title VII.\footnote{7}

In \textit{North Carolina Growers}, Luis Reyes-Gaona, a Mexican citizen residing in Mexico, asked a recruiter for the North Carolina Growers Association (NCGA) to put his name on a list for agricultural jobs in North Carolina.\footnote{8} After he was told that NCGA did not hire workers over forty who had not worked for them before, he filed an age discrimination claim.\footnote{9} The Fourth Circuit dismissed the claim on grounds that the ADEA does not protect foreign employees in foreign countries who apply for jobs in the United States.\footnote{10} In this case, the nationality of the employer and the location of the work site did not matter, only the

\begin{itemize}
\item \footnote{4} \textit{Id.} at 2229-30; 42 U.S.C. § 2000e-1(b) (2000).
\item \footnote{5} 250 F.3d 861, 866-67 (4th Cir. 2001).
\item \footnote{6} 109 F.3d 147, 150, 151 (3d Cir. 1997).
\item \footnote{7} 409 F.3d 414, 417, 422 (D.C. Cir. 2005).
\item \footnote{8} \textit{N.C. Growers}, 250 F.3d at 863.
\item \footnote{9} \textit{Id.}
\item \footnote{10} \textit{Id.}
\end{itemize}
nationality of the employee and the locus of the discriminatory act.

In SmithKline Beecham, Garland Denty, a U.S. citizen, had been Director of Quality Assurance in the United States for the Pennsylvania corporation of Smith Kline French.\textsuperscript{101} That company later merged with a larger British company, Beecham, in 1989.\textsuperscript{102} Though Denty had been promoted in the past, after the merger, he was passed over for promotions that would have taken him abroad.\textsuperscript{103} The Third Circuit dismissed his age discrimination claim on the ground that the ADEA did not cover the decisions of foreign employers concerning jobs in foreign countries, even if the applicant was a U.S. national in the United States.\textsuperscript{104} In this case, the location and the nationality of the employee did not matter, only the nationality of the employer and the location of the future rather than current work site.\textsuperscript{105}

In Sibley International, Vladimir Shekoyan, a legal permanent resident of the United States, was hired by Sibley International in the District of Columbia.\textsuperscript{106} He signed an employment contract there to work in Tbilisi, in the Republic of Georgia, as a training advisor under a contract between Sibley and U.S.A.I.D.\textsuperscript{107} Sibley later terminated Shekoyan’s employment by sending a letter to his home in D.C. stating that their staffing requirements had changed.\textsuperscript{108} Shekoyan believed he was fired because he had complained to his superiors in D.C. about harassment by his supervisor in Georgia based on his national origin and about financial misconduct by the same supervisor.\textsuperscript{109} The D.C. Circuit upheld the trial court’s dismissal of Shekoyan’s Title VII claim based on findings that the workplace was abroad and that Shekoyan was not a U.S. citizen.\textsuperscript{110} In this case, the location of the workplace and the citizenship of the employee were sufficient to defeat jurisdiction, notwithstanding the locus of at least one discriminatory act and the nationality of the employer.\textsuperscript{111}

\textsuperscript{101.} SmithKline Beecham, 109 F.3d at 148. 
\textsuperscript{102.} Id. 
\textsuperscript{103.} Id. 
\textsuperscript{104.} Id. at 148-49. 
\textsuperscript{105.} Id. at 151. 
\textsuperscript{107.} Id. 
\textsuperscript{108.} Id. 
\textsuperscript{109.} Id. at 418. 
\textsuperscript{110.} Id. at 421-22. 
\textsuperscript{111.} It’s worthy to note that Shekoyan, as a legal permanent resident, asserted that he was a U.S. national for the purposes of applying Title VII abroad. Id. at 421. The D.C. Circuit did not address this issue, since the extraterritorial provisions of Title VII only protect U.S. citizens. Id. at 421-22.
From these three cases, it seems there are four grounds for finding extraterritoriality and potentially for rejecting jurisdiction: nationality of the employer, citizenship of the employee, location of the workplace, and location of the discriminatory act. The first three are anticipated by the 1991 amendments to Title VII and the ADA and by the mirror provisions of the ADEA. The fourth is not. The introduction of this fourth factor, most notably in *North Carolina Growers*,\(^\text{112}\) threatens to crack civil rights protections in employment wide open.

Following the logic of *North Carolina Growers* and *SmithKline Beecham*, one might conclude that the locus of a discriminatory act alone is sufficient for determining whether an application of civil rights law is extraterritorial. On this reasoning, though, it would be legal for a U.S. employer to transfer a legal permanent resident from an office in the United States to a foreign office for the purpose of discharging, discriminating against or harassing that alien in a manner that would otherwise violate Title VII.\(^\text{113}\) Similarly, a foreign employer could do the same to a U.S. citizen. Following this reasoning strictly would suggest that a U.S. employer could discriminate against its alien employees working in the United States, so long as it left the country to so act, and that a foreign employer could do the same against U.S. citizen employees in the United States. This is a particularly disturbing possibility when one recalls that U.S.-owned multinationals may be foreign for the purposes of Title VII.\(^\text{114}\)

Fortunately, the D.C. Circuit's decision in *Sibley International* clarifies that the location of the discriminatory act is not the only factor for determining extraterritoriality and may even be dismissed outright.\(^\text{115}\) Perhaps unfortunately, by dismissing outright a discriminatory act committed within the United States, *Sibley International* might be taken together with *North Carolina Growers* to stand for the proposition that the location of a discriminatory act cannot be used to establish jurisdiction but only to defeat it. This is unfortunate when one recalls that civil rights legislation is remedial, meaning it should be given wide effect within the United States, regardless of the fact that this remedial

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112. Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861, 866 (4th Cir. 2001).
113. See McKeeven Madden, supra note 6, at 752 (explaining loopholes that U.S. companies operating abroad can use to exempt themselves from Title VII).
114. See EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2225.
115. See Sibley Int'l, 409 F.3d at 420-22 (dismissing the plaintiff's Title VII claims on grounds that he was not a U.S. citizen and that he was employed in a foreign country without addressing the location of the discriminatory act, even though the plaintiff received his termination letter at his D.C. residence and many decisions concerning his employment were made in the United States).
purpose may be in tension with the countervailing constructive principle of narrowly reading its extraterritorial reach. In any event, Sibley International makes it extremely difficult to formulate a rule that consistently takes account of the facts in all three cases.

