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EMPLOYMENT DISCRIMINATION—MAHONEY v. RFE/RL, INC.: THE "FOREIGN LAWS" EXCEPTION TO THE ADEA—WHEN A COLLECTIVE BARGAINING AGREEMENT EQUALS A LAW

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INTRODUCTION

In recent years, the extent to which American laws should be given extraterritorial application has been debated by both Congress and the Supreme Court. Federal agencies have also entered this debate by providing opinions as to whether certain laws are intended to have effect outside the United States. Often, these federal institutions disagree over whether to afford extraterritorial effect. In the 1990s, on at least one occasion, conflicting views resulted in the congressional overruling of a Supreme Court decision limiting a statute to territorial effect.[1]

In the area of employment discrimination law, this debate has resulted in significant changes in the application of United States laws overseas. Congress has attempted, as much as possible, to provide American workers who are employed by American companies in foreign countries substantive protections from employment discrimination similar to those afforded to domestic workers. Many thousands of Americans work for American companies in foreign countries and these employees are particularly interested in the extent to which United States employment discrimination laws provide them with protection. Yet, it can be difficult and problematic to extend American law beyond our territorial borders. Experience tells us that what is legal or customary in one country might be illegal in a different country. Potential problems exist when United States employment discrimination laws conflict with the laws or customs of a foreign nation.

Congress, in an attempt to limit this possible conflict, frequently includes exclusionary clauses in United States laws so that American employers are not required to comply with American law when doing so would violate the law of the foreign country of operation. When such a conflict arises, it is not always clear that the foreign law or custom equates with a law as defined in the United States. This anomaly presents a problem with no easy solution.

1. *See infra* notes 13-17 and accompanying text.

This Note will analyze the extraterritorial, or foreign, application of the Age Discrimination in Employment Act of 1967 ("ADEA").[2] This Note will discuss the "foreign laws" exception to the ADEA through a recent case of the United States Court of Appeals for the District of Columbia Circuit, *Mahoney v. RFE/RL, Inc.*[3] Specifically, this Note will consider whether an enforceable provision in a foreign collective bargaining agreement satisfies the requirements for exclusion from coverage of the ADEA.

Part I of this Note will discuss both the text and the legislative history of the ADEA, as well as the important cases that provide the basis for understanding the reasoning used in *Mahoney*. Additionally, the opinion of the administrative agency charged by Congress with the responsibility for enforcing the ADEA will be discussed. Part II will discuss both the lower court and appellate court decisions in *Mahoney*. Finally, in Part III, the Note will attempt to rationalize the prior case law and *Mahoney* in an effort to resolve the issue in this Note. Part III will additionally propose an alternative method of resolving the issue in *Mahoney*.

I. THE LAW, THE AGENCY, AND THE COURT

Prior to the enactment of Title VII of the Civil Rights Act of 1964 ("Title VII"),[4] the laws of the United States provided little or no protection for individuals against employment discrimination. With the enactment of Title VII, Congress provided the first substantive protection to workers from discrimination on the basis of race, color, religion, sex, or national origin.[5] Initially, Congress did not address discrimination on the basis of age when it enacted Title VII. In 1967, however, Congress passed the ADEA, providing protection to American workers from age-based job discrimination.[6]

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2. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

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

4. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

5. *See* 42 U.S.C. § 2000e-2(a)(2) (1994). For a more detailed discussion of the creation of Title VII and its provisions, see generally Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Steven K. Sanborn, Note, Miller v. Maxwell's International, Inc.: *Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143 (1995).

6. The major substantive provision of the ADEA, found at 29 U.S.C. § 623(a) (1994), makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discrimi-

The coverage provisions of the ADEA paralleled Title VII, but the remedial provisions paralleled those of the Fair Labor Standards Act ("FLSA").[7]

A. *Statutory History*

As enacted in 1967, the ADEA included no specific provision stating that the Act's scope of coverage applied extraterritorially. The prevailing view in the courts was that the ADEA incorporated section 13(f) of the Fair Labor Standards Act, which stated that "any employee whose services during the workweek are performed in a workplace within a foreign country" was not covered by the FLSA.[8] The result of this view was to limit application of the ADEA to the territorial United States. In 1984, to counteract this narrow interpretation of the age discrimination statute, Congress amended the ADEA to achieve extraterritorial effect.[9]

Specifically, Congress amended the definition of an "employee" to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."[10] To avoid placing employers in an impossible situation, Congress amended section 623(f)(1) of the ADEA to include an avoidance provision for employers when compliance with the ADEA would force the employer to violate "the laws of the [foreign] country."[11] Although the intention to extend ADEA cover-

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nate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

7. 29 U.S.C. §§ 201-219 (1994). See Sanborn, *supra* note 5, at 150-51 & nn.53, 54, 56, & 61 for a discussion of the relationship between the ADEA and the FLSA.

8. 29 U.S.C. § 213(f) (1994). The leading case to hold that the ADEA did not apply overseas because of the incorporated FLSA provision was *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). For detailed discussions of the extraterritorial provisions of the ADEA and other employment statutes, see Derek G. Barella, Note, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889 (1994).

9. *See* Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a)-(b), 98 Stat. 1767, 1792 (codified at 29 U.S.C. §§ 623(f)(1) & 630(f) (1994)).

10. 29 U.S.C. § 630(f) (1994).

11. § 623(f)(1). Section 623(f)(1) makes it not unlawful for an employer
to take any action otherwise prohibited under [the ADEA] . . . where such practices involve an employee in a workplace in a foreign country, and compli-

age abroad is clearly stated by the 1984 amendment, legislative intent in using the phrase "the laws of the country" is lacking. However, congressional direction may be found in subsequent amendments to other employment laws which created an extraterritorial effect.

In 1991, the Supreme Court held that Title VII did not apply extraterritorially, in spite of the argument to the contrary by the Equal Employment Opportunity Commission ("EEOC"),[12] the agency charged with enforcement of the ADEA. In the case of *EEOC v. Arabian American Oil Co.*,[13] in holding for the respondent-employer, the Supreme Court applied for the first time a "clear-statement rule" regarding extraterritorial application of any laws of the United States.[14] This rule required Congress to clearly state an intention to provide extraterritorial effect in order to overcome a strong presumption against extraterritorial application of United States law.[15]

> ance with [the ADEA] . . . would cause such employer . . . to violate the laws of the country in which such workplace is located.

Id.

12. See *infra* Part I.B.1 for a discussion of the EEOC's authority and Part I.B.3 for the standard of deference accorded to the EEOC regarding its interpretive guidelines.

13. 499 U.S. 244 (1991).

14. *See id.* at 248. In his dissent in *Arabian American*, Justice Marshall emphasized the significance of the Court's new policy. "The majority converts the presumption against extraterritoriality into a clear-statement rule . . . ." *Id.* at 263 (Marshall, J., dissenting). Justice Marshall argued that the majority had extended the mere presumption, which could be overcome by implicit legislative intention, to the clear-statement rule, which is irrebuttable without explicit congressional wording to the contrary. *See id.* at 261-66 (Marshall, J., dissenting). Justice Marshall argued that the proper standard was the weaker presumption standard, which would have accommodated his view that Title VII applied extraterritorially. *See id.* at 266-71 (Marshall, J., dissenting).

For discussions on the difference between presumptions and clear-statement rules, see McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (extraterritorial effect not given to National Labor Relations Act; clear congressional statement was needed because extraterritoriality of the statute would violate international law and State Department regulations); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) ("the affirmative intention of the Congress clearly expressed" was necessary before extraterritorial effect given to a statute involving a very "delicate field of international relations"); and Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (the presumption against extraterritoriality derives from "[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States").

15. *See Arabian Am.*, 499 U.S. at 248. In a strong dissent, Justice Marshall argued that enough evidence existed in the legislative history to establish legislative intent to extend Title VII protection to Americans overseas. *See id.* at 266-75 (Marshall, J., dissenting). Justice Marshall also emphasized the EEOC's broad interpretation of Title VII's coverage, as well as the "long-standing interpretation of the Department of Jus-

When *Arabian American* was decided, Congress was in the process of amending Title VII. In order to overturn the Supreme Court's holding in *Arabian American*, Congress chose to include in the Civil Rights Act of 1991[16] a grant of extraterritorial effect to Title VII.[17]

In order to satisfy the Supreme Court's "clear-statement rule," Congress explicitly included in the amended Title VII definition of employee: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[18] Furthermore, Congress included in the 1991 amendments an exclusion provision almost identical to section 623(f)(1), which allowed employers to avoid Title VII if doing so would require the employer to violate foreign law.[19]

Although the intent to extend coverage of Title VII was expressed clearly in the amendment and the accompanying legislative history, far less clear was the scope of the provision providing employers with a foreign law defense. Congress gave no direct clues as to how to interpret the word "law" in the amendment. Since there was no legislative guidance on the meaning of the "law" of the for-

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tice, the agency with secondary enforcement responsibility under Title VII," which "reinforced" the EEOC's position. *Id.* at 276 (Marshall, J., dissenting). Interestingly, Justice Marshall quoted former Assistant Attorney General Antonin Scalia, who in a 1975 speech to the Senate Subcommittee on International Finance stated that Title VII implicitly applied "to the employment of United States citizens by covered employers anywhere in the world." *Id.* at 277-78 (Marshall, J., dissenting). In his concurring opinion in *Arabian American*, however, Justice Scalia argued that the EEOC's interpretation was not reasonable in light of the newly created "clear-statement rule" because "mere implications from the statutory language" could not satisfy the congressional burden. *Id.* at 260 (Scalia, J., concurring).

16. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., 42 U.S.C. (1994)).

17. *See* Martin Adler, Note, *Nailing Down the Coffin Lid: The Rise and Fall of the After-Acquired Evidence Doctrine in Title VII Litigation*, 39 N.Y.L. SCH. L. REV. 719, 734 (1994) ("The [Civil Rights Act of 1991] legislatively overruled [the *Arabian American*] decision . . . .").

18. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 2000e(f) (1994)).

19. The amendment states:

> It shall not be unlawful under [Title VII] for an employer . . . to take any action otherwise prohibited by [Title VII], with respect to an employee in a workplace in a foreign country *if compliance* with [Title VII] *would cause such employer . . . to violate the law of the foreign country* in which such workplace is located.

Id., § 109(b), 105 Stat. at 1077 (codified as amended at 42 U.S.C. § 2000e-1(b)) (emphasis added).

eign country within Title VII, one can draw no inference as to the meaning of the "laws" within the ADEA.

B. *Agency Guidance on What Constitutes a "Law"*

The Equal Employment Opportunity Commission is the primary federal agency charged with the duty of enforcing United States employment discrimination laws, including the ADEA.[20] Since the phrase "laws of the country" in section 623(f)(1) of the ADEA is not facially clear and Congress provided no explicit definition for the phrase, the EEOC's definition of the phrase is potentially helpful and relevant. Initially, this section will detail the role of the EEOC in interpreting the ADEA. Next, the EEOC's definition of "the laws of the country" will be discussed. To determine the importance of the EEOC's definition of section 623(f)(1), this section will conclude by discussing the extent to which EEOC opinions should be recognized and enforced by the courts.

1. The Role of the EEOC under the ADEA

When Congress originally enacted Title VII in 1964, it created the EEOC.[21] The statutory text of Title VII indicates that Congress intended the EEOC to help administer[22] and enforce the statute's mandates.[23] Congress did not, however, provide the EEOC with broad enforcement abilities. Section 706, entitled "Enforcement Provisions," gives the EEOC the power to investigate charges of violations of Title VII.[24] The EEOC must first notify the employer against whom the charge is made of such charge.[25] Thereafter, if the EEOC concludes after investigating "that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, [and/or] persuasion."[26]

Congress did not provide the EEOC with the legislative au-

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20. See *infra* Part I.B.1 for a discussion of the role of the EEOC under Title VII and the ADEA.

21. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (codified as amended at 42 U.S.C. § 2000e-4).

