

2012

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Recommended Citation

Carrie Nie, *Extraterritorial Application of U.S. Employment Laws: Clearing the Murky Conflicting Foreign Laws Defense*, 46 INT'L L. 1027 (2012)

<https://scholar.smu.edu/til/vol46/iss4/6>

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Extraterritorial Application of U.S. Employment Laws: Clearing the Murky Conflicting Foreign Laws Defense

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Abstract

This article reinvigorates the separation of balance rationale in the U.S. employment law context, specifically addressing the Conflicting Foreign Laws Defense. Congress has explicitly amended certain U.S. employment laws to extend extraterritorially. It also included the Conflicting Foreign Laws Defense in the statutes. The hotly debated interpretations of foreign “law” in the Defense exhibit how courts have blurred the situations under which Congress intended an employer’s actions to qualify for the Defense.

*To clarify how courts should interpret the Defense, this article criticizes *Mahoney v. RFE/RL*—the controversial case on the Defense—using the rationale behind *Morrison v. National Australia Bank Ltd.*, *expressio unius est exclusio alterius*, and the purpose behind U.S. employment laws to encourage a narrow reading of foreign “law.”*

Introduction

In this increasingly global economy, the number of U.S. employees who work abroad (expatriates) is steadily increasing.¹ A highly controversial issue is the extent to which these U.S. employees who work abroad for U.S. employers are still protected by U.S. employment laws. Congress has expressly provided that three U.S. employment laws—the Americans with Disabilities Act (ADA),² the Age Discrimination in Employment Act

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1. The term “expatriate” generally “refers to people [who] do not plan to reside in their new country permanently and normally retain their citizenship for practical purposes.” See, e.g., *Expatriates: An Overview of the Expatriate Market*, JUST LANDED, <http://www.justlanded.com/english/Common/Footer/Expatriates> (last visited Jan. 4, 2013). “Expatriate” derives from the Latin term “expatriare,” which means “to leave one’s own country.” *Id.*

2. 42 U.S.C. § 12112(c)(1) (2006).

(ADEA),³ and Title VII⁴—extend extraterritorially. By contrast, Congress has identified when U.S. employment laws do not have extraterritorial application.⁵

This background suggests that the extraterritorial application of U.S. employment laws is clear and well established. But the analysis is not so simple. Employers may raise the Conflicting Foreign Laws Defense (the Defense), which allows a U.S. employer that is located abroad to act contrary to U.S. law if compliance with U.S. law would cause the employer to violate the foreign state's "law."⁶ The three statutes mentioned above each have the Defense written in as a provision, and each reads:

It shall not be unlawful for an employer, employment agency, or labor organization (1) to take any action otherwise prohibited . . . where such practices involve an employee in a workplace in a foreign country, and compliance [with U.S. employment laws] would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.⁷

This is where the law is murkier.⁸ Table 1 exhibits an example of the current state of the law for the Conflicting Foreign Laws Defense.

3. 29 U.S.C. § 623(f)(1) (2006).

4. Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-1(b) (2006).

5. See Fair Labor Standards Act, 29 U.S.C. § 213(f) (2006).

6. See, e.g., *id.* § 623(f)(1).

7. See *id.* (emphasis added) To measure whether a U.S. employer "controls" the corporation, Congress set forth four factors: "(A) interrelation of operations, (B) common management, (C) centralized control of labor relations, and (D) common ownership or financial control, of the employer and the corporation." See *id.* § 623(h)(3). For this article's purposes, "employer" will refer to both the U.S. employer that operates abroad and the corporation that is controlled by a U.S. employer.

8. See Equal Employment Opportunity Commission (EEOC), Policy Guidance: Analysis of Sec. 4(f)(1) "Foreign Laws" Defense of the Age Discrimination of Employment Act of 1967, EEOC Notice No. N-915.046 (1989), reprinted in EEOC Compliance Manual, 1989 CCH EEOCCM ¶ 6524 (No. N-915.046, 1989), available at 2009 WL 3608228 [hereinafter EEOC Policy Guidance]; see also Sandra Miller, Note, *Re-Examining the Role of the Equal Employment Opportunity Commission Regarding Title VII's Foreign Laws Defense*, 31 GEO. WASH. J. INT'L L. & ECON. 439, 439 (1998) ("Unfortunately . . . the law is often ambiguous and no definitive answers guiding employers exist.").

Table 1

U.S. Law	Foreign Law	Employer's Action	True Conflict?	Employer Can Successfully Raise Conflicting Foreign Laws Defense?
1 An employer cannot discriminate against an employee on the basis of religion in the workplace. ⁹	Saudi Arabia law expressly provides that non-Moslems cannot enter the holy area. ¹⁰	Employer constructively terminates a pilot when the pilot refuses to convert from Baptist to Moslem, and the position required flying over the holy area.	Yes.	Yes. ¹¹
2 An employer cannot discriminate against an employee on the basis of age in the workplace. ¹²	Foreign law does <i>not</i> address whether an employer can discriminate against an employee on the basis of age in the workplace, but some "policies or practices" in the foreign state involve the employer terminating an employee because he or she turns 65.	Employer terminates employees when they reach 65 solely because of their age.	<u>Mahoney:</u> Yes, because "law" includes "policies or practices." <u>Proposal:</u> Not unless Congress indicates that "law" includes "policies or practices."	<u>Mahoney:</u> Yes, because there is a true conflict between the "law" (read to include "policies or practices") and the ADEA. <u>Proposal:</u> No, because currently there is in fact no true conflict between the ADEA and foreign law.
3 Same as Row 2.	Foreign law does <i>not</i> address whether an employer can discriminate against an employee on the basis of age in the workplace.	Same as Row 2.	No.	No.
4 Same as Row 2.	Also agrees that the employer cannot discriminate against an employee on the basis of age in the workplace.	Same as Row 2.	No.	No.

