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# ARTICLES

## LIMITATIONS ON THE RIGHT OF JAPANESE EMPLOYERS TO SELECT EMPLOYEES OF THEIR CHOICE UNDER THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION

Robert Abraham\*

### INTRODUCTION

Within the past two decades, Japanese corporations have invested in and expanded their operations in the United States at an extremely rapid rate.<sup>1</sup> Commentators have predicted that, based on the dollar amount of acquisitions within the past few years, Japanese companies could become the largest foreign employers of American businesses by the early 1990's.<sup>2</sup> A significant portion of Japanese investment in the United States has been achieved by forming subsidiaries and establishing branches of major Japanese trading companies. Many of these subsidiaries and local branches fill key executive positions almost exclusively with Japanese nationals.<sup>3</sup> Japanese companies emphasize that

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\* Attorney, United States Department of Justice, Civil Rights Division. The views expressed are not necessarily those of the Justice Department. This article is dedicated with love to Appa and Amma. Special thanks to Jim Coppess for reading and commenting on several drafts. Thanks also to Susan Berman and Barbara Axelsson for reading and commenting on portions of the article.

1. See N.Y. Times, July 17, 1990, at D5 (stating that Japanese acquisitions of American companies were valued at \$3.8 billion during the first half of 1990).

2. See Wall Street Journal, January 17, 1990, at A22 (noting that Japanese companies and banks participated in 174 acquisitions of American corporations in 1989). The dollar amount of those acquisitions totaled a record \$13.7 billion. *Id.* British investment, traditionally the greatest both in terms of transactions and dollars, declined by 47% to \$16.8 billion in 1984. *Id.*

3. See Comment, *Clash of the Cultures: U.S. - Japan Treaty of Friendship Title VII, and Women in Management*, 3 TRANSNAT'L LAW. 337, 350 n.3 (1990), [hereinafter Comment, *Women in Management*], citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 n.2 (1973) (finding that citizenship differs from national origin). National origin

this practice is justified because of the need to fill key executive positions with persons who understand the unique business practices and the basic cultural values that underlie Japanese businesses' traditional methods of operation.<sup>4</sup> This practice has resulted in several lawsuits filed by American employees against their Japanese employers on the grounds that they were discriminated against on the basis of race, sex, national origin, or citizenship because they were not hired for key executive positions by their Japanese employers.<sup>5</sup> Most of these lawsuits have been filed under Title VII of the Civil Rights Act of 1964 (Title VII),<sup>6</sup> which prohibits employers from discriminating on the basis of race, color, sex, national origin, and religion.<sup>7</sup> Since 1986, employees have also been able to file suit against employers under the Immigration Reform and Control Act (IRCA),<sup>8</sup> which prohibits employers from discriminating against persons in their hiring practices on the basis of citizenship or national origin.<sup>9</sup>

Japanese employers defend their actions, asserting that their practices are expressly protected by the United States-Japan Treaty of Friendship, Commerce, and Navigation (Japan Treaty or Friendship Treaty).<sup>10</sup> Japanese employers assert that the Friendship Treaty gives them an absolute right to place Japanese nationals of their choice in key executive positions, and that the Treaty insulates them from compliance with Title VII and the IRCA.<sup>11</sup>

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refers to the country in which a person is born, or in a larger sense, from where his or her ancestors originated. *Id.* Throughout this Article, the term "national" and "citizen" will be used in the context described above.

4. See N.Y. Times, Aug. 6, 1990, at C14 (alluding to the cultural clash between Japanese managers and American workers at Mazda's Flat Rock, Michigan plant).

5. See *infra* notes 19, 175, and 186-194 and accompanying text (describing the employment discrimination lawsuits filed by American citizens against their Japanese employers).

6. Pub. L. No. 88-352, Tit. VII, §§ 701-16, 78 Stat. 241, 253-57 (1964) (codified as amended at 42 U.S.C. § 2000e-17 (1988)).

7. 42 U.S.C. §§ 2000e-2(a) (1988).

8. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1987) (codified in scattered sections of 8 U.S.C.) [hereinafter IRCA].

9. 8 U.S.C. § 1324(b)(a)(1). Protection against discriminatory hiring practices is not extended to unauthorized aliens. *Id.*

10. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter Japan Treaty or Friendship Treaty].

11. See, e.g., *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 177 (1982) (noting Japanese company's motion to dismiss on grounds that practices are protected under Friendship Treaty).

## I. OVERVIEW

Section II of this Article examines the differences between Japanese and American business practices, focusing on the contention that Japanese business practices are intertwined with Japanese culture, and therefore cannot be readily learned by non-Japanese. The Article then examines the language and legislative history of the Japan Treaty and concludes that the Treaty does permit Japanese employers absolute discretion to choose only Japanese nationals for key executive positions. Section III similarly examines the language and legislative history of Title VII and concludes that it does apply to Japanese employers doing business in the United States. While Title VII does apply to Japanese employers, it is not readily apparent that the specific practice of selecting Japanese nationals exclusively is in violation of Title VII. Therefore, Japanese employment practices are scrutinized under two discrimination theories recognized under Title VII. Specifically, section IV reviews the theories of disparate impact and disparate treatment to determine whether the nearly exclusive selection of Japanese nationals for key executive positions is discriminatory.

Section V analyzes the bona fide occupational qualification defense (BFOQ).<sup>12</sup> The BFOQ defense permits what is normally considered a discriminatory practice on the ground that such a practice is essential to the business.<sup>13</sup> The BFOQ defense has been asserted primarily where the protected class of persons cannot qualify for a particular job because they lack certain immutable characteristics required by the job.<sup>14</sup> Section V briefly discusses whether national origin characteristics are relevant to the qualities sought by a Japanese employer and emphasizes that Japanese employers should make employment decisions not on the basis of broad BFOQ classifications, but instead on the basis of individual employee qualifications. Section V concludes that, based on current discrimination theories, Japanese employment practices are prohibited by Title VII.

Section VI describes and applies basic conflict of law principles and concludes that under such rules, the Japan Treaty prevails over Title VII. Therefore, the Treaty grants Japanese employers the right to se-

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12. Title VII § 703(e), 42 U.S.C. § 2000e-(2)(e) (1988). Section 703(e) provides that it is not an illegal business practice for an employer to hire and retain employees on the basis of national origin in situations where it is a bona fide occupational qualification reasonably necessary to the regular conduct of that particular business. *Id.*

13. *Id.*

14. See *infra* notes 199-204 and accompanying text (discussing cases where Japanese employers invoked BFOQ defense).

lect employees of their choice, even where such practices are proscribed by Title VII.

Section VII examines the constitutional equal protection argument. The equal protection argument possesses several advantages over Title VII, the greatest of which is that equal protection under the law is required by the United States Constitution and must, therefore, prevail over the Japan Treaty. A successful equal protection argument is not possible here, however, due to the lack of requisite state action. Section VII concludes that a more expansive interpretation of state action should be developed so that private discriminatory acts sheltered by federal legislation will be viewed as state action.

Section VIII reviews the IRCA. Many Japanese employers, in order to avoid Title VII claims, initially assert that they made employee selections on the basis of employee citizenship.<sup>15</sup> Such an assertion, if accepted at face value, avoids the need to comply with Title VII because under Title VII, citizenship is not a protected class.<sup>16</sup> However, under the IRCA, selecting an employee on the basis of citizenship is clearly discriminatory.<sup>17</sup> Consequently, another conflict arises, this time between the Japan Treaty, which permits Japanese employers to select employees of their choosing, and the IRCA, which limits the Japanese employer from making choices based on citizenship. Section VIII explores whether the Japan Treaty provides a defense to citizenship discrimination and concludes that unlike Title VII, the IRCA prevails over the Treaty under conflict of laws principles.

Finally, the Article engages in a policy examination of Japanese employer practices. It concludes that although the Japan Treaty might prevail over Title VII proscriptions, it is nonetheless more prudent for the Japanese employer to forego the protection of the Treaty, and make employment decisions on the unassailable criterion of employee qualifications.

This Article assumes that the Japanese employer seeking the protection of the Japan Treaty falls within the ambit of the Treaty. Many Japanese employers conducting business in the United States are subsidiaries of a parent Japanese company.<sup>18</sup> This poses the issue of

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15. See *infra* notes 154-163 and accompanying text (discussing employers' discrimination based on citizenship).

16. See 42 U.S.C. § 2000e-2(a)(1) (1988) (forbidding employers from discriminating on the basis of race, color, religion, sex, or national origin).

17. 8 U.S.C. § 1324(a)(1)(B).

18. See Iannone, *Policy Implications of Foreign Business Recruitment as an Economic Development Strategy: The Case of Japanese Automotive Investment in the United States*, 6 ECON. DEV. REV. 25, 36 (1988) (indicating that Japanese auto manufacturers are expected to sell 1,385,000 American-built cars through their subsidiaries).

whether a Japanese subsidiary can raise the Japan Treaty as a defense in the same manner as its parent company. This matter will not be addressed here as it was already addressed by the Supreme Court in 1982<sup>19</sup> and has been the subject of numerous law review articles.<sup>20</sup> Furthermore, this Article makes no effort to determine which jobs constitute "key executive positions." Article VIII(1) of the Japan Treaty grants Japanese employers the unqualified right to select employees of their choice for key executive positions.<sup>21</sup> Some employees have argued that the position they applied for was not a key executive position, and that therefore, their Japanese employer could not rely upon the Japan Treaty.