22. *See id.* (codified as amended at 42 U.S.C. § 2000e-4) (providing the make-up, powers, and obligations of the Commission).

23. *See id.* § 706, 78 Stat. at 259 (codified as amended at 42 U.S.C. § 2000e-5) (providing the enforcement mechanism of the Commission).

24. *See id.* (codified as amended at 42 U.S.C. § 2000e-5(b)).

25. *See id.* (codified as amended at 42 U.S.C. § 2000e-5(b)).

26. *Id.* (codified as amended at 42 U.S.C. § 2000e-5(b)).

thority to promulgate regulations, which carry the force of law. Instead, Congress implicitly authorized the EEOC to create interpretive guidelines by allowing an employer to avoid Title VII liability if the employer relied in good faith on "any written interpretation or opinion of the [EEOC]."[27] Under a guideline, an administrative agency provides its view of the meaning of a statutory provision.[28]

When Congress enacted the ADEA in 1967, it included substantially the same grant of authority to the EEOC as it granted under Title VII.[29] The EEOC was, however, authorized to make independent investigations for possible ADEA violations, in contrast to the Title VII requirement of the existence of a charge.[30] Similar to Title VII, the EEOC has implicit authority to promulgate interpretive guidelines of the ADEA. Section 626(e) of the ADEA incorporates a provision of the Portal-to-Portal Act,[31] which provides an employer with a defense based upon a good faith "reliance on any written administrative regulation, order, ruling, approval, or interpretation of the [enforcing] agency."[32]

2. EEOC's Interpretation of Section 623(f)(1)

On March 3, 1989, the EEOC made its first official statement on the extraterritorial application of the ADEA by issuing policy guidelines.[33] In the publication, which was signed by EEOC Chair-

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27. Civil Rights Act of 1964, § 713(b), 78 Stat. at 265 (codified at 42 U.S.C. § 2000e-12(b)).

28. For a discussion of the difference between regulations, called "legislative rules," which carry the force of law, and "interpretive rules," which explain how an agency will construe and enforce a statute, see 2 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 36 (2d ed. 1978).

29. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7(a)-(e), 81 Stat. 602, 604-05 (codified as amended at 29 U.S.C. § 626(a)-(e) (1994)). Although, as previously stated, the remedial provisions in the ADEA were based not on Title VII, but instead on the Fair Labor Standards Act, *see supra* text accompanying note 7, *see also* Sanborn, *supra* note 5, at 150-51 & nn.53, 54, 56, & 61, the provisions providing for the filing of a charge with the agency, agency notice, and subsequent attempted agency reconciliation are functionally the same. *See* Age Discrimination in Employment Act of 1967, § 7(a)-(e), 81 Stat. at 604-05 (codified as amended at 29 U.S.C. § 626(a)-(e)).

30. *See* § 7(a), 81 Stat. at 604 (codified as amended at 29 U.S.C. § 626(a)).

31. *See* § 7(e), 81 Stat. at 605 (codified as amended at 29 U.S.C. § 626(e)) (incorporating § 10 of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, 89 (current version at 29 U.S.C. § 259)).

32. Portal-to-Portal Act of 1947, 61 Stat. at 89 (current version at 29 U.S.C. § 259).

33. *See* Policy Guidance: *Application of Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act (EPA) of 1963 to American Firms Overseas,*

man Clarence Thomas, the EEOC acknowledged the potential for conflicts of laws due to the overseas coverage of the ADEA without discussing what the Commission considered a valid defense under section 623(f)(1).[34] Later in 1989, however, the EEOC issued a second set of guidelines that considered in detail the question that had been overlooked in the original release.[35]

Initially, the policy guidelines acknowledged the lack of direction from Congress on what constitutes a "law," stating: "[t]he ADEA, as well as the legislative history interpreting the Act, is silent as to what constitutes a 'law' for purposes of setting forth a [section 623(f)(1)] defense."[36] The EEOC's second release on section 623(f)(1) provided five hypothetical examples intended to aid in construing the "foreign laws" exception. The second, third, and fourth examples provided guidance on what the EEOC considered the word "law" to mean in the statute. The first and fifth examples concerned other issues relating to the statutory provision.[37]

The second example involved company created provisions. For the sake of clarity, the EEOC prefaced the example by stating that "[a] 'law,' however, clearly does not include a corporation/business's rules, regulations or policies of employment."[38] The example read as follows:

> *Example 2* — CP is a 64-year-old United States citizen working in the country of Xenon for R, a United States business concern. At the annual stockholders meeting, an amendment to the corporate charter is adopted whereby the corporation must reduce any employee's salary by 25% upon their reaching the age of 65. The Xenon Civil Code provides that all corporate charters and amendments to corporate charters must be registered with the Department of Commerce. Two weeks later R notifies CP of its intent to reduce CP's salary upon CP's reaching the age of 65.

Their Overseas Subsidiaries, and Foreign Firms, 2 EEOC Compl. Man. (CCH) ¶ 2165 (Mar. 3, 1989).

34. *See id.* at 2308-09.

35. *See* Policy Guidance: *Analysis of the Sec. 4(f)(1) "foreign laws" Defense of the Age Discrimination in Employment Act of 1967*, 2 EEOC Compl. Man. (CCH) ¶ 6524 (Dec. 5, 1989).

36. *Id.* at 5121.

37. Example 1 indicated that domestic coverage of the ADEA included all 50 states, the District of Columbia, and all United States territories and possessions. In all of the listed places, the "foreign laws" defense was inapplicable. *See id.* Example 5 indicated that in order to invoke the "foreign laws" defense, an employer must be forced to violate the law of the specific country in which the employee works, not a separate country with which the employer has contact. *See id.* at 5124.

38. *Id.* at 5121.

> CP then files a charge of age discrimination with the Commission. In response to CP's charge, R asserts a sec. [623(f)(1)] "foreign laws" defense as CP's continued employment at a non-reduced wage would violate its government registered company charter.
>
> R's defense would fail in this instance as the provisions of R's government registered company charter do not rise to the level of a foreign law under sec. [623(f)(1)].[39]

This example indicated that section 623(f)(1) only protected employers who would be forced to violate a law imposed by the government. A self-imposed obligation, even one that received foreign government recognition, would not provide an employer with a defense.

The next relevant example involved the issue of the timing of the enactment of foreign legislation that would create an otherwise valid defense to the ADEA.

> *Example 3* — Assume for purposes of this example that the Republic of Argon's Constitution provides that only a bill which passes both houses of the legislature shall have the force and effect of law within the boundaries of the country. Due to overwhelming public support by voters in Argon a measure is introduced and passed in the lower house of government that requires an employer to retire employees at the age of 55. CP is a 57-year-old United States citizen working in Argon for R, an American corporation. R notifies CP of its decision to retire CP immediately. CP then files a charge of age discrimination with the Commission. Two weeks later the upper house of government passes the mandatory retirement bill. R responds to CP's charge by asserting a sec. [623(f)(1)] "foreign laws" defense grounded in the recently adopted mandatory retirement law.
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> A sec. [623(f)(1)] defense would not be available to R under these circumstances as no mandatory retirement law existed at the time of R's decision to terminate CP, i.e., only one house had approved the measure. Of course, since the bill later became law, it could well have a limiting effect on the available relief, e.g., reinstatement would not be feasible.[40]

This example highlighted the requirement by the EEOC that a "foreign law" be fully in force before an employer can seek protection under the defense provision. Additionally, this example implicitly prohibited employers from relying on any foreign

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39. *Id.* at 5121-23.
40. *Id.* at 5122.

government enactment that did not achieve "the force and effect of law."

The last relevant example stressed a direct causation requirement before an employer could receive the protection of the "foreign laws" defense.

> *Example 4* — Assume for purposes of this example that a Thorium law requires employers to pay an annual fee of $50 for every active employee age 65 or above. This fee is used to fund Thorium's program to provide workers' compensation benefits. While the program is available to all employees in the country, Thorium has determined that the greater frequency and amount of benefits paid to persons 65 and older justifies the assessment. R, a United States employer operating in Thorium, employs 50 U.S. citizens, 10 of whom are 65 or above. On the last pay period of the year, in addition to normal deductions, R subtracts $50 from the paycheck of each person 65 or above. In responding to charges of age discrimination filed by the 10 older workers, R asserts that compliance with the ADEA (not deducting additional money from the wages of older workers) would cause it to violate a law of Thorium.
>
> R's foreign law defense would fail in this hypothetical situation because treating employees of all ages equally with respect to their compensation as required by the ADEA would not "cause" a violation of Thorium law. The law in question does not *require* that individual employees 65 and above be assessed the fee. Indeed, the Thorium law is entirely silent with respect to the source of the levy. R had the option of paying the $500 itself or pro rating the amount deducted among all of its employees. Since either course of action would have satisfied the requirements of the ADEA without causing R to violate Thorium law, R's sec. [623(f)(1)] defense would fail.[41]

In effect, this example prevented employers from arguing that the excessive cost, difficulty, or burden of complying with a foreign law would require the employer to violate that law.

Read together, the examples from the guidelines indicated an EEOC intention that the "foreign laws" exception should be construed narrowly. Example 2 indicated that the "law" which causes a conflict must come directly from the foreign government, rather than from the employer. The exclusionary provision should not protect an employer whose own actions created the conflict. Example 3 indicated that employers should only rely on fully and prop-

41. *Id.* at 5123 (emphasis added).

erly enacted laws. Employer reliance on anything less than an enacted provision would be improper. Finally, Example 4 indicated that an employer could not avoid complying with the ADEA because a foreign law made compliance difficult or inconvenient. The EEOC therefore required that it be impossible to simultaneously comply with the ADEA and the foreign law.

3. Standard of Deference Owed to the EEOC

Since the EEOC had published an interpretation of section 623(f)(1) of the ADEA, the important question is what effect that opinion deserves. Initially, the limited legislative authority of the EEOC affects this question.[42] Since the EEOC cannot promulgate regulations with the force of law, courts and writers alike claim that the EEOC should not receive the highest level of judicial deference.[43] Two landmark decisions regarding administrative agency deference provide separate rules of law to debate.

The first case, *Skidmore v. Swift & Co.*,[44] provided direction to courts faced with interpretive guidelines. The Supreme Court held that "rulings, interpretations and opinions of [an agency] . . ., while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[45] The Court then created a four factor test which courts should use to determine "[t]he weight of such [interpretive guidelines] in a particular case": (1) "the thoroughness evident in its consideration," (2) "the validity of its reasoning," (3) "its consistency with earlier and later pronouncements," and (4) "all those factors which give it power to persuade, if lacking power to control."[46]

In 1984, the Supreme Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[47] In *Chevron*, the Court adopted a new two-part test to determine whether to afford deference to an administrative agency rule with the force of law.[48] First,

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42. For a discussion of the authority of the EEOC and its ability to issue guidelines, see *supra* notes 21-32.

43. *See generally* John S. Moot, Comment, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213 (1987); Jamie A. Yavelberg, Note, *The Revival of* Skidmore v. Swift*: Judicial Deference to Agency Interpretations After* EEOC v. ARAMCO, 42 DUKE L.J. 166 (1992).

44. 323 U.S. 134 (1944).

45. *Id.* at 140.

46. *Id.* Hereinafter, this test will be referred to as the *Skidmore* test.

47. 467 U.S. 837 (1984).