This article focuses on Situation 2 of Table 1, which is where the law is currently the most contentious. Congress has not specified what constitutes foreign "law" beyond the word "law."¹³ The leading case on the Conflicting Foreign Laws Defense is *Mahoney v. RFE/RL* in the D.C. Circuit.¹⁴

This article's main objective is to show that although courts have wrestled with the term foreign "law" in the Conflicting Foreign Laws Defense, Congress, not the courts, should decide what constitutes foreign "law." It adds to the discussion by using several canons of

9. 42 U.S.C. § 2000e-1(b) (2006).
 10. See *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196, 1203 (N.D. Tex. 1983); see also *infra* Part I(C).
 11. Note that in *Kern*, the employers chose to use the bona fide occupational qualification exception, but it serves as a good "true conflict" example for the Conflicting Foreign Laws Defense because the U.S. law and Saudi law directly conflicted. See *Kern*, 577 F. Supp. at 1199, 1203.
 12. 29 U.S.C. § 623(a) (2006).
 13. See, e.g., *id.* § 623(f)(1).
 14. See generally *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995), *rev'g*, 818 F. Supp. 1 (D.D.C. 1992), *cert. denied*, 516 U.S. 866 (1995).

statutory construction to indicate that courts should not presume Congress intended an employer's actions to qualify for the Defense unless Congress "affirmative[ly]" indicated that intent.¹⁵ 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. The highlight of this article is that courts should narrowly interpret foreign "law" to only include "law," because Congress has been clear in its definition—"law" means law. The only way Congress could be clearer than "law" meaning "law" would be to include the phrase "law and only law," which is redundant.¹⁶ Scholars and federal agencies have expressed that the Defense is unclear, and some have suggested various interpretations of, or amendments to, the Defense.¹⁷ To be clear from the outset, because Congress has already indicated its intent, Congress does not need to amend the statutes if it intended "law" to only include law. Thus, this article will not propose variations to the statute, nor does it recommend that Congress amend the statutes.

Part I will provide an overview of U.S. employment laws and the relevant case law that led to Congress amending the ADEA, Title VII, and the ADA to apply extraterritorially. Part II will focus on the *Mahoney* district and appellate courts' opinions. Specifically, Part II will compare the district court's narrow interpretation of foreign "law" with the D.C. Circuit's broad interpretation. Part III, the heart of this Article, will analyze the Conflicting Foreign Laws Defense in light of *Morrison v. National Australia Bank Ltd.* and ordinary canons of statutory construction. This analysis will lead to Part IV, which recommends that because Congress has not "affirmative[ly]" indicated otherwise, courts should defer to Congress and narrowly interpret foreign "law."¹⁸

I. Background of U.S. Employment Laws's Extraterritorial Application

This section sets forth the circumstances under which Congress explicitly amended three U.S. employment laws—the ADA, ADEA, and Title VII—to apply extraterritorially. The amendments were mainly congressional reaction to unfavorable case law results.¹⁹

15. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

16. Telephone Interview with Anthony J. Colangelo, Assoc. Professor of Law, SMU Dedman School of Law (Oct. 31, 2011).

17. See, e.g., EEOC, Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States, EEOC Notice 915.002 (1993), reprinted in EEOC COMPLIANCE MANUAL, 1993 CCH EEOCCM ¶ 2169 (No. 915.002, 1993), available at 2009 WL 3607916 [hereinafter EEOC Enforcement Guidance]; EEOC Policy Guidance, *supra* note 8, at C(2); Miller, *supra* note 8, at 446-47; Meredith P. Cook, Note, *The Extraterritorial Application of Title VII: Does the Foreign Compulsion Defense Work?*, 20 SUFFOLK TRANSNAT'L L. REV. 133, 163 (1996); Wm. Scott Smith, Comment, *Extraterritorial Application of Title VII and the Americans with Disabilities Act: Have Statute, Will Travel*, 36 S. TEX. L. REV. 191, 196-97 (1995); James D. Phipps, Comment, *Kiss of Death: Application of Title VII's Prohibition Against Religious Discrimination in the Kingdom of Saudi Arabia*, 1994 BYU L. REV. 399, 424-26 (1994).

18. *Morrison*, 130 S. Ct. at 2877.

19. See *infra* Part I(A)-(B).

A. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

The ADEA protects employees from age discrimination in the workplace.²⁰ In 1983, the Third Circuit decided in *Cleary v. U.S. Lines, Inc.* that the ADEA did not apply extraterritorially.²¹ The *Cleary* district court reasoned that “[t]he legislative history of the ADEA and its amendments [are] silent on whether the Act applies extraterritorially . . . [t]herefore, [the] court must assume that Congress intended to retain the territorial restriction.”²² Congress was concerned that “an opportunity existed for domestic employers with operations in the United States and in a foreign country to circumvent the ADEA through the transfer of older employees to an overseas operation where mandatory retirement could be enforced with impunity.”²³ Thus, in reaction to *Cleary*, Congress amended the ADEA in 1984 to “insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the [ADEA].”²⁴ The amendment included defining “employee” to encompass “any individual who is a citizen of the United States employed by an employer in a foreign country.”²⁵ The amendment also included the Conflicting Foreign Laws Defense to limit when employers could be liable under the ADEA.²⁶

B. TITLE VII AND THE AMERICANS WITH DISABILITY ACT (ADA)

Congress enacted Title VII to prevent discrimination in the workplace “on the basis of race, color, sex, religion, or national origin.”²⁷ Originally, Title VII did not include language that indicated extraterritorial application.²⁸ Then in 1991, the Supreme Court reaffirmed that Title VII did not apply extraterritorially in *EEOC v. Arabian American Oil Co. (ARAMCO)*.²⁹ The EEOC argued that because Congress included the terms “employer” and “commerce,” Title VII applied to U.S. employers that employed U.S. employees abroad.³⁰ The Court disagreed and applied the presumption against extraterritoriality.³¹ Specifically, the Court reasoned, “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”³² The Court’s holding effectively limited Title VII’s scope to employers within the United States.³³ Notably, the Court recognized that Congress is the branch of government with the power to extend the law extraterritorially and that the Court should aim to “[avoid]

20. 29 U.S.C. § 623(a) (2006).