## II. DIFFERENCES IN JAPANESE AND AMERICAN BUSINESS PRACTICES

At the outset, it is important to understand why Japanese employers insist on hiring Japanese nationals for key executive positions. Japanese employers claim that they select exclusively Japanese employees for key positions because of well-recognized differences in business and management practices between Japan and the United States.<sup>22</sup> According to Japanese employers, these differences in business and manage-

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in the United States in 1991). That represents a 12.5% share of the American car market. *Id.* See also N.Y. Times, *supra* note 4, at C14 (noting that the Japanese Ministry of International Trade and Industry believed that 840,000 Americans would be working for Japanese companies by 1990).

19. *Sumitomo*, 457 U.S. 176.

20. Note, *Subsidiary Assertion of Foreign Parent Corporation Rights under Commercial Treaties to Hire Employees "of Their Choice"*, 86 COLUM. L. REV. 139 (1986); Berman, *International Economics and American Employment Relations*, 28 B.C.L. REV. 27 (1986); Note, *Amenability of Foreign Corporations to United States Employment Discrimination Laws*, 14 VAND J. TRANSNAT'L L. 197 (1981).

21. Japan Treaty, *supra* note 10, 4 U.S.T. at 270. See also Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 952 (1979) [hereinafter Note, *Commercial Treaties*] (commenting that the United States and Japan likely intended the "of their choice" section to permit Japanese employers the right to select Japanese citizens for key executive positions).

22. See Comment, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 NW. J. INT'L L. & BUS. 585, 586 (1988) [hereinafter Comment, *Japanese Labor Relations*] (explaining that Japanese employers seek to achieve harmony with their workers). Japanese business management practices focus on labor relations and seek to ensure greater worker participation and loyalty. *Id.* at 594-99. American business management practices concentrate on efficiency and tend to view workers as tools of production. *Id.* at 595-96. See also Zhang & Kuroda, *Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies*, 10 NW. J. INT'L L. & BUS. 195, 197-201 (1989) [hereinafter Zhang] (observing that Japanese negotiation techniques emphasize step-by-step negotiations and collective decision-making).

ment practices reflect a core cultural difference between the two countries — the importance of the group versus the individual.<sup>23</sup>

There is general consensus that Japanese culture emphasizes the primacy of the group.<sup>24</sup> Reflecting its feudal past when social status regulated relationships, as well as the religious influences of Shinto and Confucianism, Japanese culture emphasizes stable and harmonious social relationships.<sup>25</sup> A commentator summarized that Japan's homogeneous population shares traditional values. The family is the center of society and other social relationships are modeled to imitate it.<sup>26</sup>

In contrast, American culture has traditionally emphasized the primacy of the individual.<sup>27</sup> Sociologist Robert Bellah wrote that "[i]ndividualism lies at the very core of American culture."<sup>28</sup> Some commentators, like Bellah, see this individualism as a major cause of alienation and malaise conflict in American society,<sup>29</sup> while others see it as the guiding value which enables America to maintain its economic and political drive,<sup>30</sup> but there is general consensus that individualism is a quintessential American characteristic.

Not surprisingly, many Japanese business practices which reflect Japan's emphasis on group interest,<sup>31</sup> are different from the "individualistic" business practices prevalent in the United States. The typical Japanese company adheres to fundamental cultural values such as loyalty

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23. See Zhang, *supra* note 22, at 200 (explaining that the three hallmarks of Japanese management style — company unions, life-time employment, and seniority ranking — reflect the Japanese cultural emphasis on the group). American culture emphasizes the importance of the individual. *Id.*

24. See J.S. BAKER, JAPANESE ART 7-8 (1984) (discussing the uniqueness of Japanese culture and the various influences of other cultures on Japanese art). The uniqueness of Japanese culture stems not from an indigenous development free from outside influence, but rather from adapting to and transforming the influences of various cultures that have reached Japan. *Id.* at 7.

25. Comment, *Japanese Labor Relations*, *supra* note 22, at 588-89. The group's interest, as opposed to the individual's, must be preeminent in order to ensure social harmony. *Id.* at 590-91.

26. *Id.*

27. See R. BELLAH, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 142 (1985) (writing that individualism is a fundamental American cultural value).

28. *Id.*

29. See Comment, *Japanese Labor Relations*, *supra* note 22, at 587 (asserting that the American emphasis on individual rights and duties impinges upon labor-management cooperation because it fosters conflict within that relationship).

30. FALLOWS, MORE LIKE US (1989).

31. See D. HALBERSTAM, THE RECKONING 276 (1986) [hereinafter HALBERSTAM] (discussing Japanese people and their respect for work, elders and superiors, and their ambition to succeed). The Japanese also stressed education as a means to achievement with more force than their American counterparts. *Id.*

to superiors and the emphasis of the group over the individual.<sup>32</sup> Japanese companies attempt to hire only those persons who are likely to fit into the company environment and not engender conflict.<sup>33</sup> Guaranteed lifetime employment is an expectation shared both by the Japanese employer and its employees, and underlying this expectation are the cultural values of loyalty and social harmony.<sup>34</sup> Japanese employers often engage in activities considered outside of the scope of the employer/employee relationship in the United States, such as arranging marriages and obtaining good housing for employees and good schooling for their children.<sup>35</sup>

Japan's seniority-based compensation system assumes that an employee's value is inextricably tied to his or her experience and commitment to the company.<sup>36</sup> In return for guaranteed lifetime employment, the typical Japanese company expects its employees to accept different positions, undergo extended training, and remain completely loyal to the company.<sup>37</sup> The decision-making process at Japanese companies emphasizes consensus and group participation.<sup>38</sup>

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32. See Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 EMPLOYEE REL. L.J. 485, 503-05 (1979) [hereinafter Sethi] (discussing how Japanese business practices, such as lifetime employment and a seniority-based wage system, incorporate traditional Japanese values such as loyalty to superiors, the primacy of the group, self-pride, and hard work).

33. *Id.* at 503.

34. *Id.* at 504. The employee expects lifetime employment as a norm of Japanese work life. *Id.* The employer expects that the employee will remain if he or she is provided normal wages and work conditions. *Id.* The Japanese commitment to lifetime employment is so strong that employers will rotate employees to other jobs if an employee's regular work is interrupted by adverse economic conditions. See Comment, *Japanese Labor Relations*, *supra* note 22, at 594-95 (noting that during the 1973 oil crisis, surplus steel employees were assigned to work as tree planters landscaping company property until the crisis subsided). Japanese companies are imbued with a strong sense of paternalism, which is symbolized by their sponsoring of social events, recreational activities and holiday parties for employees. *Id.* at 595.

35. Comment, *Japanese Labor Relations*, *supra* note 22, at 595.

36. Sethi, *supra* note 32, at 503-04. Compensation is premised on a worker's value to the company as a whole rather than on his or her production over a certain period of time or on a specific project. *Id.* at 503.

37. *Id.* at 505.

38. *Id.* at 507. Japanese management is characterized by "ringisei" or management by consensus. *Id.* New proposals are initiated by lower-level company employees and then passed along to successively higher echelons of management for comments and corrections. *Id.* Proposals that meet with approval are finally given to the chief executive officer. *Id.* The proposal becomes official upon the chief executive officer's approval and is returned to the originating employee for implementation. *Id.* Japanese management also solicits input from employees with respect to improving or streamlining company operations. See Comment, *Japanese Labor Relations*, *supra* note 22, at 596 (explaining that this policy of increased participation motivates employees to be assertive and work harder because it gives them a sense of owning a stake in the company's achievements).



By contrast, American businesses generally do not establish a close, familial relationship with their employees.<sup>39</sup> In fact, historically, American labor-management relations have been adversarial.<sup>40</sup> Within this adversarial context, American businesses generally compensate employees on the basis of "equal pay for equal work" and individual effort.<sup>41</sup> Consequently, under such a compensation system, a worker's value is primarily a factor of his or her output and not his or her relationship to the company or its other employees.<sup>42</sup>

While Japanese managers seek to reduce the social distinctions between labor and management,<sup>43</sup> American management has typically exacerbated such social distinctions, particularly in the area of compensation.<sup>44</sup> Unlike their Japanese counterparts, American managers rarely work beside their employees on the production line.<sup>45</sup> Decision-making discussions among American managers are frank, with little emphasis on maintaining harmony and unity.<sup>46</sup> While Japanese business decision-making is gradual, consensual, and involves lower echelon employees,<sup>47</sup> American managers tend to make decisions with little employee input.<sup>48</sup>

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39. See Comment, *Japanese Labor Relations*, *supra* note 22, at 594-95 (observing that the labor force in the United States is highly mobile and often connected to its employers only by a paycheck).

40. *Id.* at 595-97 (commenting on American labor-management relations). American management theories traditionally viewed labor as simply a factor of production. *Id.* at 595. Impersonal employer-employee relations were the norm, due to the widespread adoption of Frederick Taylor's scientific management theories. *Id.* at 595 n.88. Labor's attempts to form unions were met with hostility and violence. *Id.* at 597.