48. *See id.* Hereinafter, this test will be referred to as the *Chevron* test. See also

a court must look to a statute to determine if it is clear and unambiguous.[49] If so, the court then applies this clear meaning without concerning itself with an agency's view.[50] If the statute is ambiguous, then the court, in step two, defers to any agency rule so long as it is reasonable.[51] The effect of the second step is to prevent a court from "substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by" an agency.[52] In the case of EEOC guidelines, the issue is whether the *Chevron* test supplants the *Skidmore* test even though *Chevron* referred to rules with full legislative effect.[53]

In attempting to determine the proper deference that should be given to EEOC guidelines, two recent Supreme Court cases focus on the issue, without giving any precise answers. In 1988, the Supreme Court decided *EEOC v. Commercial Office Products Co.*,[54] in which the Court analyzed an EEOC interpretation of Title VII. In finding that deference was appropriate in that case, the Court applied a standard in agreement with the *Chevron* test. The Court stated that "it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards."[55] Rather, the Court stated, "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[56] This approach was consistent with several previous Supreme Court decisions on deference to EEOC guidelines.[57]

Three years later, the Supreme Court confronted the issue of the extraterritorial effect of Title VII in *EEOC v. Arabian Ameri-*

Yavelberg, *supra* note 43, at 173-75 for a further discussion of *Chevron* and its affect on *Skidmore*.

49. *See Chevron*, 467 U.S. at 842-43.

50. *See id.*

51. *Id.* at 844-45.

52. *Id.* at 844.

53. Prior to *Chevron*, the Supreme Court treated EEOC guidelines inconsistently. *Compare* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) *and* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (EEOC's interpretive guidelines "entitled to great deference") *with* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (using the *Skidmore* test to conclude the Court would not defer to a particular EEOC guideline). If *Chevron* does supplant *Skidmore*, any reasonable EEOC interpretation of an ambiguous statute would receive deference.

54. 486 U.S. 107 (1988).

55. *Id.* at 115.

56. *Id.*

57. See *supra* note 53 for examples of earlier cases granting the EEOC deference.

can Oil Co.[58] The majority of the Court ignored the holding of *Commercial Office Products* and instead cited to a 1976 case, *General Electric Co. v. Gilbert*,[59] that did not use the "great deference" standard.[60] Applying *Gilbert*, the Court stated that the proper standard of deference to EEOC guidelines was the *Skidmore* test[61] and the EEOC's interpretation "[did] not fare well under [the *Skidmore* test]."[62] Earlier in its opinion, however, the Court had held that Title VII did not express a clear legislative intention to create extraterritorial effect.[63] Since the "clear-statement rule"[64] was not satisfied, the proper degree of deference to be afforded to the EEOC was not central to the Court's holding.

In concurrence, Justice Scalia argued that the *Chevron* reasonableness test was the appropriate standard for evaluating EEOC guidelines, but that the EEOC's interpretation of Title VII as applying overseas was unreasonable in light of the "clear-statement rule" against extraterritorial application of American laws.[65] Justice Scalia argued that *Commercial Office Products* rather than *Gilbert* was the correct pronouncement on deference to the EEOC's interpretive guidelines.[66] Justice Scalia explained that the approach in *Gilbert* of affording limited deference to EEOC guidelines resulted from a dated view that a distinction should be made between rules with and without the force of law.[67] In dissent, Justice Marshall agreed that the proper deference standard was to be found in *Commercial Office Products*, but disagreed with both the majority and concurrence that the EEOC's position was unreasonable.[68]

C. *United States Supreme Court Guidance on What Constitutes a "Law"*

In addition to agency interpretation of the meaning of "foreign laws" in the ADEA, another source for construing the phrase is

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58. 499 U.S. 244 (1991). See *supra* notes 13-17 for a discussion of *Arabian American*.

59. 429 U.S. 125 (1976).

60. *See Arabian Am.*, 499 U.S. at 256-57.

61. See *supra* note 46 and accompanying text for the *Skidmore* factors.

62. *Arabian Am.*, 499 U.S. at 257.

63. *See id.* at 248-53.

64. See *supra* notes 13-15 and accompanying text for a discussion of the clear-statement rule.

65. *See Arabian Am.*, 499 U.S. at 260 (Scalia, J., concurring).

66. *See id.* (Scalia, J., concurring).

67. *See id.* at 259-60 (Scalia, J., concurring).

68. *See id.* at 274-78 (Marshall, J., dissenting).

existing decisional law. This section will discuss two Supreme Court cases that have interpreted similarly written statutory provisions contained in statutes other than the ADEA.

1. *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*[69]

In *Norfolk & Western*, the Supreme Court agreed to hear two consolidated cases from the United States Court of Appeals for the District of Columbia Circuit that had similar factual and procedural histories, and a common legal question.[70] At issue in *Norfolk & Western* was a clause in the Interstate Commerce Act ("ICA"),[71] section 11341(a), that exempted a rail carrier from "the antitrust laws and from all other law, including State and municipal law."[72]

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69. 499 U.S. 117 (1991).

70. The two cases were collectively called *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989). The first case, *Norfolk S. Corp.— Control—Norfolk & W. Ry. Co. and S. Ry. Co.*, 366 I.C.C. 173 (1982), involved the acquisition by NWS Enterprises, Inc. of the Norfolk and Western Railway Company and the Southern Railway Company. The Interstate Commerce Commission ("ICC"), pursuant to its authority, initially approved the railroad acquisitions. Subsequently, a dispute arose regarding the applicability of a collective bargaining agreement that covered Norfolk and Western employees. Mandatory arbitration was triggered, resulting in a ruling adverse to the employees. The affected employees' union, the American Train Dispatchers' Association, appealed to the ICC, challenging the arbitration ruling. *See Norfolk & Western*, 499 U.S. at 121-23.

The second case, *CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521 (1980), involved the acquisition by CSX Corp. of Chessie System, Inc. and Seaboard Coast Line Industries, Inc. As in the NWS Enterprises acquisition, the ICC granted approval to the acquisition, a dispute arose on a collective bargaining agreement, and arbitration returned a ruling against the employees, who worked for Seaboard Coastline Industries in this case. The employees' union, the Brotherhood of Railway Carmen, appealed unsuccessfully to the ICC. *See Norfolk & Western*, 499 U.S. at 123-25.

Both unions appealed the adverse ICC rulings. Hearing the cases together, the court of appeals reversed both ICC rulings, finding for the petitioner unions. Thereafter, the Supreme Court granted the petition for a writ of certiorari of the affected railroads, who were the respondents in the consolidated cases at the court of appeals level. *See id.* at 125-26.

71. 49 U.S.C. §§ 11301-11367 (1994).

72. § 11341(a). Section 11341(a) can only be applied after the ICC has approved a merger between transportation carriers pursuant to § 11343(a)(1). The ICC has exclusive authority to approve § 11343(a)(1) mergers. According to the Court, the merger provisions of the ICA "were designed to promote 'economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure.'" *Norfolk & Western*, 499 U.S. at 132 (quoting Texas v. United States, 292 U.S. 522, 534-35 (1934)). The Court further indicated that § 11341(a) was necessary to facilitate a pre-approved merger. Without § 11341(a)'s avoidance provisions, these mergers would be "difficult, if not impossible, to achieve." *Id.* at 133. Section 11341(a) is, however,

Writing for the majority,[73] Justice Kennedy held that this clause in the ICA "includes any obstacle imposed by law," both "the substantive and remedial laws respecting enforcement of collective-bargaining agreements."[74]

In reaching its decision, the majority used the statutory analysis formula of *Chevron*,[75] looking first to the plain language of the statute. The majority found that section 11341(a)'s exemption from "the antitrust laws and all other law, including State and municipal law" was "clear, broad, and unqualified," and thus facially expressed the legislative intent of Congress.[76] "By itself, the phrase 'all other law' indicates no limitation" and "is broad enough to include laws that govern the obligations imposed by contract."[77] The majority reasoned that the laws that enforce contractual obligations are incorporated into a contract, and here, the ICA provision "suspend[s] application of the law that makes the contract binding."[78] The majority also noted that its interpretation was consistent with that of the ICC, though it was reached without affording the agency any deference.[79]

Justice Stevens argued in dissent[80] that section 11341(a) was not clear on its face and that the legislative history of the ICA, contrary to the majority's holding, indicated no intention to have the "all other laws" provision apply to private contractual obligations, such as the collective bargaining agreements at issue.[81] Justice Stevens also argued that due to the historical "respect that our legal system has always paid to the enforceability of private contracts—a respect that is evidenced by express language in the Constitution itself—there should be a powerful presumption against finding an implied authority to impair contracts" in a statute such as the

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constrained by a qualifying condition, which permits the exemption from all other law only to the extent necessary to effect the merger.

73. Joining Justice Kennedy were Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, Scalia, and Souter.

74. *Norfolk & Western*, 499 U.S. at 133.

75. See *supra* notes 47-52 and accompanying text for a discussion of the *Chevron* test.

76. *Norfolk & Western*, 499 U.S. at 128.

77. *Id.* at 129.

78. *Id.* at 130.

79. *See id.* at 133-34. The majority could not afford the ICC any deference once it concluded that the statute was clear on its face because *Chevron* requires the Court to apply the clear interpretation of the statute. See *supra* notes 47-52 and accompanying text for a discussion of the *Chevron* test.

80. Justice Marshall joined in the dissent.

81. *Norfolk & Western*, 499 U.S. at 134-39 (Stevens, J., dissenting).

ICA.[82] Further, the dissent posed a question that the majority never addressed: Would not Congress write into the text of a statute the intention to supersede private contracts if it so intended?[83]

2. *American Airlines, Inc. v. Wolens*[84]

In *Wolens*, the Supreme Court addressed the question of whether a class action breach of contract claim against American Airlines survived a preemption provision included in the Airline Deregulation Act of 1978 ("ADA").[85] The pertinent provision within the ADA, section 1305(a)(1), stated that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . ."[86] Specifically, the Court had to determine whether the phrase "any law" within the statute was broad enough to encompass state common law which enforced contracts.

In deciding *Wolens*, the Court faced an issue similar to that found in *Norfolk & Western*, where the Court had to determine if the phrase "all other law" in the ICA included collective bargaining agreements, a specific type of contract.[87] In *Wolens*, if the phrase "any law" included private contracts, then section 1305(a)(1) would preempt plaintiffs' allegations and a result similar to that in *Norfolk & Western* would be reached. If the phrase did not include private contracts, then the plaintiffs' common law contract claims would remain unaffected by the preemption provision.

Justice Ginsburg delivered the opinion of the Court,[88] and concluded that section 1305(a)(1) did not preempt plaintiffs' contract

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82. *Id.* at 139 (Stevens, J., dissenting) (footnote omitted).

83. *See id.* (Stevens, J., dissenting).

84. 115 S. Ct. 817 (1995).

85. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending scattered sections of 49 U.S.C.). In *Wolens*, the Court also addressed the issue of whether the ADA preempted a state consumer protection statute. *Wolens*, 115 S. Ct. at 823. The majority held that state statutory enactments fell within the scope of the ADA provision and were preempted. *See id.* at 823-24.

86. 49 U.S.C. app. § 1305(a)(1) (1988) (repealed 1994) (current version at 49 U.S.C. § 41713(b)(1) (1994). The new provision replaces "relating to rates, routes, and services" with "related to a price, route, or service." 49 U.S.C. § 41713(b)(1).

87. See *supra* notes 69-83 and accompanying text for a discussion of *Norfolk & Western*.

88. Chief Justice Rehnquist and Justices Kennedy, Souter, and Breyer joined in the majority opinion. Justice Stevens concurred with the majority's finding that the breach of contract claims survived preemption, but dissented on a separate issue in the case. *See Wolens*, 115 S. Ct. at 827 (Stevens, J., concurring in part and dissenting in part).

claims. The majority held that no preemption resulted because the enforcement of private, "self-imposed undertakings . . . d[id] not amount to a 'State's enact[ment] or enforce[ment of] any law, rule, regulation, standard, or other provision having the force or effect of law' within the meaning of [section] 1305(a)(1)."[89] The majority, though somewhat unclear in its reasoning process, gave several explanations for its holding.[90] The language of the statute, according to the majority, helped it reach its conclusion.