21. *Cleary v. U.S. Lines, Inc.*, 555 F. Supp. 1251, 1263 (D.N.J. 1983), *aff’d*, 728 F.2d 607 (3d Cir. 1984).

22. *Id.* at 1259 n.3, 1259.

23. EEOC Policy Guidance, *supra* note 8, at B.

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

25. 29 U.S.C. § 630(f) (2006); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (1984).

26. *See* 29 U.S.C. § 623(f)(1).

27. 42 U.S.C. § 2000e-2(a).

28. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702 (1964).

29. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 249 (1991).

30. *Id.* at 248-49.

31. *See id.* at 249.

32. *Id.* at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

33. *See id.* at 259.

potential international discord.³⁴ Later in the same year *ARAMCO* was decided, Congress accepted the Court's invitation and amended Title VII to apply extraterritorially.³⁵

Congress enacted the ADA to prohibit discrimination in the workplace based on disabilities.³⁶ When Congress amended Title VII in 1991, it also amended the ADA to apply extraterritorially.³⁷

C. THE CONFLICTING FOREIGN LAWS DEFENSE

The Conflicting Foreign Laws Defense allows employers to justify actions that would otherwise violate the ADEA, Title VII, or the ADA.³⁸ Congress enacted the Conflicting Foreign Laws Defense to "avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates."³⁹ The Defense functions as follows. First, a U.S. employee working abroad sues the U.S. employer under Title VII, the ADEA, or the ADA and establishes the prima facie elements for the discrimination.⁴⁰ Next, the burden shifts to the employer to show that although its actions would otherwise violate U.S. employment law, the Conflicting Foreign Laws Defense allows its behavior because "compliance would cause [the employer] to violate [the foreign] law."⁴¹ The employer raising the defense has the burden of proof to show that it is entitled to protection under the Defense.⁴²

Part of courts' struggles in this analysis is that "it involves not only the application of [U.S. employment law] by an American court, but also the interpretation of foreign law."⁴³ The analysis is twofold. First, the court must determine whether Congress intended for the act to apply extraterritorially.⁴⁴ Fortunately, Congress has been explicit in the employment laws as to whether they should apply extraterritorially.⁴⁵ And, second, the court must determine whether the employer's conduct qualifies for the Conflicting Foreign Laws Defense, which involves an analysis of whether there is a true conflict between the foreign law and U.S. law.⁴⁶ This is where the analysis becomes more difficult because to determine whether there is a true conflict, the court must first determine what foreign "law" it is comparing to U.S. law.

To better understand the Conflicting Foreign Laws Defense and this article's analysis, one must understand the difference between a true and false conflict of laws. A true con-

34. Miller, *supra* note 8, at 442.

35. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1077 (1991) (codified as amended at 42 U.S.C. § 2000e-1 (2006)).

36. See 42 U.S.C. § 12112(a).

37. See *id.* § 12112(c)(1).

38. See ADEA, 29 U.S.C. § 623; Title VII, 42 U.S.C. § 2000e-1; ADA, 42 U.S.C. § 12112.

39. Mahoney v. RFE/RL, Inc., 47 F.3d 447, 450 (D.C. Cir. 1995).

40. See Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir. 1995).

41. See *id.*

42. R. Charles Wilkin, III, *A Stranger in a Strange Land: Applying U.S. Laws to Employees Working Abroad*, 8 OKLA. EMP. L. LETTER, no. 10, 2000 at 5, 5.

43. *Id.*

44. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010).

45. See *supra* Part I(A)-(B).

46. See, e.g., Mahoney v. RFE/RL, Inc., 47 F.3d 447, 450 (D.C. Cir. 1995).

flict of laws is a situation where State A's law directly conflicts with State B's law.⁴⁷ By contrast, a false conflict occurs when the potentially applicable laws do not differ, or when one law actually does not apply to the situation.⁴⁸ For an example of a true conflict, consider *Kern v. Dynalelectron Corp.*⁴⁹ The employee, Wade Kern, sued his employer, Dynalelectron Corporation, for religious discrimination under Title VII.⁵⁰ Dynalelectron originally hired Kern to fly helicopters over the holy pilgrimage route to Mecca in Saudi Arabia.⁵¹ Because Saudi Arabian law "prohibits the entry of non-Moslems into the holy area, Mecca, under penalty of death," Dynalelectron required all pilots who were to make this trip to become Moslem.⁵² When Kern decided not to convert, Dynalelectron offered Kern another job that did not require his conversion.⁵³ The court held that "Kern was constructively discharged" because "both Kern and Dynalelectron understood that the [original] job required Kern's conversion."⁵⁴ Kern met his burden of proof to show a "prima facie case by a preponderance of the evidence," so Dynalelectron was left with the burden to "[establish] that the discrimination was not unlawful."⁵⁵ Instead, Dynalelectron raised the bona fide occupational exception to Title VII, which functions in the same way as the Conflicting Foreign Laws Defense.⁵⁶ The court concluded that the employer's requirement that the pilot be a Moslem in a certain position qualified for the bona fide occupational qualification exception to Title VII because the "non-Moslem pilots . . . [were] not safe as compared to Moslem pilots."⁵⁷ *Kern* notably recognized that a defense to the employment laws should be "a narrow exception . . . to avoid the situation where the exception swallows the rule."⁵⁸

47. See Peter K. Westen, *False Conflicts*, 55 CALIF. L. REV. 74, 79-80 (1967).

48. See *id.* at 80.

49. See generally 577 F. Supp. 1196 (N.D. Tex. 1983). For another example of a true conflict, consider:

Sarah is a U.S. citizen. She works as an assistant manager for an U.S. employer located in a Middle Eastern Country. Sarah applies for the branch manager position. Although Sarah is the most qualified person for the position, the employer informs her that it cannot promote her because that country's laws forbid women from supervising men. Sarah files a charge alleging sex discrimination. The employer would have a [Conflicting Foreign Laws Defense] for its actions if the law does contain that prohibition.