If courts follow North Carolina Growers while taking account of Sibley International's position that the locus of a discriminatory act alone is not sufficient to settle the question of jurisdiction, extraterritoriality could be determined by both the location of the discriminatory act and the location of the employee at the time of the act, regardless of the location of the workplace. Logically, this result would be in tension with the denial of extraterritorial liability in both SmithKline Beecham, where a U.S. citizen in the United States was denied a job at a foreign workplace by a foreign employer, and Sibley International, where a foreign citizen was discriminated against locally by a foreign company regarding a foreign workplace. In effect, were the reasoning in North Carolina Growers taken as a general rule, any U.S. citizen applying for jobs abroad might be able to invoke protection under Title VII against any foreign employer, so long as the potential foreign employers came to the United States to hire them. While such a proviso might seem to inoculate most foreign employers, recall that it could prove almost meaningless in light of recent technological advances in communications such as teleconferencing and email. Thus, U.S. citizens would be authorized to bring suits against foreign companies in foreign lands regarding foreign workplaces, but non-citizens would not be protected against U.S. companies operating in the United States from discrimination carried out abroad. This result blatantly conflicts with the statute's explicit exclusion of regulating foreign employers abroad and it further undermines the rights of aliens currently protected under civil rights law within U.S. territory.

If courts were to accept the importance of workplace location as expressed in both SmithKline Beecham and Sibley International, rejecting the reasoning of North Carolina Growers, extraterritorial liability could instead depend on the employer's nationality, the employee's nationality, and the workplace location. This elegant solution more closely reflects the language of the 1991 Amendments to the Civil Rights Act. It would not open the door significantly to foreign employer regulation, although it could mean a broader scope for domestic employer liability, at least with respect to foreign recruiting. It

116. This was part of the argument the EEOC presented in North Carolina Growers, 250 F.3d at 865-66.
would not, however, broaden the law to the point that all non-U.S. citizens would be protected against U.S. employer discrimination in workplaces abroad, even when they are hired and discriminated against in this country.

Interpreting the law as regulating all U.S. workplaces, including those within U.S. territory, would enhance its coherency by eliminating the apparent extraterritorial loophole created by *North Carolina Growers*. However, the law's application would remain uneven in U.S. workplaces abroad.

As the law is currently written, U.S. citizens in U.S. workplaces abroad have significantly more protection against discrimination and harassment than their non-U.S. colleagues. This is to say that U.S. employers abroad retain the right to discriminate against and harass the locals, wherever local law allows. Further, even if such harassment or discrimination is illegal in the host country, foreign employees of U.S. employers abroad do not have the right to pursue claims in U.S. courts. While allowing non-citizens to bring suit against these employers may give rise to separate problems, especially in light of the remedies also created under the Civil Rights Act of 1991, it is not obvious why in principle the U.S. government should want its citizens to retain the right to discriminate abroad on grounds forbidden at home.

**D. An Uncertain Future**

Congress trod a narrow line in amending Title VII as part of the Civil Rights Act of 1991. To extend protection and responsibility to its citizen employers and employees without disrupting the laws of other countries, the new provisions create an uneven legal system where anything involving foreign companies, foreign citizens, or foreign actions leaves workers' civil rights and employers' obligations on quaking, shifting ground (uncomfortably shifting sands). 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. In the context of an increasingly global labor market and an increasingly multi-national corporate structure, such hesitation threatens to allow discrimination protections to fall through the cracks between domestic and foreign U.S.-workplace regulation. Most of this slippage could be avoided through a consistent and forthright application of the law to all workplaces within U.S. territory. However, troubling cases like *Sibley International* suggest that a system that does not extend
protection to alien employees abroad when they are employed by U.S. or U.S.-controlled companies may encourage outsourcing discrimination nonetheless.

II. TITLE VII UNDER INTERNATIONAL LAW

The difficulties in applying Title VII abroad most emphatically do not stem from its ultimate incompatibility with international law. This section will consider the traditional bases of sovereign prescriptive jurisdiction, noting that expanded employment discrimination jurisdiction is unique but not immodest against the background of existing international and U.S. legal practice. It will further consider the act of state doctrine, principles of comity, and separation of powers concerns as they arise in U.S. courts together with the extent to which treaty and foreign laws defenses may address them.