> [T]he word series "law, rule, regulation, standard, or other provision . . . connotes official, government-imposed policies, not the terms of a private contract." Similarly, the phrase "having the force and effect of law" is most naturally read to "refe[r] to binding standards of conduct that operate irrespective of any private agreement."[91]

Additionally, the majority looked to the broad purpose of the ADA for guidance, which the Supreme Court had previously said was "to promote 'maximum reliance on competitive market forces.'"[92] In finding this broad purpose better supported by finding section 1305(a)(1) to not impair contracts, the majority acknowledged the proposition that "'[t]he stability and efficiency of the market depend fundamentally on the enforcement of [private]

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89. *Wolens*, 115 S. Ct. at 824 (quoting Brief for the United States as Amicus Curiae at 9).

90. It is not apparent from the opinion whether the majority found § 1305(a)(1) facially clear, as did the majority in *Norfolk & Western*, or whether the majority found the text of § 1305(a)(1) ambiguous, and looked to the statute as a whole, the legislative history, and the interpretation of the relevant administrative agency. Additionally, if the latter course was used, the extent to which the majority credited the agency interpretation is uncertain. Unlike the *Norfolk & Western* Court, which immediately cited to *Chevron* as a guide for the process of interpreting statutory text, *see* Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991), the *Wolens* majority gave no indication that it was following precedent or an interpretive plan.

91. *Wolens*, 115 S. Ct. at 824 n.5 (quoting Brief for United States as Amicus Curiae at 16). In the same footnote, the Court also acknowledged that the use of the word "enforce" could "perhaps be read to preempt even state-court enforcement of private contracts." *Id.* (quoting Brief for United States as Amicus Curiae at 17). In acknowledging this possible interpretation, the majority fostered the confusion over how it reached its conclusion, as the statement implied that the statute was ambiguous. Without the statement, the most likely conclusion would have been that the majority found the statute to be clear on its face. If the majority did believe the statute was ambiguous, it should have simply deferred to the Department of Transportation's interpretation, which was the same as the majority's, as reasonable and controlling under *Chevron*. For a discussion of the *Chevron* test for statutory construction, see *supra* notes 47-52 and accompanying text.

92. *Wolens*, 115 S. Ct. at 824 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992)).

agreements freely made, based on needs perceived by the contracting parties at the time.'"[93] Finally, Justice Ginsburg noted that the statutory and regulatory schemes regarding air transportation, when viewed generally, supported the majority's conclusion.[94]

In a footnote, the majority defended its seemingly conflicting decision in *Norfolk & Western*,[95] which the defendant had argued as support for its interpretation of section 1305(a)(1) of the ADA. "We read the exemption clause to empower the ICC to override, individually, a carrier's obligations under a collective-bargaining agreement. Our reading accorded with the ICC's and 'ma[de] sense of the consolidation provisions.'"[96] The majority further noted that without ICC preemption of collective bargaining agreements, "'rail carrier consolidations would be difficult, if not impossible, to achieve.'"[97]

Thereafter, relying on its explanation for the Court's decision in *Norfolk & Western*, the majority argued that the two cases were consistent because both made sense in the context of the statutory scheme being interpreted. The Court stated "[s]imilarly in this case, our reading of the statutory formulation accords with that of the superintending agency, here, the DOT, and is necessary to make sense of the statute as a whole."[98]

In dissent, Justice O'Connor argued that state contract claims should be preempted by the ADA.[99] Justice O'Connor argued that the interpretation relied on in *Norfolk & Western* should apply to section 1305(a)(1) of the ADA.[100] The dissent stressed the requirement that contractual obligations can only be enforced by state contract law, common or statutory, which should be preempted by the ADA under the broad reading of "law" used in *Norfolk & Western*.[101]

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93. *Id.* (quoting Brief for United States as Amicus Curiae at 23).

94. *See id.* at 825-26.

95. See *supra* notes 69-83 and accompanying text for a description of the *Norfolk & Western* case.

96. *Wolens*, 115 S. Ct. at 824 n.6 (citing Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 132 (1991)).

97. *Id.* (quoting *Norfolk & Western*, 499 U.S. at 133).

98. *Id.*

99. *See id.* at 828-29 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor, joined in part by Justice Thomas, concurred in the Court's holding that the state statutory claims were preempted. *See id.*

100. *See id.* at 831 (O'Connor, J., concurring in the judgment in part and dissenting in part). See *supra* notes 85-89 and accompanying text for a discussion of the ADA.

101. *See id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

Norfolk & Western and *Wolens* gave the Supreme Court the opportunity to decide two similar cases involving disputes over the applicability of contractual agreements in light of potentially conflicting statutory provisions. The Court reached opposite results in these cases, although no single reason can be offered to explain the differing outcomes. Nevertheless, the reasoning used by the Supreme Court in each case is relevant and important in attempting to reach an understanding of the similar statutory provision in the ADEA, section 623(f)(1).

II. *MAHONEY V. RFE/RL, INC.*[102]

In this section, the *Mahoney* case will be discussed in depth. The first part will describe the facts of the case, including the early procedural history. Next, the opinion of the United States District Court for the District of Columbia[103] will be discussed. The section will conclude with a discussion of the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit.[104]

A. *Statement of Facts*

The defendant in *Mahoney*, RFE/RL, is best known for the broadcast services it provides, Radio Free Europe and Radio Liberty.[105] A non-profit corporation operating under Delaware laws, RFE/RL's principal place of business is Munich, Germany, where it employs some 300 American workers.[106]

In 1982, the defendant and the defendant's employees entered into a collective bargaining agreement that required the mandatory retirement of most employees at age sixty-five.[107] The collective bargaining agreement was to continue indefinitely, but the parties could mutually change the agreement[108] or either party could terminate the agreement by giving six months notice.[109]

After the 1984 amendment of the ADEA gave the statute ex-

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102. 47 F.3d 447 (D.C. Cir. 1995).
103. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1 (D.D.C. 1992).
104. *Mahoney*, 47 F.3d at 447.
105. *See Mahoney*, 818 F. Supp. at 2.
106. *See id.*
107. *See id.* at 3. "The contract . . . contains exceptions to the mandatory retirement provision for certain managerial positions and for employees who would qualify for pension benefits within three years." *Id.*
108. *See id.*
109. *See id.* at 5.

traterritorial effect,[110] RFE/RL believed its American employees would be able to work past the age of sixty-five.[111] RFE/RL applied to the company's "Works Council"[112] for permission to make individual agreements with American workers to comply with the ADEA.[113] The "Works Council" refused permission, after which the defendant appealed to a German Labor Court.[114] The German court, upholding the "Works Council" ruling, refused to permit the defendant to avoid the contested provision of the collective bargaining agreement.[115]

Thereafter, the defendant continued to comply with the provisions of the collective bargaining agreement, resulting in the termination of plaintiff Roy De Lon in 1987 and plaintiff William G. Mahoney in 1988.[116] In January of 1989, the EEOC concluded that a violation of the ADEA had occurred and filed suit against RFE/RL.[117] On May 4, 1990, after several months of discovery, the EEOC, believing that it would not prevail in the case, filed a Motion for Dismissal of Commission Suit Without Prejudice.[118] Both the EEOC and the trial judge were concerned about the continuing viability of a suit by individuals aggrieved by the defendant's al-

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110. See *supra* notes 8-11 and accompanying text for a discussion of the 1984 amendment.

111. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447, 448 (D.C. Cir. 1995). For the factual history of the case, the court of appeals's report is often more complete and will be cited as necessary in this section.

112. A "Works Council" is a required unit in Germany for firms with twenty or more employees. *See id.* "They are bodies elected by both unionized and nonunionized employees. Their duties include [e]nsuring that management adheres to all provisions of union contracts. Departures from contractual requirements are illegal without the Works Council's approval." *Id.*

113. *See Mahoney*, 818 F. Supp. at 5.

114. *See id.*

115. *See id.*

116. *See Mahoney*, 47 F.3d at 448.

117. *See* EEOC v. RFE/RL, Inc., No. 89-0153 (D.D.C. filed Jan. 23, 1989). The EEOC had prior knowledge of RFE/RL's termination policies. In 1985, RFE/RL successfully fought a suit challenging the mandatory age sixty-five retirement. In that case, the plaintiff filed suit prior to the 1984 amendment to the ADEA. The D.C. Circuit determined that the amendment to the ADEA did not apply retroactively, an opinion shared by the EEOC. *See* Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1131 (D.C. Cir. 1985).

118. *See* EEOC v. RFE/RL, Inc., No. CIV.A.89-0153-LFO, 1990 WL 154321, at *1 (D.D.C. Sept. 24, 1990). The EEOC did not indicate in any way that it believed it had been mistaken in filing suit against RFE/RL. Later EEOC policy guidelines indicate that the EEOC continued to believe a violation of the ADEA had occurred. *See Seniority Systems, Extraterritoriality, and Coverage of Federal Reserve Banks*, EEOC Enforcement Guidance, No. N-915.002, Oct. 20, 1993, *available in* WESTLAW, 1993 DLR 203 d27, at 34-35 (stating that Mahoney v. RFE/RL, Inc. involved a situation in which the "foreign laws" defense to the ADEA "clearly [was not] available").

leged discriminatory policies because the statute of limitations for filing a direct suit had expired.[119]

On October 30, 1990, the trial judge, the EEOC, and RFE/RL reached an agreement that RFE/RL would waive the statute of limitations, allowing the individuals 270 days to commence a suit, in exchange for the granting of the EEOC's voluntary dismissal motion.[120] Thereafter, in 1991, plaintiffs Roy De Lon and William G. Mahoney filed suit in the United States District Court for the District of Columbia seeking damages for an unlawful discharge in violation of section 623(f)(1) of the ADEA.[121]

B. *Opinion of the United States District Court for the District of Columbia*

At trial, the defendant conceded that it had terminated the plaintiffs on the basis of age.[122] However, the defendant claimed that section 623(f)(1) shielded it from liability because compliance with the ADEA would require it to violate German law.[123]

The plaintiffs moved for partial summary judgment on the issue of liability, requesting that the trial proceed immediately to a determination of damages.[124] Similarly, the defendant moved for summary judgment on its affirmative defense.[125]

To receive the protection of section 623(f)(1), the defendant attempted to establish that noncompliance with the mandatory retirement provision in the collective bargaining agreement would require it to violate a "law" as defined in the statute. The defendant argued "that a mandatory retirement age is a deeply embedded concept in German labor practice" and that it is "'general policy of the unions' to insist upon a mandatory retirement age."[126] The defendant then presented an expert who testified that collective bargaining agreements have "'legal' force" in Germany, because they are legally binding.[127] The defendant sought to equate such collective bargaining agreements with "the laws" of Germany to receive the protection of section 623(f)(1).

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119. *See RFE/RL*, 1990 WL 154321, at *1.
120. *See* EEOC v. RFE/RL, Inc., No. CIV.A.89-0153-LFO, 1990 WL 179908, at *1 (D.D.C. Oct. 30, 1990).
121. *See* Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 2 (D.D.C. 1992).
122. *See id.* at 3.
123. *See id.*
124. *See id.* at 2.
125. *See id.*
126. *Id.* at 3.
127. *Id.*

In rejecting the defendant's central argument, the district court listed two important and undisputed findings of fact regarding the retirement provision. "First, the provision is part of a contract between an employer and unions—both private entities—and has not in any way been mandated by the German government. Second, the provision does not have general application, as laws normally do, but binds only the parties to the contract."[128] The court found particularly unpersuasive the argument that "practice" and "policy" were enough to bring the collective bargaining agreement within the scope of "law" in section 623(f)(1).[129]

Since the district court found that RFE/RL's principal argument was flawed, the defendant attempted to avoid liability with alternative arguments. First, RFE/RL contended that it should be exempt from the provisions of section 623(f)(1) because the disputed collective bargaining agreement was entered into prior to the effective date of section 623(f)(1).[130] The court disagreed with the defendant on two separate grounds. Initially, the court noted, from a procedural standpoint, that such "argument misse[d] the mark," since the defendant had raised an affirmative defense to the ADEA which required the defendant to prove a conflict of laws.[131] The court stated that the defendant's argument "does not go to the issue of whether the foreign labor union 'policy' or 'practice' is *law*."[132] Nevertheless, the court addressed the defendant's argument of the applicability of section 623(f)(1) of the ADEA to a prior contractual agreement. The court disagreed with the defendant's assertion that the discriminatory act in question occurred in 1982.[133] Rather, the court found the time of the application of the provision, the

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128. *Id.*

129. *See id.* at 3-4. In so holding, the court stated "[t]he ADEA is a remedial statute and exceptions to it are to be construed narrowly." *Id.* (quoting Sexton v. Beatrice Foods Co., 630 F.2d 478, 486 (7th Cir. 1980) (citing A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945))). The original quote in *A.H. Phillips*, continued as follows: "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips*, 324 U.S. at 493. The court of appeals surprisingly did not discuss the importance of this general rule of narrowly construing exceptions. As recently as 1989, the Supreme Court, in *Commissioner v. Clark*, 489 U.S. 726 (1989), quoted the *A.H. Phillips* rule and stated "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Id.* at 739.