Employee Rights When Working for International Employers, EEOC (Apr. 28, 2003), <http://www.eeoc.gov/facts/multi-employees.html>.

50. See *Kern*, 577 F. Supp. at 1197.

51. See *id.*

52. *Id.* at 1198.

53. See *id.*

54. *Id.*

55. *Id.* at 1198-99.

56. *Id.* at 1200. The bona fide occupational exception functions in the same way in that the employer's action would otherwise be illegal under U.S. employment law, but for the exception or the Defense. See *id.*

57. *Id.* at 1201.

58. *Id.* at 1199.

II. Current State of the Law: Congress Stays Silent, but D.C. Circuit Holds “Law” may include “Policies or Practices”

Mahoney v. RFE/RL is the leading case regarding what constitutes “law” in the Conflicting Foreign Laws Defense.⁵⁹ The case covered an ADEA matter, but for this article’s purposes *Mahoney* serves to analyze the Conflicting Foreign Laws Defense under the ADEA, Title VII, and the ADA because the Defense is worded essentially identical in these three U.S. employment laws.⁶⁰ Furthermore, the purpose behind these laws is the same—to protect the employee from discrimination.⁶¹ This part explores how the *Mahoney* district and appellate courts differed on the interpretation of “law” in the Conflicting Foreign Laws Defense. It will explain how the district court correctly deferred to the legislature and read “law” to mean literally “law.” Then this part will discuss the *Mahoney* appellate court decision and how it judicially expanded the definition of “law” to include a foreign state’s “policies or practices.”

A. MAHONEY DISTRICT COURT HOLDS “LAW” MEANS “LAW”

In *Mahoney*, the plaintiffs, U.S. citizens, were employed by a Delaware corporation, Radio Free Europe and Radio Liberty (RFE/RL), whose principal place of business was in Munich, Germany.⁶² The U.S. citizen plaintiffs worked in Munich.⁶³ RFE/RL had voluntarily entered into a collective bargaining agreement with Munich unions.⁶⁴ A provision in the agreement expressly provided for mandatory retirement when employees reached the age of sixty-five.⁶⁵ The provision was widely accepted in Germany because it was “modeled after a nation-wide agreement in the German broadcast industry.”⁶⁶ The employer “concede[d] that it terminated plaintiffs because of their age” and “admit[ted] that its actions would have violated the ADEA,” but for the Conflicting Foreign Laws Defense.⁶⁷

Because Congress amended the ADEA, RFE/RL “initially thought its American employees in Munich would” not have to comply with the collective bargaining agreement’s mandatory retirement age, so it “applied to the ‘Works Council’ for limited exemptions

59. *Mahoney* is the “leading” case in the sense that, to the author’s knowledge, no other case has affirmatively addressed the meaning of “law” in the Conflicting Foreign Laws Defense. It is not “leading” in that other circuits have adopted it. Also, the case law on the Conflicting Foreign Laws Defense is surprisingly small. It is surprising because one would think that because U.S. employment laws expressly have extraterritorial application, more corporations would try to raise the Defense. Perhaps one reason behind the small amount of case law in this area is the undefined and unpredictable nature of the Defense. For example, the district court and the appellate court in *Mahoney* analyzed foreign “law” very differently, which resulted in opposite holdings. Compare *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995), with *Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1, 4 (D.D.C. 1992). Another reason is perhaps that the foreign law often does not actually conflict with U.S. employment law.

60. See 29 U.S.C. § 623(f)(1) (2006); 42 U.S.C. §§ 2000e-1(b), 12112(c)(1) (2006).

61. See 29 U.S.C. § 623(a); 42 U.S.C. §§ 2000e-2(a), 12112(a).

62. *Mahoney*, 818 F. Supp. at 2.

63. See *id.*

64. See *id.* at 3.

65. See *id.*

66. *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995).

67. *Mahoney*, 818 F. Supp. at 3.

from its contractual obligation” under the collective bargaining agreement.⁶⁸ The Works Council reviewed its request and confirmed that “allowing only those employees who were American citizens to work past the age of sixty-five would violate not only the mandatory retirement provision, but also the collective bargaining agreement’s provision forbidding discrimination on the basis of nationality.”⁶⁹ When RFE/RL appealed the Work Council’s rejection of its request to exempt the U.S. employees in Munich, the Munich Labor Court “agreed with the Works Council that RFE/RL must uniformly enforce the mandatory retirement provisions because exemptions would unfairly discriminate against German workers.”⁷⁰ Finally, the Labor Court notified RFE/RL that it could not “[retain] employees over the age of sixty-five.”⁷¹

The plaintiffs proceeded to sue RFE/RL under the ADEA.⁷² The district court ultimately held that it had jurisdiction over the matter and that RFE/RL was liable under the ADEA because it could not successfully raise the Conflicting Foreign Laws Defense.⁷³ The district court found that the Conflicting Foreign Laws Defense did not apply for two reasons. First, because the mandatory retirement provision was “part of a contract between an employer and unions—both private entities—and [had] not in any way been mandated by the German government.”⁷⁴ Second, the provision [did] not have general application, as laws normally do, but [bound] only the parties to the contract.”⁷⁵ Additionally, the court found, “[if] overseas employers could avoid application of the ADEA simply by embedding an age-discriminatory provision in a contract, having a foreign court enforce the contract, and calling the court’s decision ‘law,’ then the Act’s extraterritorial provisions would be largely nullified, for employers could easily contract around the law.”⁷⁶

In concluding that the case did not involve a true conflict of laws, the court emphasized, “[P]ractices and policies, even when embodied in contracts, are not ‘laws.’”⁷⁷ The court also recognized that Congress enacted the ADEA as a “remedial statute” to protect employees from age discrimination in the workplace, so the Defense should be “construed narrowly.”⁷⁸ Notably, especially now in light of *Morrison*,⁷⁹ the district court correctly recognized that because Congress had not expressed any “authority directly on point,” the court would not read “the term ‘laws’ to extend beyond its ordinary meaning.”⁸⁰ In fact, the court acknowledged that Congress had specified “‘policies or practices’ of foreign governments” when it had enacted arms trading legislation.⁸¹ Thus, because Congress only mentioned “laws” and not “policies or practices”—which it could have done and has

68. *Mahoney*, 47 F.3d at 448.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See Mahoney*, 818 F. Supp. at 3.