41. Sethi, *supra* note 32, at 503. Age and seniority do not mean higher pay unless they are related to improved work performance. *Id.*

42. *Id.* In Japan, long-term employees who reach supervisory status must possess more than mere technical proficiency at their jobs. *Id.* at 504. They must be able to maintain group cohesiveness and well-being. *Id.*

43. Comment, *Japanese Labor Relations*, *supra* note 22, at 597.

44. See Wash. Post, Aug. 5, 1990, at D3 (indicating that the typical CEO of a sizable American corporation earns 35 times more than the typical American manufacturing employee). In Japan, this ratio is only 15 to 1. *Id.*

45. Comment, *Japanese Labor Relations*, *supra* note 22, at 597. Japanese managers work on the production line to gain a thorough understanding of the entire business operation and process. *Id.* An American manager who might attempt to work beside employees on the production line is sometimes prevented from doing so because of union rules. *Id.* at 597-98.

46. Sethi, *supra* note 32, at 506. American businesspersons are generally quite verbal and demand specificity in their negotiations. *Id.* Japanese managers, on the other hand, are vague and general in their decision-making discussions, so as to avoid specific problems that could cause conflict. *Id.*

47. See *supra* note 38 and accompanying text (explaining the "ringisei" system). See also Comment, *Japanese Labor Relations*, *supra* note 22, at 596 (discussing how employee ideas are solicited through quality control circles).

48. See Zhang, *supra* note 22, at 200 (detailing the efficiency of the "ringisei" system in contrast to American management's decision-making process). See also

Japanese employers assert that fundamental differences such as these prompt them to hire Japanese citizens for key executive positions.<sup>49</sup> Key executives are generally defined as those who make significant decisions, set policy, and implement the basic rules of operation within the company. Japanese companies conducting business in the United States believe it is essential that significant employees be Japanese citizens because of the need for an understanding of Japanese culture and business management practices.<sup>50</sup> Even when transferred to a foreign country, the Japanese employee readily retains this cultural awareness, thus permitting a smooth exchange of ideas and policies between the parent company in Japan and its subsidiary in the United States.<sup>51</sup> Maintaining a strong Japanese management presence is an effective means by which Japanese companies can control their American subsidiaries.<sup>52</sup> The Japanese Ministry of International Trade and Industry (MITI) has stated that "the ability of Japanese investors to dispatch executive employees from Japan to manage and control their overseas subsidiaries is of the greatest importance and indeed is a basic prerequisite for the successful management of their overseas business activities."<sup>53</sup> For these reasons, many Japanese employers rely upon article

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Johnson & Ouchi, *Made in America (Under Japanese Management)*, HARV. BUS. REV., Sept.-Oct. 1974, at 61 (discussing four characteristic differences between Japanese and American managerial methods). In Japan, information runs from lower management to upper management. *Id.* Upper management reviews lower management decision-making. *Id.* Middle management is employed to provide answers to problems. *Id.* Finally, consensual decision-making is emphasized. *Id.*

49. See Sethi, *supra* note 32, at 507-08 (explaining that C. Itoh & Company, a Japanese trading company, excluded Americans from high level staff meetings because it was believed that American employees "lacked the feeling or intuition" of Japanese employees).

50. See Lansing & Palmer, *Sumitomo Shoji v. Avagliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOUIS U.L.J. 153, 166-67 (1984) [hereinafter Lansing] (describing Japanese trading companies). Japanese trading companies, which are crucial to Japanese economic success and which have offices in approximately 100 foreign cities, require particularized skills and training that few Americans possess. *Id.*

51. See SETHI, JAPANESE BUSINESS AND SOCIAL CONFLICT 47 (1975) [hereinafter JAPANESE BUSINESS] (explaining that Japanese managers serving abroad understand that their futures depend not on performance but on knowing the conditions under which their Japanese parent companies operate and conduct business). Consequently, Japanese managers typically insulate themselves from the local culture and focus on what the home office desires. *Id.*

52. Accord Lansing, *supra* note 50, at 165-66 (describing how Japanese trading companies depend almost exclusively on Japanese managers to manage their subsidiaries).

53. Amicus Brief of MITI at 5, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) [hereinafter Amicus Brief].

VIII(1) of the Friendship Treaty as legal support for their policy of selecting Japanese citizens exclusively for key executive positions.<sup>54</sup>

### III. TREATY INTERPRETATION — LANGUAGE AND LEGISLATIVE HISTORY

Many American employees of Japanese firms are not persuaded by this explanation of fundamental differences between Japanese and American business management practices.<sup>55</sup> They assert that the Japanese employers' practices are in violation of Title VII and the IRCA. They contend that Japan has traditionally viewed the foreigner with distrust, and that Japanese society discriminates against women and minorities.<sup>56</sup> Many have filed suit under Title VII, while Japanese employers counter by asserting that their employment practices are legitimate and specifically authorized by the Japan Treaty.<sup>57</sup>

An analysis of the scope and application of both Title VII and the Treaty is necessary to resolve this conflict. Proper interpretation of the above requires examining the language of Title VII and the Treaty, the intent of the signatories of the Treaty and the drafters of Title VII, and the interpretations attributed to the Treaty and Title VII by the United States State Department and the Equal Opportunity Employment Commission (EEOC), respectively.<sup>58</sup> The analysis begins with a study of the Japan Treaty's legislative history.

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54. See *infra* notes 77-83 and accompanying text (discussing Japanese employers' resort to article VIII).

55. See *infra* 212-214 and accompanying text (questioning assertions of fundamental differences between American and Japanese business practices).

56. See Comment, *Women in Management*, *supra* note 3, at 337 (discussing the treatment of women in Japanese companies). In 1990, only 1.29% of the managers in Japanese companies were female. *Id.* Only 0.2% of the division chiefs and corporate directors in Japanese companies were women. *Id.* In 1988, Honda of America Manufacturing, Inc. settled a federal discrimination complaint with black and female employees amounting to approximately \$6 million in back pay. Cole & Deskins, *Racial Factors in Site Location and Employment Patterns in Japanese Auto Firms in America*, 31 CAL. MGMT. REV. 9 (1988) [hereinafter Cole]. Japanese auto manufacturers and parts suppliers have located many of their plants in regions with very small black populations. *Id.* at 13. Japanese auto manufacturers also hire fewer blacks than would be expected based on the population employment potential. *Id.* at 15. For example, based on the population employment potential, 10.5% of the employees at Honda's Marysville, Ohio plant should be black but only 2.8% are. *Id.*

57. See *supra* note 11 and accompanying text (considering Japanese employment practices).

58. See Lansing, *supra* note 50, at 159-61 (describing the State Department's interpretation of friendship treaties in general and the EEOC's interpretation of Title VII).

## A. LEGISLATIVE HISTORY

Following World War II, the United States signed over fifteen commercial treaties, known as friendship treaties, with more than two dozen nations.<sup>59</sup> The treaties' objective was to promote economic growth through the establishment of legal mechanisms to facilitate international trade.<sup>60</sup> Moreover, the friendship treaties, in an attempt to prevent businesses from suffering discriminatory treatment in foreign markets, specified the treatment to be accorded foreign firms.<sup>61</sup> The most common type of treatment was "national treatment," which provided foreign firms the same rights accorded to domestic companies.<sup>62</sup> Other types of treatment included "most-favored-nation" treatment, defined as treatment no less favorable than that under which the most privileged foreign company operated,<sup>63</sup> and "absolute, non-contingent" treatment, which provided "foreign companies a certain specified protection without regard of whether the same protection was provided to host country business."<sup>64</sup>

The United States and Japan signed a friendship treaty in 1953.<sup>65</sup> The Friendship Treaty is comprised of the Protocol and twenty-five articles.<sup>66</sup> Each article addresses a specific business concern such as workers' compensation,<sup>67</sup> access to the host country's legal system,<sup>68</sup> protection of business property from unlawful entry and molestation,<sup>69</sup> and the right to transfer funds from the host country to the home country.<sup>70</sup> Most of the articles identify not only a specific business concern but

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59. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 229 (1956) [hereinafter Walker].

60. Note, *Commercial Treaties*, *supra* note 21, at 949, n.14. See also Sen. Comm. on Foreign Relations, *Treaties of Friendship, Commerce, and Navigation*, S. EXEC. REP. NO. 5, 83d Cong., 1st Sess. 2 (1953) [hereinafter 1953 Report] (asserting that the one main purpose of the treaties was to further American economic foreign policy goals).

61. Note, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "of Their Choice"*, 57 FORDHAM L. REV. 765, 767-68 (1989).

62. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958) [hereinafter *Modern Treaties*].

63. *Id.*

64. *MacNamara v. Korean Airlines*, 863 F.2d 1135, 1143 (3d Cir. 1988), (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 188 n.18 (1982)).

65. Note, *Commercial Treaties*, *supra* note 21, at 949.

66. Japan Treaty, *supra* note 10, 4 U.S.T. at 2066-81.

67. Japan Treaty, *supra* note 10, art. III, 4 U.S.T. at 2067.

68. Japan Treaty, *supra* note 10, art. IV, 4 U.S.T. 2067-68.

69. Japan Treaty, *supra* note 10, art. VI, 4 U.S.T. at 2068-69.

70. Japan Treaty, *supra* note 10, art. XII, 4 U.S.T. at 2072-73.

also the standard of treatment with respect to that business concern.<sup>71</sup> Foreign firms, for example, are accorded national treatment with respect to workers' compensation,<sup>72</sup> national treatment and most-favored-nation treatment with respect to access to the legal system,<sup>73</sup> and national treatment and most-favored-nation treatment with respect to protection of business property.<sup>74</sup>

Article VIII specifies no standard of treatment.<sup>75</sup> Article VIII(1) provides in relevant part that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*."<sup>76</sup> Japanese firms that conduct business in the United States have used this provision to argue that they have an unqualified right to choose Japanese nationals exclusively for key executive positions.<sup>77</sup> They assert that article VIII(1), because it contains the broad phrase "of their choice," gives Japanese employers an *absolute* right to choose Japanese nationals for key executive positions, without regard for Title VII or other United States employment discrimination laws.<sup>78</sup> There is strong evidence in the Treaty's legislative history to support this contention.