130. *See Mahoney*, 818 F. Supp. at 4.

131. *Id.*

132. *Id.*

133. *See id.* at 4-5.

actual termination, to be the significant time.[134] Since both plaintiffs were terminated after section 623(f)(1) went into effect, the court believed that the provision properly applied to the defendant.

Next, the defendant cited the decision of the German Labor Court to which it unsuccessfully appealed the "Works Council" decision, subsequent to the 1984 amendment to the ADEA, denying RFE/RL permission to employ Americans beyond age sixty-five.[135] The defendant emphasized the rulings of the Labor Court that workers under collective bargaining agreements with age sixty-five retirement provisions must retire at that age.[136] The court dismissed this argument as non-responsive to the question of whether the collective bargaining provisions in Germany are "law" within section 623(f)(1).[137] Rather, the court maintained that such rulings only evidenced the German Labor Court's enforcement of a private obligation between private parties.[138] As a general response to the defendant's argument, the court provided a pragmatic policy consideration. "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."[139]

Finally, the defendant made two other arguments that the court similarly dismissed. First, the defendant claimed to have done all it could to comply with the ADEA, by applying to the Works Council and the German Labor Court for permission to deviate from the collective bargaining agreement, but failed in spite of its best efforts.[140] The court disagreed with the defendant on this point, claiming the defendant "could have done more to come into compliance."[141] Second, the court dismissed an unsubstantiated claim that requiring the defendant to comply with the ADEA

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134. *See id.*
135. *See id.* at 5.
136. *See id.*
137. *See id.*
138. *See id.*
139. *Id.*
140. *See id.*
141. *Id.* This argument was particularly insincere and unpersuasive to the district court in light of the available six-month termination provision. The defendant attempted to argue that a unilateral termination would not have helped because the provision would continue to bind until a new agreement was reached. This argument, however, did not convince the court. *See id.*

would force the defendant to violate international law.[142] Overall, the district court treated the defendant's supplemental arguments as non-responsive to the court's assertions that: (1) the mandatory retirement provision in the collective bargaining agreement was part of a contract between the parties to the lawsuit and nothing within German law required the defendant to agree to the provision; and (2) the mandatory retirement provision in the collective bargaining agreement binds only the parties to the agreement, not German workers in general.[143]

The district court summed up the defendant's position as follows: "The defendant is essentially arguing that the German unions simply will not allow it to eliminate the mandatory retirement policy."[144] After this condensed argument, the district court delivered a simplified response: "But the United States Congress will not allow it to *retain* the policy. Of the two, [Congress and the Works Council], only Congress makes law."[145]

C. *Opinion of the United States Court of Appeals for the District of Columbia Circuit*

RFE/RL appealed the lower court ruling that compliance with its collective bargaining agreement did not result in the violation of a foreign "law" within the ADEA.[146] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's granting of the plaintiff's motion for summary judgment. In reaching its decision, the court of appeals relied on the Supreme Court decision in *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*[147] which the court found to be inconsistent with the interpretation of the district court.[148]

The court of appeals began its analysis with a discussion of the relevant legal reasoning of *Norfolk & Western*. In *Norfolk & Western*, the Supreme Court analyzed a collective bargaining agreement

142. *See id.* at 6.
143. *See id.*
144. *Id.* at 5-6.
145. *Id.* at 6.
146. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447 (D.C. Cir. 1995).
147. 499 U.S. 117 (1991). See *supra* notes 69-79 for a detailed discussion of the majority opinion in *Norfolk & Western*.
148. *See Mahoney*, 47 F.3d at 449. The court of appeals expressed surprise, if not irritation, that neither party mentioned the case to the district court and neither party included the case in the appellate brief. However, the court of appeals expressed confidence that the district court would have reached the same result had the parties brought *Norfolk & Western* to the lower court's attention. *See id.*

in light of section 11341(a) of the Interstate Commerce Act, which contained an avoidance provision "from 'all other law.'"[149] The Supreme Court found that the meaning of the word "law" was clear, and included the law that gave force and effect to collective bargaining agreements.[150] The court of appeals drew from the Supreme Court ruling the idea that contract law is the mechanism to enforce contractual obligations and that a contract cannot be detached from this law.[151]

In comparing the relevant statutory provisions, the court believed that the ICA's exemption provision and the ADEA's "foreign laws" exception were indistinguishable.[152] The court of appeals analyzed RFE/RL's problem with the retirement provision in a manner consistent with *Norfolk & Western*. The court stated that if RFE/RL was required by the ADEA to continue employing American workers over the age of sixty-five, RFE/RL would be forced to violate German laws that enforced contractual agreements and German Labor Court decisions.[153] Compliance with the ADEA would therefore "cause" RFE/RL to violate foreign law.[154] Thus, section 623(f)(1) excused RFE/RL from compliance with the ADEA.

The court of appeals claimed that *American Airlines, Inc. v. Wolens*,[155] a Supreme Court case decided after oral argument in *Mahoney*, did not undermine its reliance on *Norfolk & Western*.[156] In *Wolens*, decided almost four years after *Norfolk & Western*, the Court construed the preemption provision included in the Airline Deregulation Act of 1978 ("ADA").[157] Under section 1305(a)(1), states were prohibited from enacting or enforcing "any law . . . relating to rates, routes, or services of any air carrier."[158] Unlike the *Norfolk & Western* holding that the ICA could suspend private contractual agreements, the Supreme Court in *Wolens* held that private contractual agreements were not affected by the preemption provi-

149. *Id.* (quoting *Norfolk & Western*, 499 U.S. at 127).

150. *See id.* (citing *Norfolk & Western*, 499 U.S. at 130, 133).

151. *See id.*

152. *See id.* at 450.

153. *See id.*

154. *See id.*

155. 115 S. Ct. 817 (1995). See *supra* notes 84-101 and accompanying text for a discussion of *Wolens*.

156. *See Mahoney*, 47 F.3d at 450.

157. *See Wolens*, 115 S. Ct. at 821.

158. *Id.* (quoting § 1305(a)(1)).

sion in the ADA.[159]

In an attempt to reconcile the apparently inconsistent Supreme Court holdings, the court of appeals distinguished the facts of *Wolens* and *Norfolk & Western*.[160] The court stressed the importance of contract enforcement relied on by the *Wolens* majority[161] and pointed out that if section 1305(a)(1) of the ADA preempted contract claims, none would be enforced because no agency was authorized to hear them.[162]

Furthermore, the court pointed to the *Wolens* majority view that the ADA incorporated by reference a statutory provision, which "preserved 'the remedies now existing at common law.'"[163] In light of such "savings clause," it was necessary to read section 1305(a)(1) as not preempting private contracts.[164] Additionally, the court noted that the *Wolens* majority had itself distinguished the statute in *Norfolk & Western* on the grounds that without reading section 11341(a) of the ICA as preempting collective bargaining agreements, the statute as a whole did not make sense.[165]

Thereafter, the court of appeals asserted that "[u]nlike the situation in [*Wolens*], construing the foreign laws exception in the [ADEA] consistently with *Norfolk & Western* would not render the Act senseless."[166] To the contrary, the court of appeals argued that its view made sense, in light of the purpose of section 623(f)(1)'s foreign law exemption, which was "to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes."[167]

Finally, in response to the plaintiffs' argument that the defendants could have bargained harder to effect a change in the contract, as noted by the district court, the court of appeals stated that this fact was irrelevant because the "collective bargaining agreement here was valid and enforceable at the time of plaintiffs' terminations, and RFE/RL had a legal duty to comply with it" and there

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159. *See id.* at 824.

160. *See Mahoney*, 47 F.3d at 450.

161. *See id.* (citing *Wolens*, 115 S. Ct. at 824) ("American's contracts must have legal force because the stability and efficiency of the market depended on the enforcement of agreements.").

162. *See id.* (citing *Wolens*, 115 S. Ct. at 824).

163. *Id.* (quoting 49 U.S.C. app. § 1506 (1988) (repealed 1994) (current version at 49 U.S.C. § 40120(c) (1994))).

164. *See id.* (citing *Wolens*, 115 S. Ct. at 826).

165. *Id.* (citing *Wolens*, 115 S. Ct. at 824 n.6).

166. *Id.*

167. *Id.*

could not be "any suggestion that RFE/RL agreed to the mandatory retirement provision in order to evade the [ADEA]."[168] The court supported its contention by indicating that the provisions in the collective bargaining agreement requiring termination at age sixty-five were common throughout the German labor force.[169]

Mahoney reached closure in the fall of 1995, when the Supreme Court denied the plaintiffs' petition for a writ of certiorari.[170] Nevertheless, the court of appeals did not deliver an unchallengeable legal argument in finding for the defendant in *Mahoney*. The following section will look at the reasoning used by the *Mahoney* court with a critical eye, attempting to shed light on the strengths and weaknesses of the opinion.

III. LEGAL ANALYSIS

In reaching an understanding of the pertinent issues in *Mahoney*, this section will separately consider three perspectives. The first part will involve a comparison of *Norfolk & Western*, *Wolens*, and *Mahoney*. Next, the role of the EEOC will be discussed, with a focus on ascertaining what weight the view of the EEOC should have been given by the court of appeals in *Mahoney*. Finally, the legal analysis will conclude with a possible alternative explanation for the *Mahoney* result and a discussion of the strength of the court of appeals decision as future precedent.

A. Norfolk & Western, Wolens, *and* Mahoney

By using both *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*[171] and *American Airlines, Inc. v. Wolens*[172] as support for its holding, the United States Court of Appeals for the District of Columbia Circuit created many more questions than it answered. Though both *Norfolk & Western* and *Wolens* involved private contractual obligations and statutory provisions that limited the coverage of the ICA and the ADA, respectively,[173] the two

168. *Id.* at 451.

169. *See id.*

170. *See* Mahoney v. RFE/RL, Inc., 116 S. Ct. 181 (1995).

171. 499 U.S. 117 (1991). See *supra* notes 69-83 and accompanying text for the full discussion of *Norfolk & Western*.

172. 115 S. Ct. 817 (1995). See *supra* notes 84-101 and accompanying text for the full discussion of *Wolens*.