A. Prescriptive Jurisdiction

Under international law, sovereign states traditionally have uncontroversial prescriptive jurisdiction on the bases of territory and nationality. 117 That is, a state may assert jurisdiction for any act in its territory or for any effect of an act in its territory. 118 Further, it may try its own nationals for acts committed abroad, regardless of the nationality of the person injured. 119 So, the extraterritorial provisions in the employment discrimination area do not obviously provoke strong objections from an international legal perspective. The United States is completely within its rights to regulate employment within its borders as well as the behavior of its nationals outside its borders. In fact, Congress has done so in the Foreign Corrupt Practices Act, prohibiting bribery as a means to doing business abroad, however efficacious. 120

Despite its legality, federal courts have applied the principle of extraterritorial jurisdiction on the basis of nationality only in the context


Correcting Culture

Subject-matter jurisdiction over private international disputes typically depends on the internationally recognized principle of freedom to contract. Therefore, when federal courts apply U.S. law (or more commonly, when private arbitrators apply U.S. law) to foreign or U.S. businesses, it is generally because the businesses have acceded to such jurisdiction in advance. While employment rights might be enforced by contract, for example, where employees are unionized, Title VII aims to set a floor for employment practice. Its application is most important where employees do not have such protection. This type of protection logically falls somewhere between private law in the form of contract law and public criminal law, both of which are currently enforced by federal courts in extraterritorial contexts.

Antitrust law may be the best analogue to civil rights legislation, since it provides a kind of hybrid precedent in that the Sherman Anti-Trust Act provides for either criminal or civil sanctions. Though the first Supreme Court decision on point, American Banana Co. v. United Fruit Co., denied extraterritorial reach to the Sherman Act, later cases throughout the twentieth century have limited that case to its facts. Learned Hand's celebrated opinion in United States v. Aluminum Co. of America (Alcoa) asserts that U.S. courts addressing extraterritoriality must ask "whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so." Nevertheless, the opinion continues: "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no

121. See Malanczuk, supra note 117, at 110-11 (noting that European civil law countries use the rule extensively).
123. Id. §§ 1-4 (deeming contracts and monopolies in restraint of trade both a felony and subject to proceedings in equity by the Attorney General). Like the Department of Justice in antitrust violations, the EEOC may bring "Commissioner’s charges" against an employer absent an individual employee complaint. 42 U.S.C. § 2000e-5(b) (2000). Although it is extremely unlikely that the EEOC would ever do this in a transnational context, it is a theoretical possibility.
124. 213 U.S. 347 (1909). In this case, a U.S. plantation owner sued a competitor for violation of the Sherman Act. Id. at 353-54. The Court declined to pass judgment in this case, since to do so would require it to judge an act of state, namely Costa Rica's decision to seize the plaintiff's land. Id. at 356-59; see also Andreas F. Lowenfeld, International Litigation and Arbitration 72 (2d ed. 2002) (stating that in American Banana the complaint "would have required an adjudication of the legality of the Costa Rican seizure, an action which the Supreme Court said our courts could not challenge"); infra text accompanying notes 133-39 (discussing the "act of state" doctrine).
126. Alcoa, 148 F.2d at 443.
consequences within the United States." Consistent with *Alcoa*, antitrust law bases extraterritorial jurisdiction on the regulated conduct's effects within U.S. territory.

Despite this historic limitation of public civil law to territory, federal courts have recently begun to enforce international human rights law under a theory of universal jurisdiction. The cases arising under the Alien Tort Claims Act and the Torture Victim Protection Act bring foreign nationals to U.S. courts to answer for human rights violations against other foreign nationals abroad. Recently, there have been several such cases in federal courts where the complainants accused U.S. and other multinational corporations of complicity in extraterritorial human rights violations. Several other democracies invoke universal jurisdiction for the most heinous international crimes, including some crimes U.S. courts shy away from adjudicating. Thus, in the context of both international and domestic law, the extraterritorial provisions of Title VII and other civil rights laws are rather modest.

127. *Id.* (citing *Am. Banana*, 213 U.S. at 443).


129. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (holding that an alien within U.S. borders is subject to federal jurisdiction for perpetuating acts of torture in violation of the international law of human rights); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (holding that subject matter jurisdiction in federal court exists where the defendant may be found liable for genocide, war crimes and crimes against humanity); see *Torture Victim Protection Act of 1991*, 28 U.S.C. § 1350 (2000). The *Filartiga* decision was controversial because § 1350 does not expressly refer to human rights, and its enactment predates that language as a part of international law. *Id.*; see *Filartiga*, 630 F.2d at 878.


131. Recent cases include: an allegation of forced labor, *Doe I v. Unocal Corp.*, 110 F.2d 1294, 1299 (C.D. Cal. 2000), *vacated*, 403 F.3d 708 (9th Cir. 2005); an allegation of using paramilitaries inside a bottling plant to murder, torture and unlawfully detain trade unionists in an effort to squash the union, *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1350 (S.D. Fla. 2003); and an allegation that a variety of human rights abuses were employed with the intention of suppressing opposition to environmental damage caused by oil drilling activities, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000); an allegation that a military supplier aided in genocide, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006); an allegation that trade unionists were subjected to human rights violations including torture, kidnapping, and unlawful detention as retaliation for a planned work stoppage, *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1245 (11th Cir. 2005).

B. Acts of State, Comity, and the Separation of Powers

To say it is permissible for federal law to govern the behavior of U.S. nationals abroad is not to deny that there are often good reasons for courts to decline jurisdiction. 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. The “act of state” doctrine is a defense on the merits or “rule of decision” that can be invoked by private parties. U.S. courts generally presume that acts of foreign sovereigns in their own territories are valid, and even if not, such issues are better dealt with by the executive branch. This doctrine is based on both the domestic separation of powers doctrine and an international principle of comity, a courtesy between states that is generally expected though not legally required. Accordingly, the “act of state” doctrine is imposed by U.S. courts out of respect for other branches of U.S. government as well as for other nations, but not on the basis of international law.

The “act of state” doctrine provided the grounds for denying jurisdiction in American Banana. In that case, a U.S. plantation owner sued a competitor for violation of the Sherman Act. The Court declined to pass judgment in this case, since to do so would require it to judge an act of state, namely Costa Rica’s decision to seize the plaintiff’s land. It is on the basis of this doctrine (and this decision) that the foreign compulsion or foreign law defense emerged in anti-trust law. The foreign compulsion defense in Title VII also emerged from it.