The language of article VIII(1) is unequivocal: The Japanese firm shall be permitted to choose "technical experts, executive personnel . . . and other specialists of their choice."<sup>79</sup> The Supreme Court has recognized that "[a] basic maxim of treaty interpretation is that the clear meaning of treaty language controls unless such application leads to a result inconsistent with the intent or expectations of those who signed it."<sup>80</sup> As noted earlier, most of the Treaty provisions, in addition to specifying the rights granted or the activities protected, also specify the standard of treatment to be accorded.<sup>81</sup> Article VIII(1) is the sig-

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71. See *supra* note 67-74 and accompanying text (discussing standard of treatment accorded to various business concerns).

72. Japan Treaty, *supra* note 10, art. III, 4 U.S.T. at 2067.

73. Japan Treaty, *supra* note 10, art. IV, 4 U.S.T. at 2067-68.

74. Japan Treaty, *supra* note 10, art. VI, 4 U.S.T. at 2068-69.

75. Japan Treaty, *supra* note 10, art. VIII, 4 U.S.T. at 2070.

76. Japan Treaty, *supra* note 10, art. VIII, para. (1), 4 U.S.T. at 2070 (emphasis added).

77. *Sumitomo*, 457 U.S. 176; *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981).

78. *Sumitomo*, 457 U.S. at 182.

79. Japan Treaty, *supra* note 10, 4 U.S.T. at 2070.

80. *Sumitomo*, 457 U.S. at 180 (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

81. See *supra* notes 71-74 and accompanying text (discussing standards of treatment).

nificant exception to this rule.<sup>82</sup> Some have interpreted the absence of a standard of treatment in article VIII(1) to mean that article VIII(1) grants Japanese firms an absolute right to choose only Japanese nationals for key executive positions.<sup>83</sup>

This position was supported by Herman Walker, the Advisor on Commercial Treaties at the State Department at the time several friendship treaties were drafted.<sup>84</sup> Walker highlighted article VIII(1) as an example of an absolute right.<sup>85</sup> Such a straightforward assertion by one of the principal drafters of the Japan Treaty is strong evidence that article VIII(1) grants to the Japanese employer an absolute right to select nationals of its choosing, free from local laws.

Notably, similar provisions in other friendship treaties ratified during the same period as the Japanese Treaty expressly limit foreign employers' right to hire their own nationals.<sup>86</sup> This indicates that the drafters of the Japan Treaty had an opportunity to include limitations on Japanese employers' right to select employees of their choice. Thus, the drafters' failure to exercise this opportunity is significant.

Despite this evidence, some courts and commentators have concluded that article VIII(1) does not give Japanese employers an unfettered right to choose key executives.<sup>87</sup> They claim instead, that article

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82. See *supra* note 75 and accompanying text (noting that article VIII(1) does not specify a standard of treatment).

83. Walker, *supra* note 59, at 234 n.15. Walker stated that "[i]n the matter of employment, provisions have been developed *technically going beyond national treatment*, to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." *Id.* (emphasis added). Walker, *Provisions on Companies in United States Commercial Treaties*, 5 AM. J. INT'L. L. 373, 386 (1956) (emphasis added), [hereinafter *Provisions on Companies*].

84. *Provisions on Companies*, *supra* note 83, at 386.

85. *Id.*

86. See, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. VI, para. 1, 1 U.S.T. 785, T.I.A.S. No. 2155 [hereinafter *Ireland Treaty*] (maintaining that foreign employers select employees based on national treatment standards); Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1857-59, T.I.A.S. No. 3057 [hereinafter *Greece Treaty*] (acknowledging that foreign companies can hire employees "of their choice regardless of nationality"); Treaty of Friendship, Commerce and Protocol, Nov. 12, 1959, United States-Pakistan, art. VIII, para. 1, 12 U.S.T. 110, 114, T.I.A.S. No. 4683 [hereinafter *Pakistan Treaty*] (declaring that foreign companies have the right to hire employees of their choice only "in accordance with applicable laws").

87. See Note, *Commercial Treaties*, *supra* note 21, at 951 n.21 (indicating that the legislative history of other similar commercial treaties with limitations on hiring does not reveal that a different interpretation was intended from the Japan Treaty). These commentators reason that the omission of a specific treatment standard from article VIII(1) of the Japan Treaty is not significant and should be interpreted exactly as the provisions in the other treaties which specify national treatment with the "choice of employees" provision. *Id.* at 952. See *MacNamara v. Korean Airlines*, 863 F.2d 1135,

VIII(1) permits Japanese employers to ignore "percentile" restrictions, which discriminate on the basis of citizenship, but does not permit them to discriminate on the basis of race, sex, national origin, or age.<sup>88</sup> Percentile laws require foreign companies to hire a fixed percentage of employees from the "indigenous population."<sup>89</sup> These laws which existed in several countries during the period when the friendship treaties were drafted had a discernable impact on American corporations.<sup>90</sup> Such restrictions required American firms to hire a fixed percentage of employees from the indigenous population.<sup>91</sup>

Many thought percentile restrictions limited American firms in selecting Americans for key executive positions and thereby restricted United States investment abroad.<sup>92</sup> The United States government was acutely aware of this problem, and the legislative histories of certain friendship treaties indicate that the employer choice provisions were specifically inserted in order to protect American corporations from percentile restrictions abroad.<sup>93</sup> Proponents of the "percentile" argument interpret this evidence as supporting their view that article VIII(1) was intended solely to avoid percentile restrictions.<sup>94</sup>

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1144 (3d Cir. 1988) (holding that there was no logical conflict between an "of their choice" employee hiring provision in The United States-Korea Treaty and Title VII of the ADEA); *Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir. 1984) (holding that article XII, the "of their choice" employee hiring provision in the Greece Treaty, was intended to be a narrow privilege to permit employment of Greek citizens for some high-level positions, not a complete exemption from compliance with United States labor laws); *Avagliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 559 (2d Cir. 1981), *rev'd* 457 U.S. 176 (1982) (holding that article VIII(1) did not exempt wholly-owned Japanese subsidiaries incorporated in the United States from Title VII). *See also* Cooper, *Japanese Corporations and American Civil Rights Laws*, 12 DEN. J. INT'L L. & POL. 93, 93-107 (1982) (suggesting that the Supreme Court, in deciding *Sumitomo*, could have taken a bolder stance against employment discrimination by holding that article VIII(1) does not permit discrimination).

88. *See Sumitomo*, 457 U.S. at 188 (explaining that the friendship treaties grant foreign companies no greater rights than domestic companies; i.e., national treatment). *See also MacNamara*, 863 F.2d at 1144-46 (determining that the "of their choice" key employee hiring provision of the Korea Treaty allowed a limited privilege to hire non-citizens).

89. *MacNamara*, 863 F.2d at 1144 (quoting *Wickes*, 745 F.2d at 367-68 n.1).

90. *See infra* notes 6-7 and accompanying text (introducing Title VII).

91. *Wickes*, 745 F.2d at 367 n.1.

92. Note, *Commercial Treaties*, *supra* note 21, at 952-53.

93. S. EXEC. REP., 81st Cong., 2d Sess. 5-6 (1950). This report, which relates to a United States-Uruguay commercial treaty, stressed the need for American firms to be guaranteed the right to "employ American, as distinguished from foreign, technical experts, creative personnel, attorneys and other specialized employees." *Id.* The United States-Uruguay Treaty served as a model for the Japan Treaty. Comment, *Commercial Treaties*, *supra* note 21, at 953 n.31.

94. *See supra* notes 87-94 and accompanying text (detailing the "percentile" argument).

Another argument against a broad interpretation of article VIII(1) is that by the time the Japan Treaty was signed in 1953, nine states had civil rights laws forbidding private employment discrimination.<sup>95</sup> This argument contends that there is nothing in the legislative histories of the friendship treaties that suggest that they were intended to override existing state laws.<sup>96</sup>

None of these arguments explains why some treaties of this period specifically place limits on the employer's right to choose employees,<sup>97</sup> while the Japan Treaty contains no such specific limitation.<sup>98</sup> It is not convincing to ascribe such divergence to omission.<sup>99</sup> When the Japan Treaty was created, the drafters were aware of other friendship treaties which specifically place limitations on the employer's right to choose key executives.

The fact that several states statutorily prohibited private employment discrimination is also not a convincing argument against a broad interpretation of article VIII(1) of the Japan Treaty. Under the Supremacy Clause of the United States Constitution, where state law is inconsistent with federal law, federal law prevails.<sup>100</sup> This fundamental constitutional principle was well established during the period when the Japan Treaty was drafted.<sup>101</sup> If the Treaty drafters did not wish to un-

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95. See *Wickes*, 745 F.2d at 368, (citing Comment, *Commercial Treaties*, *supra* note 21, at 951 n.23 (naming the nine states with civil rights statutes: Connecticut, Indiana, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington)).