73. *See id.* at 6.

74. *Id.* at 3.

75. *Id.*

76. *Id.* at 5.

77. *Id.* at 3.

78. *Id.*

79. *See infra* Part III(A).

80. *Mahoney*, 818 F. Supp. at 4.

81. *Id.*

done in the past—the court concluded that the Conflicting Foreign Laws Defense only applied when a foreign state’s “laws” and not simply “policies or practices” were in conflict with the ADEA.⁸²

B. MAHONEY APPELLATE COURT READS “LAW” TO INCLUDE “POLICIES OR PRACTICES”

The appellate court disagreed with the district court and allowed RFE/RL to use the Conflicting Foreign Laws Defense.⁸³ The court reasoned that “[c]ongressional legislation cannot . . . set aside the laws of foreign countries. When an overseas employer’s obligations under foreign law collide with its obligations under the [ADEA], [the Conflicting Foreign Laws Defense] quite sensibly solves the dilemma by relieving the employer of liability under the Act.”⁸⁴

In holding that RFE/RL’s collective bargaining agreement entitled it to use the Defense, the court brushed by the district court’s reasoning⁸⁵ and instead predominantly relied on *Norfolk & Western Railway v. American Train Dispatchers’ Ass’n*.⁸⁶ *Norfolk* recognized that when a rail carrier was exempt “from all other law,” “law” included a “carrier’s legal obligations under a collective-bargaining agreement.”⁸⁷ The Court also recognized that contracts “[have] no legal force apart from the law that acknowledges its binding character”⁸⁸ so “[t]he obligation of a contract is ‘the law [that] binds the parties to perform their agreement.’”⁸⁹

The court also noted that its holding would “agree[] with § 623(f)(1)’s evident purpose—to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates.”⁹⁰ Notably, the court did not mention the larger purpose behind the full ADEA.

III. Analysis: A Doctrinal Look at How the D.C. Circuit Overstepped Judicial Bounds in Mahoney and Upset the Separation of Powers Balance

The D.C. Circuit overstepped its bounds in *Mahoney*. It noted, “[c]ongressional legislation cannot . . . set aside the laws of foreign countries.”⁹¹ This statement is true and would have been applied to *Mahoney* had there been a true conflict between the U.S. law and the foreign law. The problem is that the D.C. Circuit did not provide a convincing argument

82. *Id.*

83. *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450-51 (D.C. Cir. 1995).

84. *Id.* at 450.

85. Notably, the D.C. Circuit never addressed the *expressio unius est exclusio alterius* rationale.

86. *Id.* at 449 (citing *Norfolk & W. Ry. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 127 (1991)).

87. *Norfolk*, 499 U.S. at 127-28.

88. *Id.* at 130.

89. *Id.* at 129 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429 (1934)).

90. See *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995).

91. *Id.*

regarding why the German “policies or practices” were actually “law.”⁹² If the “policies or practices” were in fact not “law,” the *Mahoney* analysis would look something more like Table 2:

Table 2

U.S. Law	Foreign Law	Employer's Action	True Conflict?	Available Conflicting Foreign Laws Defense?
An employer cannot discriminate against employees on the basis of age in the workplace. ⁹³	Unclear.	Employer terminates employees when they reach age 65 solely because of their age. ⁹⁴	No.	No.

U.S. employment laws state plainly that without a true conflict between U.S. employment law and the foreign “law,” the employer cannot raise the Conflicting Foreign Laws Defense.⁹⁵ This article proposes that *Mahoney* did not involve a true conflict because the foreign “law” did not read contrary to U.S. law. As the table shows, a true conflict does not exist because the foreign state does not have a “law” that conflicts with the ADEA. Because no conflict exists, the employer cannot raise the Defense, and the employer would be liable under the ADEA.

Three main doctrinal arguments support this analysis. First, this part analyzes how *Morrison* strengthens the *Mahoney* district court’s reading of the Conflicting Foreign Laws Defense over the appellate court’s reasoning. Next, it supports the district court’s *expressio unius est exclusio alterius* analysis and asks why the D.C. Circuit ignored this part of the district court’s opinion. Finally, this part returns to Congress’s original purpose behind U.S. employment laws, balances it against the sub-purpose behind the Conflicting Foreign Laws Defense, and concludes that the language in the Defense should be read in cohesion with Congress’s original purpose behind U.S. employment laws.

A. MORRISON REINVIGORATES DEFERENCE TO CONGRESS

1. General Overview of Morrison’s Two-Part Test

This article views the question of whether an employer’s actions qualify for the Conflicting Foreign Laws Defense as a matter of prescriptive, not adjudicative, jurisdiction.

92. See *supra* text accompanying notes 86-91. *Norfolk*, the case that the D.C. Circuit relied on, is flawed because how can a contract be the same as law if it relies on law for its legal force? Furthermore, if a contract (here, the collective bargaining agreement) were really law, then parties could simply contract around actual laws. Also, to determine Congress’s intent behind the statute, the court should have looked at the intent behind the whole statute, not simply one part of the whole. See *infra* Part III(c). It should have erred on the side of caution, as did the district court, especially because the purpose behind U.S. employment laws is to protect workers from discrimination. Rather than reading the defense narrowly, as it should have done, the court actually broadly read the text in a way that hurt the individuals whom Congress intended to protect. It is not the court’s job to decide issues of foreign policy.

93. 29 U.S.C. § 623 (2006).