A foreign laws defense may be broader than what the Constitution

133. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2000). This reasoning does not typically apply when the act of state is not in its sovereign capacity, but rather in a commercial one, of which employment certainly is a case. Id.; see also EEOC Guidance, supra note 13, § 605, ¶ 2169, at 2236 (stating that the Attorney General should be consulted where there is an issue about the scope of foreign law or treaties).


137. See id. at 353-54.

138. Id. at 356-59; see also LOWENFELD, supra note 124, at 72 (discussing Am. Banana, 213 U.S. at 353-59).

139. Poznanski Cook, supra note 6, at 143; see also Am. Banana, 213 U.S. at 356-57 (noting the territorial nature of statutes and the authority of a sovereign).
and international comity require because in some instances Congress has instructed courts to hear cases in which an act of state is alleged to violate international law.\textsuperscript{140} Hence, the "act of state" doctrine does not necessarily prevent Congress from similarly instructing courts to consider whether a foreign law defense is valid, for example, under international human rights law. Absent such authorization, should the employment law of another country require a U.S. or U.S.-controlled employer to violate Title VII in direct contradiction to that country's international commitments to the United States in the form of Human Rights Treaties or International Labour Organization Conventions, U.S. courts nonetheless might be bound to accept such a defense as valid. This would be in line with the EEOC Enforcement Guidance, which gives employers a simple, secure test in judging the legality of discriminatory actions abroad: If the discriminatory action is mandated by the host country's legal code, the defense is valid.

\textbf{C. The Legality of Extraterritorial Reach}

To sum up, although employment discrimination law may be unique as an application of nationality jurisdiction in the civil context, it is a rather modest extension of jurisdiction in the context of international law generally and in that of U.S. law specifically. International law would not prohibit extending Title VII to offer aliens protection against U.S. companies, even when they are employed abroad. Further, a foreign laws defense based on the "act of state" doctrine assures that U.S. employers and U.S. employer-controlled employers are not put in the position of guessing which laws they are bound to obey.

\textbf{III. POLITICAL AND ETHICAL CONSIDERATIONS}

The Civil Rights Act of 1964\textsuperscript{141} (along with other civil rights legislation) gives legal effect to the anti-caste sentiment or belief that it is unfair to assign benefits and burdens to people on the basis of their identity. This value is naturally in tension with an equally old and important liberty sentiment or belief that it is unfair to strap individual private actors with moral obligations they do not want, at least not when reasonable minds could disagree. The legislation was expressly designed to correct individual and cultural commitments that violate the anti-caste

\textsuperscript{140} LOWENFELD, supra note 124, at 526-27 (discussing 22 U.S.C. § 2370(e)(2) (2000)).

norm. It is the result of decades of political struggle, and that struggle is ongoing.\textsuperscript{142}

Title VII of the Civil Rights Act prohibits discrimination on the basis of national origin, religion, race, or sex inside the United States and outside it.\textsuperscript{143} Its reach into foreign workplaces is restricted to U.S. employers and foreign employers abroad controlled by U.S. employers. It only regulates foreign employers that are not U.S. employer-controlled when such employers maintain workplaces in the United States.\textsuperscript{144} Having established that Title VII’s extraterritorial application is legitimate under international law and, in a limited way, necessary for maintaining protections inside the United States, a deeper political and ethical question comes into focus: What justifies U.S. export of anti-discrimination law at all?

This section will review the purposes of anti-discrimination law in employment, along with some of its classic objections. It will then consider two prominent arguments for understanding the extraterritorial extension of the values embodied in civil rights legislation, either as frank ethnocentrism or as one aspect of participation in complex cultural dialogue. Finally, it will reconsider U.S. unilateral intervention into foreign workplaces from the perspective of the exigencies of globalization.

\textit{A. The Purposes of Anti-Discrimination Law in Employment}

The Civil Rights Act of 1964 was enacted on the basis of some of the most important norms and values of U.S. law and culture.\textsuperscript{145} Prohibitions on caste, such as the proscription on titles of nobility and bills of attainder, have been woven into the Constitution from the beginning. Though that same founding document counted people held in the bondage of slavery as partial people and excluded women from the

\textsuperscript{142} See, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-82 (1998) (quoting 42 U.S.C. § 2000e-2(a)(1)). Gay men, lesbians, and transsexuals are protected from discrimination by local legislation in some places, but they are still mostly excluded from protection at the federal and constitutional level. Whether the Supreme Court’s decision in Oncale will ultimately provide a basis for protecting such individuals from discrimination generally has yet to be determined. That case did provide the possibility of a same-sex sexual harassment claim on the basis of Title VII. \textit{Id.} at 82.

\textsuperscript{143} 42 U.S.C. §§ 2000e-1 to -3.

\textsuperscript{144} 42 U.S.C. § 2000e-1(c).

franchise, subsequent amendments have remedied these cheats on the
country’s founding ideals.

In addition to giving the anti-caste norm the force of law, Title VII
also represents a carefully crafted shift in the balance between the
traditionally delineated public and private spheres of life in the United
States. While the Fourteenth and Fifth Amendments to the Constitution
protect individuals from state-imposed discrimination, Title VII, like
section 1981 before it, protects individuals from discrimination by
private actors. In their capacity as private persons, individuals may
harbor racist, sexist, or religious biases, and they may express such
sentiments through their speech, associations, or even their consumer
choices. However, they may not discriminate in employment on the
basis of such biases.