96. See *Wickes*, 745 F.2d at 368 (discussing the Greece Treaty). A State Department legal adviser informed Congress that the Greece Treaty would not impact existing state laws except those relating to restrictions on the practice of certain professions by noncitizens. *Id.* (citing *Commercial Treaties: Hearings on Treaties of Friendship, Commerce, and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan Before the Subcomm. on Commercial Treaties of the Senate Foreign Relations Comm.*, 83d Cong., 1st Sess. 4-5 (1953) [hereinafter 1953 Hearings]). Although *Wickes* involved the Greece Treaty, the arguments raised by the court are relevant because the treaty was ratified during the same period as the Japan Treaty.

97. See *supra* note 86 and accompanying text (noting those Friendship Treaties which specifically limit foreign employers' rights to select employees).

98. See Japan Treaty, *supra* note 10, art. VIII(1), 4 U.S.T. at 2070 (containing no express limitation on a Japanese employer's right to hire "technical experts, executive personnel [and] . . . other specialists of their choice").

99. *But see* Note, *Commercial Treaties*, *supra* note 21, at 951 n.21, citing S. EXEC. Doc. P, 89th Cong., 1st Sess. 2 (1966) (referring to the Treaty of Amity & Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540). A letter from the Secretary of State to Congress regarding the Thailand Treaty noted that the Treaty possessed "the basic provisions [of the Japanese Treaty] considered of major value from the standpoint of United States interests." *Id.*

100. U.S. CONST. art. VI, cl. 2.

101. See *Spieess*, 643 F.2d at 356 (noting that the Friendship Treaties supersede inconsistent state law).



dermine state employment discrimination laws, they would have specified as much within the Treaty. Yet, article VIII(1) does not contain any language suggesting that it be interpreted subject to existing state law.<sup>102</sup>

The most serious flaw in the percentile argument is that it only presents part of the picture. While Congress might have been somewhat concerned with percentile restrictions, its objective in drafting the Treaty was much broader.<sup>103</sup> In the years immediately following World War II, it was primarily United States investors who were able to make substantial foreign investments.<sup>104</sup> Certainly after the devastation Japan suffered in World War II and until 1952 when the Allied occupation of Japan formally ended, Japan had no ability to engage in foreign investment, and<sup>105</sup> the United States Congress was well aware of this serious imbalance of economic power.<sup>106</sup>

Indeed, Congress could not help but be aware of the imbalance after authorizing over two billion dollars in food, fertilizer, and industrial products to aid Japan's recovery.<sup>107</sup> Congress' Committee on Foreign Relations reflected this awareness when it noted that "in many cases the United States is in the position of seeking opportunity for American business abroad when, as a practical matter, foreign business may not be seeking similar opportunities in the United States."<sup>108</sup> What this suggests is that Congress wanted to help American business exploit its superior economic position in the immediate post-war period.<sup>109</sup> The early 1950's were a period when American business interests were

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102. See Japan Treaty, *supra* note 10, art. VIII(1), 4 U.S.T. at 2070 (containing no reference to existing state law).

103. See 1953 Report, *supra* note 60 (noting that in drafting the Treaties, Congress sought to increase private investment with Treaty countries).

104. Lansing, *supra* note 50, at 156-57 n.25.

105. *Id.*, citing Patrick & Rosovsky, *Japan's Economic Performance: An Overview*, in *ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 11 (H. Patrick and H. Rosovsky, ed. 1976).

106. See Lansing, *supra* note 50, at 156-57 (noting that Congress created protection essentially for American foreign investments because it was the only nation capable of serious foreign investment immediately following World War II).

107. COHEN, *REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL* 455 (1987) [hereinafter COHEN].

108. 1953 Report, *supra* note 60, at 11.

109. See Lansing, *supra* note 50, at 158 (referring to a Senate Executive Report concerning the Japanese Treaty). The Senate Report stated that article VIII(1)'s purpose was to avoid employment restrictions under local law. *Id.* Congress was aware that the incentive to invest in foreign countries was significantly reduced when profitability was hampered by having to teach domestics to work in significant managerial and technical positions. *Id.* Congress wanted to assure American firms abroad that they could reserve key managerial and technical positions for American citizens. *Id.*

thought to coincide with American interests in general,<sup>110</sup> a period when a General Motors executive allegedly quipped that "what's good for GM is good for the country."<sup>111</sup> In the spirit of these times, one can see why article VIII(1) of the Japan Treaty was designed not just to overcome percentile restrictions, but also to immunize American companies from any foreign barriers that might hinder American business.

Percentile proponents argue that the friendship treaties attempted to ensure equivalent national treatment,<sup>112</sup> and that therefore, Congress did not intend article VIII(1) to exempt foreign businesses from United States employment discrimination laws.<sup>113</sup> After all, any advantages American businesses would realize from such a provision would also be realized by their Japanese counterparts in the United States. Moreover, any "absolute" right provision would result in local American businesses having to abide by anti-discrimination laws while their Japanese competition remained exempt from such laws.

There is legislative history, however, indicating that Congress was not very concerned about reciprocal business effects.<sup>114</sup> From its vantage point in the early 1950s, Congress had no cause for concern about Japan exercising treaty rights to its advantage. Japan had been devastated by World War II and no one imagined that Japanese companies could invest on a large scale within the United States.<sup>115</sup> It was especially inconceivable that a treaty provision that gave American companies an immediate advantage in foreign countries might be used by foreign companies in the United States to create civil rights problems.<sup>116</sup> In the early 1950's, the concept of civil rights had not yet embedded itself into the fabric of American society; the *Brown v. Board of Education*<sup>117</sup> decision was handed down one year after the ratification of the Japan Treaty. Congress could not have foreseen or been overly con-

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110. HALBERSTAM, *supra* note 31, at 30.

111. See J. BARTLETT, *FAMILIAR QUOTATIONS* 817 (1980) (citing a 1952 quotation by Charles Erwin Wilson).

112. Note, *Commercial Treaties*, *supra* note 21, at 951.

113. See *id.* (contending that Congress did not consider civil rights implications in negotiating the Japan Treaty simply because there were no federal civil rights laws in existence at that time).

114. See 1953 Report, *supra* note 60, at 10 (explaining that the reciprocal nature of the Friendship Treaties would benefit American professionals more than foreign professionals simply because of the immense scale of American economic involvement in foreign nations).

115. See *supra* notes 104-08 and accompanying text (noting the post-war economic imbalance that existed between the United States and Japan).

116. See Note, *Commercial Treaties*, *supra* note 21, at 951 (noting that there were no federal civil rights laws concerning private employment discrimination when the Japan Treaty was ratified).

117. 347 U.S. 483 (1954).

cerned about any reciprocal civil rights effects. Instead, Congress focused on the more immediate matter of securing economic opportunity abroad for American business.<sup>118</sup> Senator Hickenlooper, in his remarks urging ratification of the Greece Treaty, stated that it was "essential that we not view conventions simply as documents which give aliens limited rights in this country. In fact, there are many more Americans doing business abroad than there are aliens doing business in this country. Americans get more advantages abroad than we accord advantages here to aliens."<sup>119</sup> In sum, the legislative history indicates that article VIII(1) attempted to provide employers of the signatory countries, both Japanese and American, with the right to choose their own nationals for key executive positions without being subject to domestic laws of the host country.

#### B. STATE DEPARTMENT AND MITI INTERPRETATION

The State Department has interpreted the Japan Treaty as according Japanese employers national treatment; that is, providing them a right to prefer Japanese citizens for key executive positions, but subject to the laws of the United States.<sup>120</sup> Although not conclusive, the State Department's interpretation of the Treaty carries great weight with federal courts.<sup>121</sup> Japan's Ministry of International Trade and Industry (MITI) has taken the opposite position, contending that the Japan Treaty exempts Japanese employers from Title VII limitations.<sup>122</sup> MITI did not specifically analyze the Treaty's legislative history, but stated that the "ability of Japanese investors to dispatch executive employees from Japan to manage and control their overseas subsidiaries is of the greatest importance."<sup>123</sup> MITI concluded that any court decision

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118. See 99 CONG. REC. 9313-37 (1953) (providing the pre-vote Senate debate on the advantages to American business that would result from passage of the Greece Treaty).

119. *Id.* at 9313.

120. See Walker, *supra* note 59, at 232 (explaining that the national treatment standard controlled with respect to the rights accorded foreign firms under the Friendship Treaties). Walker was the Advisor on Commercial Treaties at the State Department and was in charge of establishing the general structure of the Friendship Treaties. *Sumitomo*, 457 U.S. at 181 n.6. See also *Spiess*, 643 F.2d at 370 (citing Airgram from Secretary of State Kissinger to American embassy in Tokyo, No. A-105, Jan. 9, 1976 (discussing article VII of the Japan Treaty)). Kissinger stated that "a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired." *Id.*

121. *Sumitomo*, 457 U.S. at 184-85 (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

122. Amicus Brief, *supra* note 53, at 2.

123. *Id.* at 5.

that impaired this right would prompt Japanese investors to limit their investment in the United States.<sup>124</sup>

The Supreme Court held that great weight must be given to the meaning attributed to treaty provisions by the government agencies charged with its negotiation and enforcement.<sup>125</sup> Although the Supreme Court did not explicitly instruct as such, one can reasonably assume that both interpretations are of equal weight. After all, both nations participated fully in drafting the Treaty and presumably possess equally legitimate insights into the meaning of article VIII(1). Thus, interpretations by either the MITI or the State Department do not help in resolving the conflict between the Treaty and Title VII. Under these circumstances, this Article however, abides by MITI's position and concludes that article VIII(1) was intended to provide employers with the right to choose their own nationals for key executive positions without subjection to the domestic laws of the host country.