94. See *Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1, 3 (D.D.C. 1992), *rev’d*, 47 F.3d 448 (D.C. Cir. 1995).

95. 29 U.S.C. § 623 (2006) (ADEA); 42 U.S.C. §§ 2000e-1 (Title VII); 12112 (ADA).

This view is distinguishable from the thought that Congress gave the courts jurisdiction over employment law claims, under which the courts engage in a comity analysis of whether the courts should abstain to respect the foreign state's sovereignty.⁹⁶ The analysis should be a question of whether the law had legislative (prescriptive) jurisdiction to begin with. Specifically, the analysis asks whether Congress intended to apply the act to the conduct at issue, not whether the court should decline to apply the act. To determine whether Congress intended the Defense to cover an employer's actions, *Morrison* provides the latest guidance from the U.S. Supreme Court on the applicable canons of statutory construction.

In 2010, the Supreme Court set forth the standard to determine whether an act applies extraterritorially.⁹⁷ The plaintiffs, Australian investors, sued an Australian bank (National Australia Bank Ltd.) and an American company (HomeSide) for conspiring to defraud the Australian investors.⁹⁸ Australia was the location of the Australian bank, the investors who were harmed, and the transaction.⁹⁹ Some fraud occurred in Florida that influenced the stock price, but otherwise the main players and transactions were in Australia.¹⁰⁰

Before *Morrison*, the test for extraterritoriality was the "conduct-and-effects test."¹⁰¹ The Supreme Court moved away from this test and reinvigorated the presumption against extraterritoriality.¹⁰² *Morrison* criticized the various tests that courts had been using as having gutted the presumption against extraterritorial application.¹⁰³ It was more concerned with deference to the legislature; it did not want judges to start putting themselves in Congress's head.¹⁰⁴ The Court's rationale was to place the burden of deciding matters of foreign policy back into the correct branch's purview—that is, the Legislative, and not the Judicial branch.¹⁰⁵ If Congress intends for a certain circumstance to fall under a law, it should "affirmative[ly]" indicate that intent; otherwise, a court should not read into a law

96. In *Hartford Fire Insurance Co. v. California*, U.K. reinsurers had conspired to adversely affect the U.S. reinsurance market. 509 U.S. 764, 770 (1993). The defendants' actions were legal in the United Kingdom, but they would have been a violation of U.S. antitrust laws. *Id.* at 769-70. The issue was whether the Sherman Act applied to the U.K. defendants' conduct that affected the United States. *Id.* at 779. Justice Souter analyzed the problem in terms of adjudicative jurisdiction, namely, because Congress gave the Court jurisdiction over the Sherman Act, the question was whether the Court should abstain as a matter of comity. *Id.* at 794. Justice Scalia, the author of *Morrison*, disagreed and said it was really a matter of prescriptive jurisdiction. Compare *id.* at 795 n.22, with *id.* at 812-20 (Scalia, J., dissenting). Justice Scalia analyzed the question as whether the Sherman Act even reached the conduct to begin with—specifically, whether Congress intended the Sherman Act to apply to the U.K. defendants' conduct. *Id.* at 812-20. This article agrees with Justice Scalia's cleaner analysis that respects the separation of powers.

97. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010).

98. *Id.* at 2875-76.

99. *Id.*

100. See *id.*

101. *Id.* at 2889 ("This test asks '(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon [U.S.] citizens.'") (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008)).

102. See *id.* at 2891-95.

103. See *id.* at 2878-81.

104. See *id.* at 2882-83.

105. *Id.*

an intent that is not there.¹⁰⁶ *Morrison* reinforced the separation of powers between the judiciary branch and the executive and legislative branches.¹⁰⁷

Morrison created a two-part test. First, Congress must have clearly indicated its intent to apply a certain act extraterritorially, or else the presumption against extraterritoriality applies.¹⁰⁸ The indication must be an affirmative indication, which raised the bar by requiring Congress to have actually written the indication in the law.¹⁰⁹ Second, the Court localizes the cause of action by looking at the focus of the statute.¹¹⁰ If the focus is foreign, then the presumption against extraterritoriality applies. *Morrison* localized the transaction to Australia and applied the presumption. In the U.S. employment law context, only part one of the *Morrison* test applies. Part two does not apply because it deals with whether a law applies extraterritorially at all, which Congress has already specified that U.S. employment laws do.

2. *Under Morrison, a True Conflict Cannot Currently Exist Between U.S. Employment Law and Foreign Policies or Practices*

Scholars might be inclined to overlook *Morrison*'s application to certain U.S. employment laws—specifically, the ADA, the ADEA, and Title VII—because Congress has explicitly provided extraterritorial application. But the application is not necessarily as clear as one might think. Specifically, Congress has made clear *whether* these employment laws extend extraterritorially, but have not made clear *when* an employer's actions would qualify for the Conflicting Foreign Laws Defense. As one scholar smartly noted, "A law is only as good, or as powerful, as its exceptions allow it to be."¹¹¹ Because Congress has not indicated that foreign "laws" includes anything other than law in the Conflicting Foreign Laws Defense, the D.C. Circuit essentially engaged in "mak[ing] foreign policy decisions, with the attendant risks of international conflict and the threat of trampling on the executive branch's prerogative to make foreign policy."¹¹²

Now we have the *Morrison* rule to analyze whether a statute applies to a given situation. Courts have indicated that *Morrison* is not limited to only securities law matters.¹¹³ In fact, the rationale behind *Morrison* is even more applicable in the U.S. employment law context than it was to the *Morrison* scenario. *Morrison*'s reasoning is more applicable in this context because here Congress has affirmatively indicated that U.S. employment laws extend extraterritorially, whereas in *Morrison* Congress had not done so with securities laws. Because Congress has in fact considered the extraterritorial application of U.S. em-

106. *Id.* at 2878.

107. *See id.* at 2883.