173. In *Norfolk & Western*, the relevant provision of the ICA, § 11341(a), was an exemption provision, *see supra* notes 71-72 and accompanying text; while in *Wolens*, the relevant provision of the ADA, § 1305(a)(1), was a preemption provision, *see supra* notes 85-86 and accompanying text. Both provisions result in the suspension of law.

cases reach completely opposite results. In *Norfolk & Western*, the Court found the exemption provision "from the antitrust laws and from all other law, including State and municipal law" to include a collective bargaining agreement between the parties.[174] In *Wolens*, however, the Court found the preemption provision of "any law, rule, regulation, standard, or other provision having the force and effect of law" did not include, and therefore could not preempt, private contracts between private parties.[175]

In spite of the facial differences between *Norfolk & Western* and *Wolens*, the court of appeals in *Mahoney* claimed that both cases supported its holding. The court found the reasoning of *Norfolk & Western* controlling with respect to the interpretation of "law" within section 623(f)(1) of the ADEA.[176] Additionally, the court found the discussion by the *Wolens* majority of the importance of contracts to support the result in *Mahoney*, which allowed the private contract between the parties to the lawsuit to be enforced.[177]

Even though the *Wolens* reading of "law" left the private agreement undisturbed, which is effectively the same result that the *Mahoney* court reached with its interpretation of "law," the *Mahoney* court claimed that the *Norfolk & Western* holding, which achieved the opposite result of voiding a private agreement, was controlling. The court selectively picked from the two Supreme Court cases, using one to support its statutory construction and the other to support its result.[178] The *Mahoney* court attempted to distinguish the facts and circumstances of *Wolens* from the comparable facts and circumstances found in both *Norfolk & Western* and *Mahoney* to establish that it correctly interpreted the statutory text.[179]

The *Mahoney* court's conclusion that *Norfolk & Western* controlled the statutory interpretation is suspect. The most obvious criticism of the court's assertion is that the statutory interpretation

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The preemption provision always exempts compliance with contradictory laws, in contrast to the exemption provision, which only allows exemption in certain situations. The differences in application is effectively negated, however, because the issue in both cases as it related to *Mahoney* was whether the term "law" was intended by Congress to include contracts at all.

174. *See Norfolk & Western*, 499 U.S. at 127, 133.

175. *See Wolens*, 115 S. Ct. at 824, 826.

176. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447, 449-50 (D.C. Cir. 1995).

177. *See id.* at 450.

178. See *supra* notes 149-67 and accompanying text for the *Mahoney* court's application of *Norfolk & Western* and *Wolens*.

179. *See Mahoney*, 47 F.3d at 450.

of *Wolens* could just as easily have been used by the court as precedent on the meaning of "law." If the court had relied on *Wolens*, then "laws" within section 623(f)(1) would mean only those laws arising from the government, not those which seek to enforce private agreements. The result under this approach would then resemble the result in *Norfolk & Western*, where a statute excused noncompliance with a collective bargaining agreement. The statute in *Mahoney* would supersede the private agreement between the parties. Although this result would place RFE/RL in a difficult situation, the district court in *Mahoney* argued quite persuasively that this type of dilemma is not of such significance that a court should refuse to apply United States law.[180]

A second concern arising from the court of appeals's interpretation of section 623(f)(1) regards the court's reading of the statutory text of the ADEA when compared to the approaches used by the *Norfolk & Western* and *Wolens* Courts. In *Norfolk & Western*, the Court read the phrase "from the antitrust laws and from all other law, including State and municipal law" to express on its face congressional intent to include private agreements.[181] Nevertheless, the Court looked beyond the statute to the agency opinion for other indicia of support for its conclusion.[182] In *Wolens*, the Court first looked to the text of the statute, and then considered the facts and circumstances, including the legislative history and the agency interpretation, before concluding that "any law, rule, regulation, standard, or other provision having the force and effect of law" did not include private contracts.[183]

It appears from *Mahoney* that the court of appeals initially looked to the text of the statute. Instead of trying to determine if the text clearly expressed congressional intent, however, the court looked beyond the facts of the case and the language and legislative history of the ADEA to a different case, *Norfolk & Western*, which dealt with a different statute, the ICA. The court apparently did not look to either the legislative history or the relevant agency interpretation before looking to *Norfolk & Western*. Under both *Norfolk & Western* and *Wolens*, the court of appeals has deviated

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180. *See* Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 6 (D.D.C. 1992).

181. *See* Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 127, 133 (1991).

182. *See supra* Part I.C.1.

183. *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 824-26 (1995). See *supra* note 90 for a further discussion of how the Court reached its conclusion.

from established Supreme Court approaches to resolving the textual uncertainty.

The shortcomings of the court of appeals's approach in *Mahoney* may or may not have resulted in harm to the losing plaintiffs. If the court reached a correct result in spite of its deficiencies, then little or no harm has resulted. If, however, the court of appeals wrongly interpreted section 623(f)(1), and thereby wrongly concluded that the defendant was exempt from the ADEA, then manifest harm has resulted. It is necessary to look for answers to this question in other relevant sources, because the three important cases, *Norfolk & Western*, *Wolens*, and *Mahoney*, fail to resolve the problem.

B. *The Missing EEOC*

A major problem in *Mahoney* was the court's failure to address the views of the EEOC.[184] From the available agency materials,[185] it appears certain that the EEOC would have agreed with the district court in *Mahoney*, which denied RFE/RL the section 623(f)(1) defense.[186] The examples, included in the Policy Guidance on section 623(f)(1) of December 1989, aid greatly in understanding the EEOC's belief as to the state of the law. Example 2 involved a provision in a company charter, which was registered with the foreign host state as required by law, that violated the ADEA.[187] Compliance with the charter, even though the charter was registered with the state, would be a violation of the ADEA because the EEOC did not consider the charter to equate to "law" in the statute. The *Mahoney* facts could be viewed as similar to this example,

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184. According to the Supreme Court, deference to administrative agencies is based on "the practical expertise which an agency normally develops" and "to accord some measure of flexibility to . . . an agency as . . . new and unforeseen problems [arise] over time." International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979). As discussed *supra* Part I.B.3, whether EEOC guidelines should be afforded the same deference as agency regulations is an open question.

185. These materials were discussed in Part I.B of this Note. See *supra* notes 33-41 and accompanying text for a discussion of these materials; see also *supra* notes 117-20 and accompanying text for a discussion of the early procedural history of *Mahoney*. Specifically, the materials include: two Policy Guidances on the ADEA, *supra* notes 33, 187, which include three examples of violations of the ADEA in a foreign setting, *supra* notes 39-41 and accompanying text; the early stage of the *Mahoney* litigation materials, in which the EEOC was a party to the lawsuit, *supra* notes 117-20; and a later Enforcement Guidance that stated the EEOC believed *Mahoney* to involve a clear violation of the ADEA, *supra* note 118.

186. *See* Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 6 (D.D.C. 1992).

187. *See* Policy Guidance, *supra* note 35, at 5121-22. See *supra* note 39 and accompanying text for Example 2.

if one views the charter and the collective bargaining agreement as two privately created obligations that could lead to legal problems if violated.

The fourth example could be viewed as even more determinative of the EEOC's view in a case like *Mahoney*. The example involved a foreign fee imposed on employers who employ workers beyond age sixty-five.[188] The EEOC would not permit the employer to assert a section 623(f)(1) defense based on the fee, because the employer could pay the fee, continue to employ the worker, and violate neither foreign law nor the ADEA. The example mandates a direct causation requirement.

In *Mahoney*, the collective bargaining agreement between RFE/RL and the plaintiffs provided for a unilateral right of termination with six months notice.[189] After the expiration of six months, RFE/RL would be free to strike a new bargaining agreement with its workers that allowed American employees to continue working past age sixty-five.[190] The new agreement might require RFE/RL to grant concessions to the workers which had a monetary value. Whether or not a cost was involved, at the very least the process would be inconvenient. However, the direct causation requirement established in Example 4 does not support cost or difficulty as an acceptable reason within section 623(f)(1). Rather, compliance with the law itself must cause the violation of the ADEA. Therefore, using the reasoning of Example 4, RFE/RL's violation of the ADEA was arguably caused not by German law, but rather by RFE/RL's failure to terminate the collective bargaining agreement. Since "foreign law" did not cause RFE/RL's violation, section 623(f)(1) would not apply. Both examples support the view that the EEOC would have favored the district court ruling.

Even more supportive of this conclusion was an EEOC guidance entitled *Seniority Systems, Extraterritoriality, and Coverage of*

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188. *See* Policy Guidance, *supra* note 35, at 5123. See *supra* note 41 and accompanying text for Example 4.

189. See *supra* note 141, indicating that the district court in *Mahoney* raised the issue of the termination provision.

190. This argument assumes that RFE/RL would not be forced to terminate an American employee until after the six month notice period expired. This contingency would have been satisfied with respect to both plaintiffs William Mahoney and Roy De Lon in *Mahoney*, since the ADEA was amended in 1984 and the plaintiffs were not terminated until 1988 and 1987, respectively. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447, 448 (D.C. Cir. 1995).

Federal Reserve Banks.[191] The EEOC release, which came after the district court decision in *Mahoney*, stated that the EEOC found *Mahoney* to be a clear violation of the ADEA.[192] The release implied that when the EEOC released the second set of ADEA guidelines in 1989, it believed that the *Mahoney* facts involved a violation of the ADEA.[193]

Since a published EEOC interpretation regarding section 623(f)(1) existed at the time of litigation, the court of appeals should have at least acknowledged the opinion's existence, if not considered it in resolving the case. This approach was seemingly required by both *Norfolk & Western* and *Wolens*, as the Supreme Court acknowledged in both cases that the Court and the relevant agency shared a common statutory interpretation.[194] Nevertheless, the court cited to both Supreme Court cases without following the approach used in both decisions.[195]

Assuming that the EEOC did in fact consider RFE/RL's actions as violative of the ADEA and not exempted by section 623(f)(1), then a relevant agency opinion existed at the time of trial. Two issues must be addressed: (1) what standard of deference the EEOC opinion should have received in *Mahoney*, and (2) how the outcome in *Mahoney* would have been affected if the EEOC opinion was considered.

The Supreme Court cases of *Skidmore v. Swift & Co.*[196] and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[197] provide the two potential deference standards for EEOC guidelines.[198] Which standard is correct hinges on the open question of

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191. *See Seniority Systems, Extraterritoriality, and Coverage of Federal Reserve Banks*, EEOC Enforcement Guidance, No. N-915.002, Oct. 20, 1993, *available in* WESTLAW, 1993 DLR 203 d27, at 34-35.

192. *See id.*

193. Although the EEOC did withdraw from the *Mahoney* litigation, no indication exists to show that the EEOC in any way believed that it wrongly alleged a violation of the ADEA. *See supra* note 118 and accompanying text.

194. *See* Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 133-34 (1991); American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 824 n.6, 826 (1995).

195. See *supra* Part III.A for an evaluation of the *Mahoney* court's application of *Norfolk & Western* and *Wolens*.

196. 323 U.S. 134 (1944).

197. 467 U.S. 837 (1984).

198. In both *Skidmore* and *Chevron*, deference to an agency is relevant only when a statute is ambiguous. See *supra* notes 44-46 and accompanying text for a discussion of *Skidmore* and the *Skidmore* test. See *supra* notes 47-52 and accompanying text for a discussion of *Chevron* and the *Chevron* test. The following analysis, which will attempt to relate the EEOC interpretation of § 623(f)(1) to both *Skidmore* and *Chev-*

whether *EEOC v. Arabian American Oil Co.*,[199] which stated that *Skidmore* controlled, supplanted the earlier decision *EEOC v. Commercial Office Products Co.*,[200] which applied *Chevron*. Because the proper standard of deference for EEOC guidelines is an open question, it is appropriate to test the EEOC opinion under both *Skidmore* and *Chevron*.[201]

The EEOC promulgated its first guidelines on the meaning of section 623(f)(1) in 1989. Under the *Skidmore* four factor test,[202] the EEOC guidelines would likely fare well and deserve significant deference. First, the EEOC was very thorough in creating the Policy Guidance on section 623(f)(1) of the ADEA, as it created five explicit and detailed examples for use in understanding the meaning of the statute. Second, the EEOC appears to interpret section 623(f)(1) logically, as a narrow exception to the general rule that

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ron, assumes that § 623(f)(1) is ambiguous and does not facially express congressional intent. This assumption is supported by the court of appeals in *Mahoney*, which looked to the Supreme Court's interpretation of § 11341(a) of the Interstate Commerce Act for aid in construing § 623(f)(1). See *supra* notes 149-69 for the analysis used by the court of appeals.

199. 499 U.S. 244 (1991). See *supra* notes 13-17 for a discussion of *Arabian American*.

200. 486 U.S. 107 (1988).