#### IV. TITLE VII — STATUTORY INTERPRETATION AND SCOPE

Some assert that the Friendship Treaty notwithstanding, the Japanese employer's practice of hiring only Japanese nationals is discriminatory and violative of Title VII.<sup>126</sup> Title VII prohibits employers from employment practices which discriminate on the basis of race, color, sex, religion, or national origin.<sup>127</sup> Title VII does not refer to the Japan Treaty or any other friendship treaty.<sup>128</sup> Title VII also does not expressly indicate whether foreign employers doing business in the United States come within its ambit.<sup>129</sup> This statutory silence raises two questions: 1) does Title VII apply to foreign employers doing business in the United States; and 2) if it does apply, does it limit the hiring practices of the Japanese employer?

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124. *Id.* at 5-6.

125. *Sumitomo*, 457 U.S. at 184-85 (citing *Kolovrat*, 366 U.S. at 194). In *Sumitomo*, the Court implicitly indicated that the Ministry of Foreign Affairs was the Japanese agency responsible for interpreting the Treaty. As indicated earlier, however, MITI has played an equally influential role in the interpretation and application of the Treaty. For purposes of this paper, the MITI position will be deemed to be the position of the Japanese government.

126. *Id.* at 178.

127. 42 U.S.C. § 2000e-2(a) (1988).

128. *Id.*

129. See 110 CONG. REC. H2737 (daily ed. Feb. 10, 1964) (statement of Rep. Libonati) (indicating that at least one congressman viewed Title VII as applying to foreign commerce). Rep. Libonati stated, "Title VII covers employers engaged in industries affecting commerce - interstate and foreign commerce and commerce within the District of Columbia." *Id.*

Although Title VII does not explicitly so state, its language, its underlying policies, and the social and political environment in which it was passed support the assertion that Congress intended Title VII to encompass all employers who do business in the United States. Title VII was enacted at a time when blatant, pervasive discrimination was practiced against African-Americans and other minorities in the workplace.<sup>130</sup> Several Congressional sponsors highlighted the debilitating effects of discrimination on the individual employee and on industry. Senator Humphrey, one of the sponsors of the 1964 Civil Rights Act, emphasized that, apart from moral concerns, full participation in the workplace through the prevention of discrimination would assure America's continued industrial strength.<sup>131</sup>

Title VII defines an employer as a person involved in an industry affecting commerce who employs fifteen or more employees.<sup>132</sup> Under this broad definition, the duties imposed by the Act attach once the basic threshold of fifteen or more employees is reached.<sup>133</sup> Such broad definitional language, enacted at a time of widespread discrimination, strongly suggests that Title VII applies to foreign employers doing business in this country. No other conclusion is reasonable, given Congress' serious concern over employment discrimination.

Further support for this position may be gathered by noting that while the definition of "employer" does provide limited exceptions from Title VII coverage, and these are explicitly set forth in the statute,<sup>134</sup> the exceptions do not include foreign employers doing business in this country.<sup>135</sup> In other words, Congress did not specifically exempt foreign employers doing business in the United States from Title VII coverage, even though it specifically exempted other categories of employers. Moreover, when the statute was amended in 1972, several of the excep-

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130. See B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS MOVEMENT* 224 (1970) (referring to Title VII). During the Title VII debates, Sen. Humphrey stated, "[d]iscrimination in employment is not confined to any region—it is widespread in every part of the country. It is harmful to Negroes and to members of other minority groups. It's also harmful to the Nation as a whole." *Id.*

131. See *id.* at 224-25 (statement of Sen. Humphrey) (referring to Council of Economic Advisors' estimates that discrimination in employment cost the American economy billions of dollars).

132. Title VII, § 701(b), 42 U.S.C. § 2000e(b) (1988).

133. See 42 U.S.C. § 2000e-2(a) (1988) (defining unlawful employment practices).

134. Title VII, § 701(b), 42 U.S.C. § 2000e(b) (1988). The term "employer" does not include the United States, a corporation wholly owned by the Government of the United States, or an Indian tribe. *Id.* In addition, Title VII does not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association or society. 42 U.S.C. § 2000e-1 (1988).

135. 42 U.S.C. § 2000e(b) (1988).

tions to the definition of employer were eliminated,<sup>136</sup> suggesting that Congress wished to maximize the coverage of Title VII. The Equal Opportunity Employment Commission (EEOC), the agency charged with enforcing Title VII, reached a similar conclusion.<sup>137</sup> In a comprehensive policy statement issued in 1988, the EEOC stated that "[i]t is also significant that the Act contains no exemption from coverage for foreign employers even though Congress wrote numerous exemptions in the original statute and its amendments."<sup>138</sup> In the same policy statement, the EEOC noted that following Congressional intent required extending Title VII to some foreign employers.<sup>139</sup> According to the EEOC, section 2000e-1 of Title VII is consistent with the remedial purpose of the Civil Rights Act, which aims to break down the barriers that operated to favor certain classes of employees over others.<sup>140</sup> Furthermore, the Supreme Court recognized that Congress considered the policy underlying Title VII to be of highest priority.<sup>141</sup> As a policy of the highest priority, it would be consistent to apply Title VII to all employers, unless specifically exempted from the Act. Here, Japanese employers are not specifically exempted from Title VII.<sup>142</sup> It is therefore reasonable to conclude that Japanese employers fall within the ambit of Title VII.

## V. TITLE VII — THEORIES AND APPLICATION

Although the scope of Title VII encompasses Japanese employers, it still remains to be determined whether the Japanese hiring practices violate Title VII. As noted, Japanese employers have a practice of choosing only Japanese citizens for key executive positions.<sup>143</sup> At first glance, this practice does not appear violative of Title VII which only prohibits discrimination on the basis of race, color, sex, religion, and national origin; citizenship is not a protected category.<sup>144</sup> The problem

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136. See H.R. REP. NO. 238, 72d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2180 (expanding the coverage of the term "employer").

137. EEOC Policy Statement, N-915.033, (New Developments), Empl. Prac. Guide (CCH) § 5158, at 6433-41 (Sept. 2, 1988).

138. *Id.* at 6434.

139. *Id.*

140. *Id.* See also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (finding that the pre-employment test given by the company did not measure job performance but rather discriminated against blacks in the abstract).

141. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

142. See *supra* notes 132-139 and accompanying text (discussing the coverage of the term "employer").

143. See *supra* notes 22-54 and accompanying text (discussing Japanese hiring practices).

144. 42 U.S.C. § 2000e-2(a) (1988).

arises when one examines the *effect* of hiring on the basis of citizenship upon Title VII's protected categories.

Hiring on the basis of citizenship tends to overlap with certain protected categories, especially national origin. Citizenship refers to a legal identification with a particular country—a native or naturalized person owing allegiance to a particular state, subject to its jurisdiction and government, and entitled to protection from it.<sup>145</sup> National origin, is generally understood to refer to the country from which an individual or an individual's ancestors originated.<sup>146</sup> Both terms refer to a type of attachment to a specific country — a legal attachment in the case of citizenship, and an ancestral attachment in the case of national origin.

Because both terms refer to a particular country, and employment decisions made on the basis of citizenship may discriminate against those whose ancestors did not originate from that country. This is especially true in the case of Japan, which has a homogenous population and a restrictive immigration policy so that few foreigners are permitted to become naturalized citizens.<sup>147</sup> Consequently, a Japanese-only employment policy inevitably encompasses only Japanese citizens and those of Japanese origin. This can result in national origin discrimination because it would affect qualified applicants whose national origin was not Japan. Exclusion on the basis of national origin is explicitly prohibited by Title VII.

As an aside, it is not immediately apparent that Congress intended to include persons whose national origin is the United States.<sup>148</sup> Resolving this issue is important because the majority of those who may be denied employment by Japanese employers in the United States will most likely be those whose immediate ancestors are Americans.<sup>149</sup> If it is determined that the legislature did not intend to include such persons, then this large class of persons is precluded from bringing an action under Title VII for national origin discrimination. The legislative history suggests that Congress intended that "national origin" be broadly

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145. BLACK'S LAW DICTIONARY 221 (5th ed. 1979).

146. BLACK'S LAW DICTIONARY 924 (5th ed. 1979).

147. See Note, *Yankees out of North America: Foreign Employer Job Discrimination against American Citizens*, 83 MICH. L. REV. 237, 241 n.19 (1984) [hereinafter note, *Yankees*] (observing that as of 1971, over 99% of Japan's population was made up of persons of Japanese origin).

148. See 110 CONG. REC. 2549 (1964) (statement of Rep. Roosevelt) (stating that national origin means a person's country of origin).

149. See generally D. BOGUE, *THE POPULATION OF THE UNITED STATES: HISTORICAL TRENDS AND FUTURE PROJECTIONS* (1985) (examining United States population trends). This is clear when one considers that the percentage of persons whose immediate ancestors are from the United States far outnumber first and second generation immigrants to the United States. *Id.*

construed to include members of all national groups and groups of persons of common heritage or ancestry.<sup>150</sup> Yet there is no clear evidence that Congress intended to extend coverage to those of American national origin.