108. *Id.* at 2877. This article uses the first part of the *Morrison* test to support the notion of deferring to Congress when reading a statute (that is, whether Congress intended the Defense to cover an employer's actions when the foreign policies or practices, but not the foreign law, support that action).

109. *See id.*

110. *See id.* at 2884.

111. See Thomas Wang, Note, *Mahoney v. RFE/RL: An Unexpected Direction for the Foreign Laws Defense*, 30 VAND. J. TRANSNAT'L L. 379, 379 (1997) (abstract).

112. *Id.* at 411.

113. *See Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1, 5 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir. 1995).

ployment laws, and then drafted the Defense in the way that it reads now, courts should read its text even more narrowly than did the Court in *Morrison*.¹¹⁴

B. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

The Latin phrase *expressio unius est exclusio alterius* is “[a] maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.”¹¹⁵ Applying this maxim, if Congress does not use a phrase in a Law A that it uses in Law B, which is a similar law, then by excluding that phrase Congress did not intend it to be in Law A. The *Mahoney* district court recognized this rationale; however, the appellate court did not even address the issue.¹¹⁶ The *Mahoney* district court noted, because Congress has used the phrase “policies or practices” in extending other laws extraterritorially, that Congress simply using “law” and not “law, policies, or practices,” or even merely “policies or practices,” in the Conflicting Foreign Laws Defense indicates Congress did not intend to include “policies or practices” in foreign “law.”¹¹⁷

Courts have long recognized that determining the scope of a law’s application is a matter for Congress, not the courts, to decide.¹¹⁸ In fact, in the U.S. employment law context, the Supreme Court has already recognized that Congress should step in when the law is unclear as to whether it applies extraterritorially in *EEOC v. ARAMCO*.¹¹⁹ Although the Conflicting Foreign Laws Defense by its nature applies extraterritorially,¹²⁰ the great disparity between the *Mahoney* district and appellate court interpretations of foreign “law” shows in itself that the situations under which an employer’s actions qualify for the Defense are contentious.¹²¹ This problem has a simple solution: Because Congress has indicated “policies or practices” in another similar area,¹²² but did not do so here, *expressio unius est exclusio alterius*, courts should not presume that Congress did not intend “law” to mean “law.”

C. HARMONIOUSLY INTERPRETING THE CONFLICTING FOREIGN LAWS DEFENSE IN LIGHT OF THE WHOLE PURPOSE BEHIND U.S. EMPLOYMENT LAWS

“In analyzing a statute’s text, [courts are] guided by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose.”¹²³ The *Mahoney* appellate court recognized the Conflicting Foreign Laws Defense’s “evident pur-

114. See *Morrison*, 130 S. Ct. at 2877–78.

115. BLACK’S LAW DICTIONARY 581 (6th ed. 1991).

116. *Mahoney*, 818 F. Supp. at 4.

117. *Id.*

118. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

119. *Id.* at 259. Congress’s response to *ARAMCO* was to broaden the scope of “employee” to include “[w]ith respect to employment in a foreign country . . . an individual who is a citizen of the United States.” 42 U.S.C. § 2000e(f) (2006).

120. The Conflicting Foreign Laws Defense by its nature applies extraterritorially because it only arises in contexts dealing with U.S. employers (or foreign employers controlled by a U.S. corporation) that operate abroad and employ U.S. employees.

121. See *supra* Part II.

122. The situation is similar in that Congress was amending a law to extend extraterritorially.

123. YULE KIM, CONG. RESEARCH SERV., Order Code 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

pose—to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates.”¹²⁴ The court however fails to ever mention the purpose behind the ADEA, to which the Conflicting Foreign Laws Defense is only a part. The purpose behind the ADEA was to protect individuals, such as the plaintiffs in *Mahoney*, from age discrimination in the workplace.¹²⁵ Because Congress’s purpose behind the ADEA is clear, and because Congress chose to use “law” rather than “laws, policies, or practices” in the Defense, the D.C. Circuit should have read the “ambiguous”¹²⁶ part of the law in a way that “further[ed] [the ADEA’s] purpose.”¹²⁷

The *Mahoney* decision has set a “troubling precedent” for the standard for extraterritorial application of U.S. employment laws.¹²⁸ Different interests at play in this decision include:

[T]he interest in eliminating employment discrimination against U.S. citizens, the legitimate desire of foreign states to regulate their domestic workplaces,¹²⁹ the potential for international disputes stemming from jurisdictional or cultural overreaching by the United States, the rational impulse of U.S. companies to avoid being caught in conflicting social and legal regimes, and the reluctance of U.S. courts to become involved in international policy making.¹³⁰

Although the decision takes into account the interests of the parties, the D.C. Circuit seemed to focus more on the employer’s burden rather than the employees’ individual rights. This unequal balancing of interests is contrary to Congress’s intent behind the ADEA, which was to protect employees from discrimination in the workplace.¹³¹

IV. Recommendation

Working within the current state of the law courts can preserve Congress’s intent behind U.S. employment laws by strictly adhering to the rationale behind *Morrison*. An immediate recommendation that can be implemented the next time a Conflicting Foreign Laws Defense case reaches federal court would be to follow the rationale behind *Morrison* and to defer to the legislature when analyzing “ambiguous” terminology, such as foreign “law” in the Defense. Regarding the *Mahoney* appellate decision, in light of the canons of statutory construction that weigh in favor of deferring to Congress in reading what “law” means, courts should recognize that *Mahoney* is operating outside of the correct state of

124. *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995).

125. See 29 U.S.C. § 623 (2006) (ADEA).

126. The author does not believe the term foreign “law” is ambiguous, but because the courts have struggled with its interpretation, it will treat the word as such in giving recommendations. See *supra* text accompanying note 16.

127. See *supra* text accompanying note 122.

128. See Wang, *supra* note 111, at 410.

129. This article recognizes that the problem of unequal treatment of U.S. citizen versus non-U.S. citizen employees might arise if the employer were to comply with U.S. law regarding the U.S. citizen; however, the alternative of not protecting either employee is not preferable. If the United States can operate within the law and protect its citizen, this article supports taking the required action to do so.