There are several classic objections to imposing the anti-caste norm
through legislation such as this. An argument of economic efficiency is
worth consideration: Richard Epstein argues that such legislation is
unnecessary, since irrational choices based on employee identity rather
than qualification will hurt employers economically.146 Thus, a
discriminating employer will be less competitive in the market.147 So
long as the use of force is proscribed, the market will punish and correct
cultural biases.148 Thus, the interference with liberty Title VII mandates
is unnecessary and possibly counterproductive. “In a world of free
access to open markets, systematic discrimination, even by a large
majority, offers little peril to the isolated minority. Unconstrained by
external force, members of minority groups are free to search for jobs
with those firms that do want to hire them.‘149 Though arguments like
this have not carried the day in the domestic context, they are apparently
gaining ascendancy - and their force is arguably much stronger - in the
international context, where foreign direct investment and free trade are
often seen as panaceas for a state’s economic woes.150 The economic
efficiency argument is problematic. First, discrimination may not be
irrational in a context where social and economic inequalities of
opportunity and background are pervasive and correlative with
disfavored identity characteristics such as race, gender, and religion. So,

146. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT
147. Id.
148. Id. at 41-43, 47.
149. Id. at 32.
150. See Alan O. Sykes, COMPARATIVE ADVANTAGE AND THE NORMATIVE ECONOMICS OF
the number of qualified persons passed over might be insignificant enough that it would not hurt an employer’s business. Perhaps more importantly, the qualifications themselves are often tied to experience. Consequently, if systematic discrimination is pervasive, then fewer members of disfavored groups will be qualified. Finally, if it is true that the market can correct individual and cultural biases, it works remarkably slowly. The Equal Employment Opportunities Commission shows no signs of closing down due to lack of complaints.

An older argument against discrimination law generally is that it is a violation of the freedom of association to force an individual to work with people she does not want to. This argument has more or less fallen by the way-side as overtly racist groups have lost mainstream appeal. It gains force in the international context, however, since respect for cultural autonomy bears a close relation to the norms of tolerance and respect for difference that Title VII represents.

Whether one considers discrimination to be wrong because it is unfair, because it violates human dignity, or even because it is inefficient, the norm against employment discrimination is firmly rooted in U.S. culture. It has developed in direct conflict with the equally firmly rooted countervailing norms of white supremacy, patriarchy, and prescriptive Protestantism. It is also in tension with a libertarian instinct that has been gaining currency domestically, particularly with those engaged in international economic enterprises. This background brings our questions sharply into focus: How can the United States unironically promulgate values with such a pedigree abroad? On what possible basis could remedial legislation such as this be extended beyond U.S. territorial borders? On the other hand, why should U.S. companies be allowed to adopt the caste systems of the cultures where they invest if they do not have to? These are philosophical, ethical, and political questions.

B. Relativism, Frank Ethnocentrism, and Global Interdependence

Richard Rorty and Seyla Benhabib, two prominent social, political and ethical philosophers, disagree over how to understand values like the anti-caste norm. For Rorty, westerners would be better off embracing their heritage and acknowledging their perspectives as “frankly ethnocentric” as they promulgate their values among non-westerners.151

He argues that westerners should point out how well our norms have served us in the hope that non-western cultures may also find them useful.\textsuperscript{152} Benhabib challenges the notion that universal values are essentially or uniquely western values,\textsuperscript{153} and at the same time cautions against the "conflation of validity and genesis."\textsuperscript{154} She argues that "[p]olitically, the right to cultural self-expression needs to be grounded upon, rather than considered an alternative to, universally recognized citizenship rights."\textsuperscript{155}

In \textit{Justice as a Large Loyalty}, Rorty offers a series of examples of expanding and contracting loyalties to illustrate how a perceived conflict could occur between justice and loyalty, for example, when a family member has committed murder for which an innocent person will hang, can be better understood as a conflict between loyalties to relatively larger and smaller groups.\textsuperscript{156} Thus, when the CEO of Caterpillar explained that relocating operations abroad was "positive" because it was not "realistic for 250 million Americans to control so much of the world's GNP,"\textsuperscript{157} he could be understood to express a larger loyalty to all of humanity over and against the small group of workers no longer in his employ.\textsuperscript{158} The significance of replacing the term "justice" with the term "loyalty" has to do with moral psychology. Rorty rejects terms like "reason" and "universal moral obligation," preferring to focus his attention on "affectional relations" like trust.\textsuperscript{159}

Rorty offers an image of moral development that begins with local, reciprocal loyalty relationships and moves from these to ever greater abstractions, to ever widening concepts of who should count as "one of us."\textsuperscript{160} This image of an expanding circle is contrasted with a more traditional Kantian image in which reason or universal human nature underlie our everyday relations, giving them the same foundation as our relations with any others.\textsuperscript{161} According to the Kantian view, a moral conflict will often be experienced as a conflict between reason

\begin{itemize}
\item\textsuperscript{152} See id.
\item\textsuperscript{153} See SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 24-25 (2002).
\item\textsuperscript{154} \textit{Id.} at 47.
\item\textsuperscript{155} \textit{Id.} at 26.
\item\textsuperscript{156} Rorty, \textit{supra} note 151, at 45.
\item\textsuperscript{157} \textit{Id.} at 57 n.1 (quoting Caterpillar CEO Donald Fites \textit{in} EDWARD N. LUTTWAK, THE ENDANGERED AMERICAN DREAM 184 (1993)).
\item\textsuperscript{158} See \textit{id.} at 46.
\item\textsuperscript{159} See \textit{id.} at 47.
\item\textsuperscript{160} See \textit{id.} at 45.
\item\textsuperscript{161} See \textit{id.}
\end{itemize}
Correcting Culture (universal) and sentiment (purely personal).\textsuperscript{162} According to Rorty’s view, a moral conflict will be experienced as conflicting loyalties, even conflicting selves.\textsuperscript{163} The larger the group, the less strongly one will identify with it and the more necessary it is to codify obligations into laws.\textsuperscript{164}