This is understandable because national origin cases involving employees of American descent would most likely arise only where a foreign employer is involved; it is doubtful that an American employer would discriminate against applicants of American origin. As discussed earlier, however, Congress did not expressly consider the applicability of Title VII to the foreign employer and thus probably did not consider whether national origin discrimination extended to those of American national origin.<sup>151</sup> This raises the issue of whether Title VII covers discriminatory practices based on *American* national origin. The brief response is yes — given the broad definition of national origin, the broad policies underlying Title VII, and the broad EEOC regulations.<sup>152</sup> Several courts have come to this conclusion, noting that “employment discrimination, based on one’s country of birth, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII.”<sup>153</sup>

#### A. ESPINOZA AND ITS IMPLICATIONS

In 1973, the Supreme Court addressed the issue of overlap between citizenship and national origin in *Espinoza v. Farah Manufacturing Co.*<sup>154</sup> Espinoza, a lawfully admitted resident alien who remained a citizen of Mexico, applied for employment as a seamstress with Farah Manufacturing Company (Farah).<sup>155</sup> Her application was rejected on the basis of a long standing company policy of not hiring aliens.<sup>156</sup> She

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150. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 305 (2d ed. 1983).

151. See *supra* notes 146 and 150 and accompanying text (discussing the meaning of national origin).

152. Guidelines on Discrimination Because of National Origin, 29 C.F.R. Part 1606 (1990). The EEOC regulation explicitly states that the guidelines on national origin discrimination apply to “all entities covered by Title VII (collectively referred to as ‘employer’).” *Id.* at § 1606.2. As noted earlier, “employer” has been defined in the Title VII context to also include foreign employers conducting business within the United States. 42 U.S.C. § 2000e(b) (1988). See also Lansing, *supra* note 50, at 160 (contending that Title VII applies to both foreign and domestic employers because it does not distinguish one from the other).

153. Chaiffetz v. Robertson Research Holding, 798 F.2d 731, 733 (5th Cir. 1986) (citing Thomas v. Rohner-Gehrig, 582 F. Supp. 669, 675 (N.D. Ill. 1984)).

154. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

155. *Id.* at 87.

156. *Id.*



filed suit under section 703 of Title VII,<sup>157</sup> alleging that Farah had discriminated against her because of her national origin.<sup>158</sup> The Supreme Court disagreed, holding that Espinoza was rejected because of her citizenship, which the Court concluded is a different category than national origin.<sup>159</sup> The Court determined that national origin refers to the nation from which an individual's ancestors came and not to an individual's legal relationship with a particular nation.<sup>160</sup> In support of this conclusion, the Court noted the legally sanctioned policy of barring non-citizens from certain federal government jobs, a policy which existed despite Congressional intent to forbid discrimination in Federal employment on the basis of national origin.<sup>161</sup> The Court reasoned that prohibition of non-citizens from certain federal government jobs could be reconciled with the general prohibition against national origin discrimination only if citizenship and national origin were conceptually different.<sup>162</sup> Thus, based on the above analysis, the Court determined that Congress did not intend for discrimination based on citizenship to be included in Title VII.<sup>163</sup>

The Court, while drawing a clear distinction between citizenship and national origin, cautioned that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin."<sup>164</sup> The Court stated clearly that where the purpose or *effect* of the employer action is to discriminate on the basis of national origin, such action is prohibited by Title VII.<sup>165</sup> Because national origin and citizenship are closely connected, it is possible that a Japanese employer who hires on the basis of citizenship effectively discriminates on the basis of national origin. To determine whether there is such an effect, we turn to various Title VII theories.

#### B. DISPARATE TREATMENT

Disparate treatment refers to the employer practice of treating some people less favorably than others due to their race, color, religion, sex, or national origin.<sup>166</sup> Demonstrating disparate treatment involves prov-

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157. 42 U.S.C. § 2000e (1988).

158. *Espinoza*, 414 U.S. at 87.

159. *Id.* at 95-96.

160. *Id.* at 94.

161. *Id.* at 90.

162. *Id.*

163. *Id.* at 89-91.

164. *Id.* at 92.

165. *Id.*

166. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

ing a discriminatory motive, which may be accomplished through comparative evidence.<sup>167</sup> In the typical disparate treatment case, the plaintiff employee must initially establish a *prima facie* case of discrimination.<sup>168</sup> The burden of proof then shifts to the defendant employer, who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>169</sup> If the employer accomplishes this, then the burden of proof shifts back to the employee, who must prove by a preponderance of the evidence that the employer's supposedly legitimate, nondiscriminatory reason was actually a pretext for intentional discrimination.<sup>170</sup>

The Japanese practice of hiring key executives on the basis of citizenship is discriminatory under the disparate treatment theory. It is relatively easy to demonstrate that selection on such a basis is a pretext for national origin discrimination.<sup>171</sup> The Japanese employer values not citizenship *per se*, but more the cultural values and business knowledge believed to be associated with citizenship.<sup>172</sup> The rejected applicant can argue that citizenship is a subterfuge which assures that the Japanese employer select only candidates of Japanese national origin.<sup>173</sup> Thus, the Japanese employer's explanation that the hiring selections were based on Japanese citizenship is likely to be viewed as false.<sup>174</sup>

Some courts have held that even if an employer's asserted basis for its actions is proven false, the complainant must also prove that the asserted basis is a pretext for discrimination.<sup>175</sup> These courts have rea-

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167. *Id.*

168. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This means the plaintiff employee must show that: (1) he or she is a member of a protected class; (2) he or she was qualified for the position; (3) he or she was rejected despite his or her qualifications; and (4) that the position remained unfilled and the employer continued to look at applicants with similar qualifications. *Id.*

169. *Id.* at 802.

170. *Id.* at 804.

171. See note, *Yankees*, *supra* note 147, at 241 (observing that requiring an employee to possess extensive familiarity with Japanese business and cultural values may be tantamount to national origin discrimination). The EEOC has acknowledged this, determining that national origin discrimination meant those practices premised on "cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1983).

172. Note, *Yankees*, *supra* note 147, at 241.

173. See *id.* (observing that because of Japan's homogenous population, those with the necessary understanding of Japanese culture either in Japan or America are almost inevitably of Japanese national origin).

174. *Id.*

175. See *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987) (stating that a claimant may prove an employer's pretext for discrimination by demonstrating that the employer's reasons are unworthy of belief). See also *White v. Vathally*, 732 F.2d 1037, 1042-43 (1st Cir. 1984), *cert denied*, 469 U.S. 933 (1984) (acknowledging the required showing of pretext consists of proof that the legitimate reasons offered by the defendant

soned that the additional showing is necessary because the employee retains the burden of demonstrating discriminatory intent throughout the case.<sup>176</sup> Under these circumstances, Japanese employers can conceivably argue that their non-Japanese employees have not demonstrated that Japanese citizenship is a pretext for national origin discrimination. In other words, while citizenship may not be the desired employment qualification, the employee may not be able to demonstrate that it is a pretext for national origin discrimination.

This argument, however, may not be particularly successful. First, a number of federal circuits have rejected the additional requirement and have held instead that discrimination can be found once the employer's asserted basis is proven false.<sup>177</sup> Second, if a Japanese employer considers only Japanese nationals for employment, then it would not be difficult to demonstrate discriminatory intent because if the employer's objective is to obtain the best qualified person, then it is not clear why all non-Japanese applicants are automatically precluded from consideration. The employer's action appears even more discriminatory when the court considers that the Japanese have historically had a strong prejudice against non-Japanese.<sup>178</sup> Thus, a Japanese employer who attempts to raise the "citizenship" defense against a claim of disparate treatment may find it difficult to dodge a finding of national origin discrimination.

A Japanese employer's best strategy with respect to successfully defending its hiring and employment practices is to demonstrate that the selected candidate was chosen not on the basis of citizenship, but instead on the basis of his or her knowledge of Japanese culture and business practices. This can avoid a finding of intentional discrimination because it focuses on the unique and specific qualifications necessary to be a key executive in a Japanese company. Under this strategy, a Japa-

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were not sincere, but were instead only a pretext for discrimination); *Mason v. Continental Illinois National Bank*, 704 F.2d 361, 367 (7th Cir. 1983) (explaining that the plaintiff should have presented evidence to establish that the legitimate nondiscriminatory reason articulated by the employer was pretextual).

176. *White*, 732 F.2d at 1042-43.

177. See *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (dismissing the appellant's federal claims on the ground that appellant failed to establish a prima facie case of race discrimination); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 726 (3d Cir. 1988) (stating that once plaintiff meets his or her burden of showing that the defendant employer's asserted reasons are pretextual, then the jury may infer that the defendant employer's decision was motivated by race); *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987) (noting that the falsity of the articulated reason is not the only basis for finding it pretextual).

178. See *Cole*, *supra* note 56, at 9 (noting that Honda of America Manufacturing settled a federal discrimination complaint with 370 non-Japanese workers for six million dollars in 1988).

nese employer can hire employees based on an ostensibly legitimate, non-discriminatory factor — familiarity with Japanese business practices and cultural values.<sup>179</sup> Then, even if the employees selected are Japanese citizens or those of Japanese origin, the employer has not acted discriminatorily under Title VII because it hired the candidate on the basis of legitimate qualifications.