201. Although *Arabian American* is a more recent decision, the *Commercial Office Prods.* high deference standard appears to be better supported. First, *Commercial Office Prods.* applied its standard of deference for EEOC guidelines, the reasonableness approach, to resolve the case. *See Commercial Office Prods.*, 486 U.S. at 115. In *Arabian American*, however, the Court did not use the *Skidmore* standard of deference to decide the case. See *supra* text accompanying note 64, indicating that the Supreme Court decided the relevant issue in *Arabian American*, whether Title VII applied overseas, on the failure of Congress to clearly express an affirmative intent to extend coverage overseas. See *supra* notes 13-15 and accompanying text for a discussion of the clear-statement rule. Rather, the Court stated in dicta that the appropriate standard was *Skidmore*. *See Arabian Am.*, 499 U.S. at 257. As precedent, only *Commercial Office Prods.* is controlling. Additionally, Justice Scalia persuasively argued in his *Arabian American* concurrence that the *Skidmore* approach, created forty years before *Chevron*, was outdated and *Chevron* embodied the modern trend. *See id.* at 259-60 (Scalia, J., concurring). For a more detailed discussion of Justice Scalia's concurring opinion in *Arabian American*, see *supra* notes 65-67 and accompanying text. Nevertheless, an argument exists that since *Chevron* concerned only agency regulations, it has no value as precedent with respect to agency guidelines. Therefore, *Skidmore* is the only controlling precedent for agency guidelines. Since the Supreme Court has yet to officially address this question, neither argument can effectively be accepted or rejected. See generally Yavelberg, *supra* note 43, for a thorough discussion of this question.

202. The *Skidmore* four factor test, which courts use to determine the weight of deference to give to agency guidelines, includes: (1) "the thoroughness evident in its consideration," (2) "the validity of its reasoning," (3) "its consistency with earlier and later pronouncements," and (4) "all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

the ADEA covers Americans working for American companies in foreign countries. Third, the EEOC pronouncement is not inconsistent with any previous agency interpretations, since the 1989 release was the first to discuss the exception in section 623(f)(1). There are no subsequent pronouncements on the statute that would cause a contradiction. Finally, although the fourth prong is somewhat ambiguous, the EEOC's primary responsibility in the administration and enforcement of the ADEA favors giving weight to the EEOC guidelines.

Although the *Skidmore* factors support giving strong weight to the EEOC opinion of section 623(f)(1), nothing requires a court to ultimately defer to the agency. In contrast, the *Chevron* test, which prohibits courts from simply ignoring an agency opinion, should lead to a certain result with the EEOC guidelines. Under *Chevron*, the only question to answer with an ambiguous statute and a corresponding agency interpretation is whether the agency interpretation is reasonable.[203] With respect to section 623(f)(1), the EEOC's determination that a collective bargaining agreement does not fall within the definition of "law" appears reasonable, as stated above, because it would make little sense for Congress to grant extraterritorial effect to the ADEA if Congress planned to allow parties to contract around the law. Additionally, the reasoning used in *Wolens* supports the conclusion that the EEOC's opinion is reasonable.[204] Therefore, if the *Chevron* test was applied correctly, a court would be obligated to defer to the EEOC's interpretation of section 623(f)(1).

The court of appeals's exclusion of the EEOC's interpretation of the "foreign laws" exception to the ADEA appears to have adversely affected the outcome in *Mahoney*. Under both *Skidmore* and *Chevron*, the EEOC opinion of section 623(f)(1) should have received some deference. Since the EEOC opinion appeared to match the interpretation of the district court and conflict with the interpretation of the court of appeals, the court of appeals was arguably wrong in finding for the defendant. In the final part, this section of the Note will discuss an alternative legal means of resolving the dispute in *Mahoney*. This final section will find common

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203. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).

204. *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 824, 826 (1995) (holding that the word "law" did not include private contractual agreements in the Airline Deregulation Act).

ground between the district court and the court of appeals in an attempt to unravel the inconsistencies in *Mahoney*.

C. *An Alternative Legal Approach*

The evaluation of *Mahoney* thus far has focused on the concern that the court of appeals resolved the controversy in an inappropriate manner.[205] However, an inquiry into fairness will demonstrate that, as between the plaintiffs and RFE/RL, the result was correct. For future parties, however, the decision may be disastrous. Under the assumption that neither the district court nor the court of appeals resolved the controversy in a satisfactory manner, this Note, considering retroactivity concerns, will propose a new method of resolving the controversy that is both legally sound and achieves fairness to the parties in *Mahoney* and future parties encountering a similar concern.[206]

1. A Reevaluation of the Controversy Considering Fairness to the Litigants

In *Mahoney*, the district court and court of appeals opinions each achieved positive and negative results.[207] Using the district court approach, an employer violates the ADEA when it complies with terms of a collective bargaining agreement that conflict with the statute.[208] It does not matter if the collective bargaining agreement was created before or after the effective date of the conflicting statutory provision. In both instances, employers are subject to liability for violating the ADEA. From a simple fairness approach, it is less fair to subject an employer to liability when the employer

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205. *See supra* Part III.A-B.

206. The discussion to follow introduces fairness concerns prior to evaluating the question of retroactivity. Avoiding "the unfairness of imposing new burdens on persons after the fact" is the basis for the presumption against applying statutes retroactively; Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994); thereby making fairness a relevant consideration. A complete discussion of retroactivity is beyond the scope of this Note. For a detailed discussion of *Landgraf* and the present state of the law concerning retroactivity, see Michael D. Blanchard, Note, *Statutory Construction of Section 541(a) of the Cable Television Consumer Protection and Competition Act of 1992: A Presumption in Favor of Practical Reason*, 18 W. NEW ENG. L. REV. 437 (1996).

207. For this paragraph, *see generally* the discussion of the district court opinion in *Mahoney*, *supra* Part II.B.

208. In this discussion, the employers should be considered American employers that employ American workers in a foreign country. The collective bargaining agreements should be considered foreign agreements between American employers and American employees in the foreign country in which the employee works, and the agreements are enforceable in that country.

complied with a bargaining agreement created prior to the enactment of the law which caused the conflict. This hypothetical parallels the facts of *Mahoney*, where the collective bargaining agreement between RFE/RL and the plaintiffs was created in 1982, but the ADEA did not make it unlawful to retire American workers in foreign countries at age sixty-five until 1984.[209] In contrast, no concern over fairness exists when the collective bargaining agreement was created subsequent to the change in the statute that made the bargaining agreement unlawful. In this instance, an employer has entered into an unlawful agreement. If the employer enforces the unlawful agreement, it is subject to liability.

The court of appeals reversed the district court and applied an opposite approach.[210] Using the court of appeals's approach, all collective bargaining agreements equate to "foreign laws" as defined by section 623(f)(1). Therefore, any employer that complies with a collective bargaining agreement in violation of the ADEA will be excused from that statutory violation under the "foreign laws" exception. Again, it does not matter if the collective bargaining agreement was created before or after the effective date of the conflicting statutory provision.[211] In either instance the employer is not subject to liability for violating the ADEA. From a simple fairness approach, it is less fair to exempt an employer from liability when the employer negotiated the inclusion of a bargaining agreement term in conflict with the ADEA after the statute made the provision unlawful. In this instance, an employer has in effect entered into an unlawful agreement, but avoids liability on a technicality. In contrast, the concern over fairness lessens when the employer entered into the collective bargaining agreement prior to the effective date of the law making a provision in the agreement unlawful. This hypothetical also parallels the facts of *Mahoney*.

In both the district court and court of appeals approaches, some form of unfairness results. With the district court, employers

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209. See *supra* notes 9-11 and accompanying text for a discussion of the 1984 amendments to the ADEA.

210. For this paragraph, *see generally* discussion of the court of appeals opinion in *Mahoney*, *supra* Part II.C.

211. This discussion assumes that the court of appeals's approach applies to both pre- and post-amendment agreements because the court's reading of § 623(f)(1), equating a collective bargaining agreement with law, allows for no distinction. See *supra* Part II.C for the discussion of the court of appeals's resolution of the controversy. The court of appeals, however, did imply that an equitable exception was possible when defendants attempted to contract around the ADEA. See *infra* note 212 and accompanying text for a discussion of the possible equitable exception.

are subject to liability based on lawfully created collective bargaining agreements. With the court of appeals, employers are released from liability on unlawfully created collective bargaining agreements. Without directly addressing the problem with pre-amendment agreements, the court of appeals implied that an exception to section 623(f)(1) might be available in situations where employers attempted to contract around the ADEA.[212]

Tension exists between the court of appeals's acknowledgement that equitable concerns are important and its holding that collective bargaining agreements equate to "laws" in section 623(f)(1). Particularly troubling is the idea that a court must inquire into the facts surrounding the enactment of a collective bargaining agreement containing a term that conflicts with the ADEA to determine if it is "inequitable" to apply the law.[213] If the court of appeals truly

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212. The court of appeals did note that RFE/RL could not have attempted to evade the ADEA by contracting around the statute because the collective bargaining agreement in *Mahoney* pre-dated the change in the ADEA. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447, 451 (D.C. Cir. 1995). This statement by the court of appeals evidences two significant beliefs. First, the court of appeals was concerned with subjecting RFE/RL to liability for complying with a lawfully negotiated agreement. Second, the court of appeals believed that a contrary result was available if evidence existed that an employer intentionally contracted around the ADEA to avoid compliance with impunity.

213. The need for an alternative approach is evidenced by a recent law review article that stated, without any qualification, that "'[l]aws of the [foreign] country' has been construed to include collective bargaining agreements." *See* Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 342 n.174 (1996). The possibility of an equitable exception implied in *Mahoney* will not ensure certain and consistent application of the ADEA abroad. The court of appeals in *Mahoney* simply noted that the enactment of the discriminatory clause prior to the 1984 amendments foreclosed any possibility "that RFE/RL agreed to the mandatory retirement provision in order to evade the [ADEA]." *Mahoney*, 47 F.3d at 451. The language neither provides a court with guidance on how to determine if an employer was attempting to evade the ADEA nor does it provide guidance on what action the court should take if the court determines that the employer attempted to evade the ADEA. Additionally, the unqualified statement in the above article that the "foreign laws" exception includes collective bargaining agreements suggests that courts may simply ignore or overlook the conduct of employers before applying the exclusionary provision of § 623(f)(1). These concerns are further exacerbated by the fact that Title VII contains an exclusion provision modeled after § 623(f)(1). *See supra* note 19. Analogous legal reasoning could result in employers avoiding liability for discrimination based on sex, race, national origin, or religion provided the collective bargaining agreements mandated such discrimination. *Cf. See Seniority Systems, Extraterritoriality, and Coverage of Federal Reserve Banks*, EEOC Enforcement Guidance, No. N-915.002, Oct. 20, 1993, *available in* WESTLAW, 1993 DLR 203 d27, at 34-35 (The EEOC release noted that "[a]lthough [the district court opinion in *Mahoney* was] decided under the ADEA . . ., the reasoning of *Mahoney* is equally applicable to analysis of the foreign laws defense under Title VII . . . ." By negative inference, the court of appeals's approach in *Mahoney* can also be applied to the Title VII exception provision).

believes this approach is correct, it has created a strange process for the evaluation of the adjudicability of age discrimination claims like that found in *Mahoney*. It is possible that the court of appeals in *Mahoney* was truly concerned with punishing the defendant for exercising its lawfully negotiated contract right of mandatory retirement, yet found no alternative legal theory to address this concern.

2. The Defendant's Argument at Trial

The evaluation of the equities of the district court and court of appeals opinions in *Mahoney* evidences (1) unfairness to employees when no liability results from post-amendment agreements and (2) unfairness to employers when liability results from pre-amendment agreements. To avoid the unfairness in both scenarios, the ADEA must apply to foreign collective bargaining agreements, but only to ones created after the statute became extraterritorial. This solution concerns redefining the effective date of the amended statute.