Because thicker, more local loyalties form the basis of abstract principles like the liberal maxim, “Do not make arbitrary distinctions between moral subjects,” rather than the other way around, Rorty urges his readers to drop the idea that pure reason is “always in danger of being contaminated by irrational feelings, which introduce arbitrary discriminations among persons.”\textsuperscript{165} Instead we should face up to the fact that the norms of liberal democracy simply reflect the customs of liberal societies.\textsuperscript{166} And, “it is better not to say that the liberal West is better informed about rationality and justice, and instead to say that, in making demands on nonliberal societies, it is simply being true to itself.”\textsuperscript{167}

Thus, the United States might promote the anti-caste ideal because the people of the United States would not like themselves if it did not. It might limit protections to its citizens in foreign workplaces because locally-hired workers in foreign countries do not count as “one of us,” at least not yet.

Recasting prominent liberal theory in these new terms, Rorty suggests that moral and social theory should take rationality not as an authority that tells people what to do, but as an appeal to the already enduring beliefs and identifications of an interlocutor.\textsuperscript{168} Moreover, he suggests that, in some contexts, moral rationality might be understood as the offer of a new moral identity, that is, of a new, larger loyalty.\textsuperscript{169} This follows because any unforced agreement about what to do will create a community “and will, with luck, be the initial stage in expanding the circles of those whom each party to the agreement had previously taken to be ‘people like ourselves.’”\textsuperscript{170} Thus, when a liberal concludes that someone is irrational, it means that the two do not share sufficient

\textsuperscript{162} See \textit{id.} at 47-48.
\textsuperscript{163} See \textit{id.} at 48.
\textsuperscript{164} \textit{id.}
\textsuperscript{165} \textit{id.} at 49. The term “liberal,” as Rorty uses it, denotes democracy with protections for individual rights. It is logically opposed to authoritarian and majoritarian governments, not to conservative politics in the twenty-first century.
\textsuperscript{166} See \textit{id.}
\textsuperscript{167} \textit{id.} at 50.
\textsuperscript{168} See \textit{id.} at 53-54.
\textsuperscript{169} \textit{id.} at 54.
\textsuperscript{170} \textit{id.}
beliefs or desires to make "fruitful conversation about the issue in dispute." At this point, the liberal will reluctantly turn to less communicative means, such as threat, force, or presumably, law.\textsuperscript{171}

Rorty rejects a stronger version of rationality, in which liberal theorists insist that if the two argue for long enough in good faith, the force of the better argument will prevail, if only as a matter of principle.\textsuperscript{173} He deflates this idea, describing it as an excuse to pay oneself an empty compliment by describing one's own resolution to conflicts of loyalty as "rational."\textsuperscript{174} Perhaps even more importantly, such a rhetorical gesture is not useful in helping individuals or groups reach agreement.\textsuperscript{175}

Rorty asserts that non-westerners were justified in their skepticism when western conquerors invaded their lands, claiming to be acting under God's authorization.\textsuperscript{176} He says they are justified in their skepticism today when westerners urge them to change their ways, to become more rational.\textsuperscript{177} He ultimately claims:

If we [w]esterners could get rid of the notion of universal moral obligations created by membership in the species, and substitute the idea of building a community of trust between ourselves and others, we might be in a better position to persuade non-[w]esterners of the advantages of joining in that community.\textsuperscript{178}

Rorty does not offer much guidance on the question of whether to impose egalitarian norms on foreign employers and workplaces, but his discussion suggests a way to understand what is happening when such norms are imposed extraterritorially. For Rorty, it is all about "us."\textsuperscript{179} The existence of domestic anti-discrimination laws in the United States shows that we, as a people, have withdrawn from conversation about whether we value equality. Those who disagree may present their arguments, but they may not act on their disagreement by engaging in employment discrimination. If they do, they will be dealt with through force of law. The situation is only slightly different in the transnational

\textsuperscript{171} Id. at 55.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 55-56.
\textsuperscript{175} Id. at 56.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 56-57.
\textsuperscript{179} See id. at 45.
context. To the extent that a foreign employer wants to operate within our borders, it must abide by our rules. To the extent that a U.S. employer or a U.S. employer-controlled employer wants to invest abroad, it is saddled with promulgating not only the values of capitalism, but also the egalitarian norms of Title VII, at least insofar as they hire U.S. citizen employees. Abiding by this norm, which has worked so well for us in the United States, the employer effectively becomes a model and an instrument of change for the cultures among which it resides. The justification for this lies in western identity, and to some extent it offers this identity to those who trust and accept its liberal values.

It should be noted that this justification is somewhat undercut by a stratified working environment, whether at home or abroad. This is true where upper management is composed of citizens from a sending country, enjoying privileges and protections that are denied to the citizen employees of a receiver country.

In her essay, "Nous" et Les "Autres" (We and the Others): Is Universalism Ethnocentric?, Seyla Benhabib argues that the worry that universalism is ethnocentric rests on the false assumptions that western culture is radically different from other cultures, that it is a coherent whole, and that it provides a homogenous identity. She argues instead that cultures and societies “are not holistic but polyvocal, multilayered, decentered, and fractured systems of action and signification.” She questions whether the legal and moral universalism that Rorty and others advocate “can be defended without a strong commitment to the normative content of reason.”