130. Wang, *supra* note 111, at 381.

131. See 29 U.S.C. § 623 (2006).

the law. This solution will not only provide more predictability for U.S. employees and employers, but also for the foreign states out of which these U.S. corporations operate. Then the foreign states will be on notice that if their policies or practices are so important to them that they would want to enforce them against U.S. employees and employers in their state, then they should enact “blocking laws” that would achieve this purpose.¹³² Because these issues often confront the foreign jurisdiction’s religious beliefs¹³³ or accepted customs, these circumstances are often hotly political and controversial.¹³⁴ For this reason, the political branches should be the voice that acknowledges what is foreign “law,” not the courts, which as this article demonstrates, might muddy the waters even more through inconsistent interpretations.¹³⁵

One might point out problems in this recommendation for several reasons. First, one might argue that strict deference to the legislature is neither realistic nor desirable in certain circumstances because it may be that Congress actually intended the law to apply to the scenario and thought that the courts would be able to discern that intent. Second, one might argue that so much deference to the legislature undermines the court’s authority to enforce the law. Finally, some might read Congress’s silence on the matter after *Mahoney* as an indication that it supports the decision’s holding.

To respond to these concerns, although this article acknowledges this solution is not perfect, an immediate recommendation to give more deference to the legislature is preferable to alternative solutions. The U.S. Supreme Court has evidenced that it supports the presumption against extraterritoriality (and more importantly, deference to Congress and the separation of powers balance), especially where Congress has evidenced its intent.¹³⁶ Here, Congress has evidenced its intent to apply the ADA, the ADEA, and Title VII extraterritorially.¹³⁷ Furthermore, Congress has not affirmatively indicated that the term “law” should include anything other than the term’s ordinary meaning. Thus, even if Congress’s silence since *Mahoney* did imply that Congress supported its decision to include “policies or practices” in “law,” *Morrison* shows us that Congress must still “affirmative[ly]” indicate this intent.¹³⁸ Following another canon of statutory construction, *expressio unius est exclusio alterius*, because Congress has used the phrase “policies or practices” when extending another law extraterritorially, but did not use that same phrase here, courts should view this as Congress not intending to include the phrase in this

132. See Wang, *supra* note 111, at 406.

133. For example, “Muslim law is not an independent branch of knowledge or learning, but is a facet of the Islamic religion itself. In many cases, it is difficult to separate Islamic law from Islamic theology.” Smith, *supra* note 17, at 211 (citing David Suratgar, *The Development of the Legal Systems of the Middle East; Islamic Law and the Importance of Civil Law to the Process of Modernization*, in *An Introduction to Business in the Middle East* 1, 3 (Brian Russell ed., 1976)). Note, however, that sometimes the foreign state will recognize religion as a source of legislation, even “instruct[ing] judges to fill any gaps in the codes according to the principles of Muslim law.” *Id.* at 211 n.143 (“For example, the Constitution of Kuwait states: ‘The religion of the State is Islam, and Islamic Sharia shall be a main source of legislation.’”) (citing KUWAIT CONST. art. II, translated in 10 Albert Blaustein & Gilbert H. Flanz, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: KUWAIT* 12 (1991)).

134. See, e.g., *id.* at 208.

135. See *supra* Part II(B).

136. *Morrison v. Nat’l Austrl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

137. See 29 U.S.C. § 623 (2006) (ADEA); 42 U.S.C. §§ 2000e-1 (Title VII); 12112 (ADA).

138. *Morrison*, 130 S. Ct. at 2877.

law.¹³⁹ Finally, one might alternatively argue that we should just let the standards for the Defense play out in the courts—that we should let the courts formulate the rules on a case-by-case basis. This alternative is not desirable because it would weave an unpredictable web around the Defense.¹⁴⁰

The court should place emphasis on the employer's burden when there is a true conflict between the U.S. law and the foreign law; however, this was not the situation in *Mahoney*. In fact, "the German government had expressed no opinion on the controversy," and scholars have noted, "[I]t does not appear that deciding to force RFE/RL to comply with the ADEA would have implicated any delicate foreign policy matters."¹⁴¹ When even the foreign state has not established whether the matter at issue is "law," our courts should not do that job for them without an affirmative indication from Congress.¹⁴²

Conclusion

Although Congress had never indicated that "laws" in the Defense implies anything other than the ordinary reading of the word "laws," *Mahoney* nonetheless found that the "policies or practices" of the foreign state constituted "laws." Because the foreign state's "policies or practices" conflicted with U.S. employment laws, *Mahoney* allowed the employer to raise the Defense even though its actions would have otherwise been a violation of the ADEA.

The court's analysis was flawed for three doctrinal reasons. First, in light of *Morrison*, which reinvigorated deference to Congress and the separation of powers balance, the court was wrong to read more into the Defense than was actually in the text. Second, because Congress included "policies or practices" in a similar law, but chose only to include "law" in the Defense, under the maxim of statutory construction *expressio unius est exclusio alterius*, "law" means "law." Finally, harmoniously reading the intent behind the Defense and U.S. employment laws, even if the court struggled with the term foreign "law," it should have interpreted the Defense in conformity with the intent to protect employees from discrimination in the workplace.

Doctrine firmly supports courts' narrow interpretation of the Conflicting Foreign Laws Defense until Congress affirmatively indicates otherwise. Therefore, courts should read the term foreign "law" in the Defense to only include law, excluding policies and practices. If courts adhere to *Morrison*'s rationale, the courts' interpretations will become uniform and continue to uphold the intent behind the U.S. employment laws.¹⁴³

139. See *supra* Part III(B).

140. See *Morrison*, 130 S. Ct. at 2881.

141. Wang, *supra* note 111, at 410 (citing *Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1, 6 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir. 1995)).

142. See *Morrison*, 130 S. Ct. at 2877-78.

143. See *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995); see also Wang, *supra* note 111, at 411-12.