In recognizing that a different effective date for the amendment could resolve the dispute in *Mahoney*, an interesting question arises—whether the debate over the meaning of the statute should have instead been a debate over coverage of contractual obligations that existed at the time of amendment. Essentially, this question addresses the issue of retroactivity. The inquiry into this question is two-fold: (1) does the application of section 623(f)(1) to pre-1984 collective bargaining agreements create a retroactive effect and, if so, (2) does section 623(f)(1) apply retroactively.[214] The focus of a debate over retroactive effect would be on the time of RFE/RL's discriminatory act. If the discriminatory act occurred prior to 1984, at the time of the creation of the collective bargaining agreement, then the 1984 amendments to the ADEA would have to apply retroactively in order to make RFE/RL's collective bargaining agreement unlawful. By contrast, if the discriminatory act occurred upon the termination of the plaintiffs, which was after the ADEA became effective overseas, then no retroactivity concerns would exist.

At trial, the defendant raised the issue of retroactivity, arguing that it lawfully discharged the plaintiffs because the collective bargaining agreement preceded the 1984 amendment to the ADEA.[215] The district court, while acknowledging that an argument existed

214. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1505 (1994). In reality, the second question is not in dispute. In a previous case involving the same defendant, RFE/RL, the District of Columbia Circuit concluded that the 1984 amendments did not apply retroactively. *See* Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1131 (D.C. Cir. 1985).

215. *See* Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 4 (D.D.C. 1992).

that the time of discrimination was the time of contracting, found the argument unpersuasive.[216] The judge found *Lorance v. AT&T Technologies, Inc.*,[217] to support the defendant's argument, but also to foreclose the application of the argument in *Mahoney*.[218]

Lorance involved the determination of the time of discrimination for statute of limitations purposes with the adoption of a facially neutral seniority system.[219] The district court found that, although *Lorance* held that the relevant time of discrimination in the case of a facially neutral seniority system was the time of its creation, the Supreme Court nevertheless acknowledged "that a *facially discriminatory* system . . . can be challenged at any time, because such a system 'by definition discriminates each time it is applied.'"[220] Applying this rationale to *Mahoney*, the district court found the relevant time of discrimination to be the time of discharge.[221] A more detailed explanation of the district court's conclusion with regard to the relevant timing is necessary in order to understand the true nature of the defendant's concern.

3. The Domestic Setting: The Time of Amendment Determines Retroactivity Analysis

To evaluate the district court's determination that the time of termination was the relevant measuring time for a statutory violation, it is necessary to consider the underlying legal reasons supporting the conclusion. The issue in *Mahoney*, in the broadest sense, concerned the legality of terminating employees solely based on their age. With the 1984 amendment to the ADEA, Americans working abroad for United States companies obtained new protection that previously existed only domestically.[222] This amendment created a "public right" in all of society, not just workers affected by the change. According to the Supreme Court, a "public right," in contrast to a "private right," is "a statutory right . . . closely intertwined with a federal regulatory program Congress has the power to enact" or a right that "belongs to [or] exists against the Federal Government."[223]

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216. *See id.* at 4-5.
217. 490 U.S. 900 (1989).
218. *See Mahoney*, 818 F. Supp. at 4-5.
219. *See Lorance*, 490 U.S. 900.
220. *Mahoney*, 818 F. Supp. at 5 (quoting *Lorance*, 490 U.S. at 912 n.5).
221. *See id.*
222. See *supra* notes 9-11 and accompanying text for a discussion of the 1984 amendments to the ADEA.
223. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54 (1989).

Employment discrimination statutes by their very nature concern "public rights."[224] Such statutes, created by Congress, establish rights in all of society, or an identifiable portion of society. Prior to the enactment of these statutes, no such right exists in the public.

Concerning the time of discrimination with a "public right," Supreme Court precedent establishes that "public rights" warrant different treatment than "private rights." The Court, in cases concerning the "public rights" associated with federal wage and hour laws under the Fair Labor Standards Act ("FLSA"),[225] "ha[s] held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement."[226] In elaborating on the purpose of the FLSA, the Court found that:

> Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any . . . contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.[227]

The Court's discussion establishes that "public rights" create new rights by elevating one's protections rather than by destroying preexisting obligations.

Congress created "public rights" with the FLSA and "public rights" with the ADEA and Title VII in an analogous fashion. With the employment discrimination statutes, Congress elevated societal

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224. *See, e.g.*, Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737-38 (1981) (Supreme Court stating that "in enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to equal employment opportunities . . ." (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974))); Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 547 (5th Cir. 1980) (noting that Title VII protects "important public rights"); Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465, 469-70 (D. Mass. 1980) (court equated the importance of the Title VII public rights recognized in *Gardner-Denver* with the ADEA protections); EEOC v. American Nat'l Bank, 420 F. Supp. 181, 185 (E.D. Va. 1976) (noting that "[t]he EEOC indeed has a duty to vindicate the important public rights secured to all citizens under Title VII") (citation omitted).

225. 29 U.S.C. §§ 201-219 (1994). The Supreme Court has long found the FLSA to involve "public rights." *See Barrentine*, 450 U.S. at 739-41 and cases cited therein.

226. *Barrentine*, 450 U.S. at 740-41 (citing Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 177-78 (1946); Walling v. Harnischfeger Corp., 325 U.S. 427, 430-32 (1945); Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161, 166-67, 170 (1945)).

227. *Id.* at 741 (quoting Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602-03 (1944)).

protections to the level of "public rights." As a result, contractual agreements inconsistent with these later statutes must necessarily yield just as contractual wage agreements below the FLSA's minimum wage yielded with that earlier statute's passage. Regarding the enactment of the 1984 amendments to the ADEA, non-exempt contracts and collective bargaining agreements[228] that included provisions violating the ADEA could no longer be enforced, including the mandatory age sixty-five termination clause included in the collective bargaining agreement between RFE/RL and the *Mahoney* plaintiffs.[229]

Relating the "public rights" aspect of the 1984 amendment to the district court's conclusion that the disputed collective bargaining agreement discriminates at the time of termination, it is apparent that the district court reached the correct conclusion under existing law and precedent, which presently covers only the domestic setting. Once Congress changed the ADEA, no agreements equivalent to that in *Mahoney* could lawfully be enforced beyond the effective date of the statute.

4. The Foreign Setting: A Proposal That the Time of Contracting Controls Retroactivity Analysis

Returning to the earlier fairness discussion,[230] the correctness of the district court's decision by no means obviates the resulting unfairness to the defendant under that court's approach. A future litigant may well be placed in the same predicament that RFE/RL encountered as a result of the district court's decision—terminate people like the plaintiffs and be subject to liability under the ADEA[231] or continue to employ people like the plaintiffs and violate German labor law by unilaterally changing a term of the collective bargaining agreement.[232] A new approach is therefore necessary in situations like *Mahoney* where parties in foreign countries are legally obligated to follow two contradictory policies.

The basis for the proposed approach is based on the distinction between the domestic setting and the foreign setting. If *Mahoney*

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228. See *supra* note 11 and accompanying text for a discussion of the exception from foreign coverage included in § 623(f)(1) of the ADEA.

229. Essentially, RFE/RL's contractual right to follow its collective bargaining agreement termination clause gave way to the public's right to see employees like the *Mahoney* plaintiffs continue in their jobs. See *supra* Part II.A for the facts of *Mahoney*.

230. *See supra* Part III.C.1.

231. *See generally* district court opinion in *Mahoney*, *supra* Part II.B.

232. *See supra* note 109 (indicating that a unilateral change violates German law).

was a domestic case, the employer could not have lawfully terminated a sixty-five year old employee covered by an agreement like that in *Mahoney*. On the other hand, no labor union could seek to force that employer to comply with the invalid termination provision. Essentially, an employer would lose the right to enforce the collective bargaining agreement, but would be insulated from liability for failing to do so. In *Mahoney*, however, under the district court's approach, American law forbade RFE/RL from enforcing the termination clause while German labor law compelled it to enforce the agreement. The result left RFE/RL in a "Catch-22," with inevitable liability.

The proposed approach is to treat the agreement between RFE/RL and the *Mahoney* plaintiffs as a "private right" between the parties no different than any other individual contract right. This approach assumes that the employer (1) remains bound by a private agreement in a foreign country[233] and (2) cannot avoid compliance with American employment discrimination law. When considering the power of Congress in creating "public rights," treating a binding foreign agreement as private is legally sound. In the domestic setting, Congress can effectively invalidate previously existing obligations by creating new statutes. In the *Mahoney* setting, Congress lacks the power to elevate American law over a foreign contractual agreement. This distinction warrants the separate treatment.

Applying this approach, the time of contracting would be considered the relevant time rather than the time of termination. Because the District of Columbia Circuit previously determined that the 1984 amendment was not to be applied retroactively,[234] the district court in *Mahoney* would have granted summary judgment in favor of RFE/RL. This approach removes the problems of unfairness from the application of section 623(f)(1) noted above.[235] No employers would be subject to liability on collective bargaining agreements created prior to 1984 and no employers would escape liability on collective bargaining agreements created after 1984. In the first instance, the rights of an employer would be protected. In the second instance, the rights of an employee would be protected.

With the proposed alternative approach presented in this Note,

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233. If the employer is not bound by a foreign agreement, that employer has no basis to avoid complying with American law under § 623(f)(1) and is specifically excluded from this proposed approach.

234. *See supra* note 214.

235. *See supra* Part III.C.1.

no foreign collective bargaining agreement negotiated before the 1984 amendments to the ADEA would be covered by the statute. This approach obviates the need to stretch the definition of "laws of the [foreign] country" within section 623(f)(1) to include collective bargaining agreements, a reading of the statute criticized by this Note. Indeed, under the alternative approach, every foreign agreement containing an age-based discriminatory provision in conflict with the ADEA would have been negotiated after the 1984 amendment to the ADEA prohibited employers from committing such discrimination. The court of appeals's reading of the statute, on the other hand, would authorize, and possibly encourage, employers to contract around the ADEA. This reading of the "foreign laws" exception could not reflect the intent behind section 623(f)(1), as both the district court and the court of appeals expressed concern over employers attempting to contract around American law. Thus, the only plausible construction of the statute as applied to post-amendment agreements would be the district court's, where American statutory laws remain supreme over contractual provisions.

CONCLUSION

Mahoney v. RFE/RL, Inc. presents two related questions. First, the question of what constitutes a "foreign law," allowing an employer to avoid compliance with the ADEA, was pivotal to the outcome of the case. The district court and court of appeals reached opposite conclusions on the viability of the defendant's foreign law defense. Congress provided the courts no help in reaching a conclusion, as legislative history is lacking for the ADEA and other related employment discrimination statutes that apply extraterritorially. The only possible direct guidance on the question was a published EEOC interpretation of the statute which, ironically, neither court chose to mention.

This ironic point leads to the second issue raised by *Mahoney*. The question of what level of judicial deference EEOC interpretations merit is one that continues to be unresolved. A debate over the proper standard of deference to afford the EEOC—a debate between the *Skidmore* and *Chevron* tests—could have provided strong arguments to aid in the resolution of *Mahoney*, but neither the lower court opinion nor the appellate court opinion indicates that the agency interpretation was considered in the outcome of the case. Yet, by omission, the Court of Appeals for the District of Columbia Circuit made the agency opinion relevant. By simply ig-

noring the EEOC and reaching a conclusion in conflict with the agency position, the court appeared to commit error because both available tests supported some degree of deference.

In looking to an alternative approach, this Note attempts to resolve seemingly unanswered questions from *Mahoney*. The need for a different method of resolving the case is apparent when fairness concerns are highlighted. Essentially, the court of appeals reached a fair result on the facts of *Mahoney* at the potentially high cost of interfering with congressional intent to apply American law in foreign settings. By contrast, the district court properly interpreted the narrow reach of the foreign laws exception, but reached an unfair result on the facts of *Mahoney*. To avoid both unfairness and the thwarting of Congress's will, this Note proposes a retroactivity-based approach which would effectuate a proper balance of law and equity.

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