Benhabib describes Rorty’s “ethnocentrism” as universalist within “framework relativism.” This is to say that Rorty’s liberal commitments to universal values are qualified by the framework of liberalism or perhaps of western culture. The irrational person from his discussion simply falls out of the framework into another incommensurable one. Benhabib claims such views must fail “because the very process of individuating and identifying frameworks contradicts the claims of framework relativism.” That is, such visions of judgment and justification require frameworks within which to identify and

180. BENHABIB, supra note 153, at 24.
181. Id. at 25-26.
182. Id. at 28.
183. Id.
184. See id.
185. See id. at 28, 33.
186. Id. at 28.
evaluate frameworks.\textsuperscript{187} She reasons that cultures must bear some similarities to each other or else we could not recognize such complex cultural phenomena as myth, marriage, or prayer.\textsuperscript{188} Deciding which frameworks are better requires independent judgment, and, she proposes, this is best understood as requiring “complex cultural dialogues.”\textsuperscript{189}

Benhabib specifically singles out Rorty for criticism. Given that the difference between disagreements within a culture are not different in kind from disagreements across cultures, Rorty’s use of such terms as “we,” “them,” and particularly, “ethnocentric,” is misleading.\textsuperscript{190} Rorty uses the term “ethnos” to denote the group of people with whom one can have a fruitful conversation, but such an ethnos “has a shifting identity and no fixed boundaries.”\textsuperscript{191} Benhabib argues that the “we” with which Rorty identifies ought not to be the “we” of western civilization at all, but rather the “we” of liberalism or even the “we” of a community of conversation defined by the topic or task at hand.\textsuperscript{192}

Benhabib is careful to limit her critique, noting that there may be incommensurabilities between culturally embedded points of view: “Experiences of incommensuration can range from total bafflement in the face of another culture’s rituals and practices, to more mundane and frustrating encounters with others when . . . ‘[we] just don’t get it.’”\textsuperscript{193} Such experiences might lead to violence, but they might also lead to “extending the horizons of one’s comprehension.”\textsuperscript{194} What she means by this is that conversations in cases where cultural viewpoints conflict may result in the revision of both viewpoints, or of many viewpoints, through a process of “mutual challenging, questioning, and learning.”\textsuperscript{195} And, she notes, some of the most pressing issues of our day arise from real confrontation between cultures that are materially interdependent.\textsuperscript{196}

Benhabib argues that globalization is “increasing the effects of local activities on a global scale” such that “the articulation of a pluralistically enlightened ethical universalism on a global scale emerges
as a possibility and a necessity."197 The global situation gives all of us a pragmatic imperative to extend the community of conversation as broadly as we can.198 To make a community of interdependence a moral community requires the members of that community "to settle those issues of common concern to all via dialogical procedures in which all are participants."199 By "all," she means both the "all" of humanity as implicated in the pragmatic situation of planetary interdependence and the "all" of those who may be affected by a particular decision.200 To be a dialogue, the conversation must take place in accordance with the norms of universal respect and egalitarian reciprocity.201 That is, it cannot be a dialogue if participants are silenced, threatened, coerced, or tricked. While such dialogue may be unattainable in reality, these norms serve as guides.202

Given that most, if not all, cultures fall short of these generalized attitudes embracing human equality – attitudes that Benhabib finds necessary to reach reasoned, uncoerced agreement – she places hope in the same transnational mechanisms that bring the world into a situation of global interdependence. As conversations and confrontations between and among cultures spread, through economic and military engagement, as well as through international law and international threats, she believes and hopes the generalized attitude of moral equality will spread.203

At least insofar as these attitudes may spread through conversation, Benhabib recommends understanding three levels of normative life within a "culture," and understanding that cultures are not pure wholes and may not be definable at the margins.204 These three levels are the moral, the ethical, and the evaluative.205 The moral refers to justice; what is right for people qua human beings.206 The ethical refers to identification; what is right for members of this community qua this community.207 The evaluative refers to whatever individuals or

197. Id. at 35-36.
198. Id. at 36.
199. Id.
200. See id.
201. Id. at 36-37.
202. Id. at 37.
203. Id. at 38-39.
204. Id. at 40.
205. Id.
206. Id.
207. Id.
communities think is necessary for human happiness. On her view then, Rorty conflates the moral primarily with the ethical, but also with the evaluative level of normative life. Benhabib suggests that we might take issue with some aspects of the moral, ethical, or evaluative practices of a particular community without rejecting its values totally. Such critical engagement is as possible with one’s own community as with someone else’s.

Benhabib closes her essay with a meditation on John Locke’s *Second Treatise on Government*, an important document in western intellectual history. It not only offers the ideal of government by consent among equals, it also engages “in a complex cultural dialogue that positions and repositions the ‘we’ and the ‘others’ in complex, multiple, and unpredictable ways.” For example, it casts Amerindians as being “just like Europeans; their otherness . . . buried in the early stages of our own past,” justifying colonization as a speeding up of their development. It excludes “women, propertyless servants, and other races from the ark of equality.” While Locke can be criticized, and justly so, for his “fanciful reconstructions of the hypothetical beginnings of human history,” Benhabib distinguishes these weaknesses from his “philosophical argument concerning consent and political legitimacy.” That argument has prevailed as the “foundation for all democratic theory and practice.”

Benhabib offers more guidance than Rorty about whether to impose egalitarian norms on foreign employers and workplaces. She suggests a different way to understand what is going on when such norms are imposed extraterritorially. For Benhabib, the commercial activities of U.S. employers abroad can be expected to have some instrumental effect in transforming the communities in which they operate. Discrimination is non-egalitarian: it precludes the possibility of moral community. Thus, the United States is quite justified in requiring its nationals to abide by these minimum moral standards. Benhabib’s instruction to consider the

208. *Id.*
209. *Id.* at 40–41.
210. JOHN LOCKE, OF CIVIL GOVERNMENT SECOND TREATISE (Henry Regnery Co. 1968) (1690).
212. *Id.* at 46–47.
213. *Id.* at 46.
214. *Id.*
215. *Id.* at 47.
216. *Id.*
217. *Id.*
polyvocal nature of communities and cultures might also lead us to note that Title VII will most likely be invoked by individuals who have suffered or believe they have suffered discrimination, whether they are U.S. citizens or not. Thus, while Title VII may disfavor discriminatory attitudes within a given culture, complaints by members of the same culture indicate that that culture does not maintain a univocal appreciation for such discrimination.

C. Recasting the Dialogue

Benhabib and Rorty’s arguments are as notable for what they share as for the points on which they diverge. Both understand moral rationality as requiring a non-coercive discussion in a community of conversation. Both understand the motive force behind such conversations as pragmatic. Both understand moral experience to be largely rooted in the accidents of history, including the increasing importance today of the global economy. Additionally, both recognize the history of the colonial era that overshadows discussions of cross-cultural moral dialogue.

Benhabib is right about Rorty’s use of the term “ethnocentric.” He would surely agree that the United States, for example, or even the West is not a monolith. While he might not take issue with the narrative history of the anti-caste norm I articulated above, his “ethnos” more closely resembles a set of political and ethical commitments than what most of us understand by the term. Nonetheless, we should be mindful that U.S. law, too, emerges from a specific country with a specific history. When Title VII is enforced abroad, it is enforced on behalf of the people of the United States, not on behalf of liberals. And, when Rorty suggests westerners have learned from their history, that is not a theoretical claim. So, while Benhabib is also right to distinguish liberal norms analytically from their histories, it would be a mistake to think such history does not stick to these norms, especially when they are carried by former colonizers into the lands of the formerly colonized.

Assuming Benhabib’s characterization of Rorty’s point of view as framework relativism is accurate, she has given us no reason to think that we need an outside perspective in order to pick out relevant characteristics of other cultures. How could we even begin to recognize myth as myth or marriage as marriage if we did not already have some familiarity with it in our own background? If it is possible, it requires education, not an outside perspective from which to adjudicate between frameworks, whatever that might mean. Incommensurability of culture is
not the key for Rorty, but incommensurability of value commitments, beliefs, etc., up to the point of break-down. Thus, on his view, there is tremendous room for overlap and hence for conversation between members of the same or different communities. If there is real incommensurability, then the apparent result would be a lack of engagement, not engagement on a higher level. Science and religion may provide just one example: A religious explanation of science and a scientific explanation of religion are both possible. But neither is capable of refuting the other. They don't operate in the same logical space. By contrast, racism and the anti-caste norm operate in at least very similar logical space, whether they occur in a transnational context or not. In other words, to argue about whether discrimination is acceptable in a given context is already to have granted some level of commensurability.

Indeed, when we are talking about applying Title VII to a workplace, we are talking about a specific type of context in which the forces of globalization are already in tension with traditional cultures, including our own. Although the term “globalization” initially characterized the recently accelerated emergence of international financial markets,¹¹¹ it encompasses many overlapping trends of economic, social, political, and cultural change.¹¹² These include rapid global communication, rapid deployment of short-term and foreign direct investments, and changing gender relations.¹¹³ Thus, the question is not whether to be involved in global cultural transformation, as if abstention were possible. Rather, it is how to be involved, and how to be involved responsibly.

Unrestricted markets will not necessarily correct cultural biases on their own, at least not quickly.¹¹⁴ One need not look far to see how violently individuals and governments may defend cultural norms of subordination against economic interventions that threaten to destabilize their power. Can wealthy countries such as the United States responsibly allow their wealthier citizens to profit from foreign investment without

²¹⁸ Though states began to lift capital controls in the 1970s, see Thomas L. Friedman, The Lexus and the Olive Tree 114-15 (1999), the emergence of global financial markets began accelerating much more recently, in 1987, when the United Kingdom deregulated capital and securities. See Manuel Castells, Information Technology and Global Capitalism, in Global Capitalism 52, 53 (Will Hutton & Anthony Giddens eds., 2001).

²¹⁹ Anthony Giddens & Will Hutton, In Conversation, in Global Capitalism, supra note 2¹¹⁸, at 1-1-2.

²²⁰ See id. at 1-2.

²²¹ See supra Part III.A (discussing the purposes of anti-discrimination law).
some safeguards? The many human rights and International Labour Organization conventions on the subject suggest not. Although multilateral, international regimes may be preferable from the perspective of a global community of complex cultural dialogue or conversation, currently no coherent international legal regime is in a position to redress grievances as Title VII does. Against this background, Title VII appears as an important stop-gap measure and one that would be justified in reaching farther than it does.

IV. IMPLICATIONS

The extraterritorial provisions of Title VII and other employment civil rights laws, as written, are consistent both with international law and with the values that inform respect for foreign cultures and the legal protection of civil rights. However, as the law currently stands, extraterritorial civil rights law creates unstable and uneven employment rights. Courts should not allow this instability to prevent them from enforcing the law in light of its purposes at least in workplaces within the territorial United States. Even better, Congress could extend jurisdiction to include all employees of U.S. employers and foreign employers controlled by U.S. employers. The law’s current shortcomings aside, since the United States, its people, its businesses and their employees are already deeply engaged in processes of social, cultural, and economic transformation at home and abroad, holding all U.S. employers accountable to minimum standards of conduct towards their employees represents a step in the direction of responsible participation in an increasingly interdependent, global community.