This strategy requires Japanese employers to develop specific hiring criteria that will inevitably encompass some persons not of Japanese origin, while making Japanese candidates significantly more likely to meet requirements.<sup>180</sup> These criteria could include: (1) language fluency, (2) understanding of and experience with Japanese management and business practices, and (3) understanding of Japanese culture.<sup>181</sup> Japanese employers will have to demonstrate that their employment decisions legitimately require consideration of such criteria. This may create difficulties because it may not be easy to demonstrate that core Japanese values are a necessary requirement for the position. In some cases, while an applicant may have had some exposure to cultural values, the Japanese employer may question whether the applicant will apply those values in the same manner as a Japanese employee. Having an intellectual grasp of a concept or practice does not guarantee that those concepts will be put into practice in a manner consistent with Japanese culture. Although such reasoning may be theoretically justified, actions based on such concerns may be deemed by courts to be a pretext for discrimination.

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179. See Note, *Yankees*, *supra* note 147, at 241-42 (making the argument that a cultural and business familiarity requirement does not represent national origin discrimination). American courts interpretation of "national origin" may be construed as narrow to the point of not including cultural characteristics. *Id.*

180. See *id.* at 242 (arguing for a business and cultural familiarity requirement). The EEOC prohibits employment practices that discriminate on the basis of cultural or linguistic characteristics. *Id.*, citing 29 C.F.R. § 1606.1 (1983). The EEOC's focus with respect to national origin discrimination appears to be on immutable characteristics that cannot be acquired by those outside the group. *Yankees*, *supra* note 149, at 242. A cultural and business familiarity requirement falls outside the ambit of the EEOC's policy because it does not demand that a person be born in Japan in order to meet the test. *Id.*

181. See *Avagliano*, 638 F.2d at 552 (considering applicability of Title VII). The Second Circuit suggested that, in consideration of the unique needs of a Japanese firm conducting business in America, the following factors be given credence: (1) Japanese fluency skills; (2) understanding of Japanese goods, markets, customs, and business methods; (3) familiarity with the persons and operations vis-a-vis the Japanese parent; and (4) a sound relationship with those persons with whom the subsidiary or parent conducts business. *Id.* at 559.

Japanese employers should also emphasize the rigorous training needed to meet the above criteria,<sup>182</sup> thus amplifying the difficulties a person of non-Japanese origin would undergo in attempting to achieve them. The employer may wish to highlight that future Japanese executives, who already have the advantage of being born into the Japanese culture, must nevertheless undergo rigorous ten-year training programs where they become familiar with the monetary systems, culture, and products of the countries with which they trade. The employer bears the burden of convincing the trier of fact that such a mix of culture and training is fundamental to key executive positions.

Japanese employers should adopt qualifications-oriented employment policies that do not expressly refer to citizenship. This "qualifications" approach avoids reliance upon an overly broad classification (such as citizenship) that could be construed as a pretextual reason for intentional discrimination. At the same time, it permits Japanese employers to hire employees who possess the characteristics and qualifications required by the position. In short, the "qualifications" approach is non-discriminatory.

### C. BFOQ EXCEPTION

A Japanese employer can defend an employment policy premised on national origin under the bona fide occupational qualification (BFOQ) exception.<sup>183</sup> The BFOQ exception allows intentional discrimination on the grounds of religion, sex, or national origin, if the discriminatory practice is "reasonably necessary" to the regular conduct of the employer's business.<sup>184</sup> The exception is expressly permitted by Title VII.<sup>185</sup>

The BFOQ exception thus permits an employer to make employment decisions on the basis of what would normally be considered discriminatory criteria. For example, in *Dothard v. Rawlinson*,<sup>186</sup> the Supreme Court held that the BFOQ exception permitted the employer to consider only males for the position of prison guard in maximum security prisons.<sup>187</sup> The Alabama Board of Corrections denied a woman employ-

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182. See Lansing, *supra* note 50, at 166-67 (discussing the extensive training executives undergo in Japan's trading companies); Note, *Yankees*, *supra* note 147, at 251 (noting that the average Japanese trading executive goes through a ten year training program).

183. 42 U.S.C. § 2000e-(2)(e) (1988). See also *supra* notes 12-14 and accompanying text (describing the BFOQ defense).

184. 42 U.S.C. § 2000e-(2)(e) (1988).

185. 42 U.S.C. § 2000e-(2)(e) (1988).

186. 433 U.S. 321 (1977).

187. *Id.* at 324.

ment as a prison guard.<sup>188</sup> The Board justified its denial, in part, on the basis of a state regulation which required male prison guards in maximum security facilities.<sup>189</sup> The Court found that the state regulation was encompassed by the BFOQ exception and found that Alabama's male maximum security prisons were such violent and disorganized places that using women as guards would endanger prison security.<sup>190</sup> The Court reasoned that "where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians."<sup>191</sup> The Court justified a BFOQ exception under such circumstances by indicating that placing women in such positions would pose a real threat not only to the women, but also to the "basic control of the penitentiary and protection of its inmates and the other security personnel."<sup>192</sup> The Court concluded that "[t]he employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a [prison guard's] responsibility" and that therefore, the "male guards only"<sup>193</sup> regulation was justified.<sup>194</sup>

Japanese companies wishing to use the BFOQ exception should note that it is generally narrowly interpreted by American courts<sup>195</sup> and the EEOC.<sup>196</sup> Courts that narrowly construe the BFOQ exception apply it only when the "essence of the business operation" would be hurt

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188. *Id.* at 323. Rawlinson was denied a position as correctional counselor trainee because she did not meet the statutory minimum height and weight requirement. *Id.* at 323-24. The Court found that such requirements had a discriminatory impact on female applicants. *Id.* at 332.

189. *Id.* at 332 n.16.

190. *See id.* at 334-37 (describing conditions in Alabama's male maximum security prisons). Alabama's male maximum security prisons aggregated prisoners without regard to seriousness of offense. *Id.* at 335.

191. *Id.* at 335-36.

192. *Id.* at 336.

193. *Id.*

194. *Id.*

195. *Id.* at 334. *See also* *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 387 (5th Cir. 1971) (noting that EEOC guidelines required the BFOQ exception to be narrowly construed), *cert. denied*, 404 U.S. 950 (1971); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (denouncing broad interpretation of the BFOQ defense).

Supporters of a broad interpretation of the BFOQ exception cite *Sumitomo*, 457 U.S. 176. In *Sumitomo*, the Court suggested that the BFOQ defense may be legitimately invoked by a Japanese employer when "[t]here is little doubt that some positions in a Japanese controlled company doing business in the U.S. call for great familiarity with not only the language but also the culture, customs, and business practices of that country." *Id.* at 189 n.19. The Court, however, did not specifically address the BFOQ issue in *Sumitomo*. *Id.*

196. 29 C.F.R. §§ 1604.2(a), 1606.1 (1977) (noted in Note, *Commercial Treaties*, *supra* note 21, at 968-69, n.110).

through compliance with Title VII.<sup>197</sup> Other courts have applied the BFOQ defense when there is a reasonable, factual cause to believe that all or substantially all of the members of the discriminated class would be unable to perform their work safely and efficiently, or when it would be extremely impractical to deal with the protected class on an individual basis.<sup>198</sup> Only in these limited situations may the employer make employment decisions that discriminate against persons protected under Title VII.

The Second Circuit broke from this restrictive approach when it fashioned a significantly different BFOQ analysis within the "foreign employer" context.<sup>199</sup> In *Avagliano v. Sumitomo Shoji, Am., Inc.*, the Second Circuit reasoned that while the BFOQ exception is normally construed very narrowly, as pertaining to a Japanese firm enjoying rights under Article VIII of the Treaty, it must be interpreted in a way that gives proper weight to the Treaty rights and special needs of a Japanese firm conducting business in the United States.<sup>200</sup>

This more expansive application of the BFOQ defense was not adequately justified by the Second Circuit. The court's rationale was that only a broad construction of the BFOQ defense would appropriately account for the Treaty rights of the Japanese employer and give due weight to the unique requirements of a Japanese employer doing business in this country.<sup>201</sup> This rationale, however, avoids the more fundamental question of *why* Treaty rights needed to be taken into account. Indeed, earlier in its opinion, the Second Circuit recognized that the Treaty phrase "of their choice" did not immunize Japanese employers from Title VII.<sup>202</sup>

If the court was attempting to accommodate the potentially conflicting provisions of the Treaty and Title VII, then it never explained why accommodation was necessary in the first place. The court's decision leaves the impression that because of the Treaty, accommodation is the *only* possible resolution to the conflict. Yet, given the lack of reference within Title VII to practices of foreign employers, the court possibly

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197. *Dothard*, 433 U.S. at 334. *Pime v. Loyola Univ.*, 803 F.2d 351, 356 (7th Cir. 1986).

198. *Harris v. Pan Am. World Airways*, 649 F.2d 670, 676 (9th Cir. 1980).

199. *Avagliano*, 638 F.2d at 552.

200. *Id.* at 559. The court went on to list four factors that would be relevant to finding a BFOQ: 1) Japanese linguistic and cultural skills, 2) knowledge of Japanese products, markets, customs, and business practices, 3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and 4) acceptability to those persons with whom the company or branch does business. *Id.*

201. *Id.* at 559.

202. *Id.* at 558.

could have concluded that employers doing business under the FCN treaty were exempt from Title VII. Similarly, given the broad language of Title VII and its overarching policy, the court could have possibly concluded that Title VII was fully applicable to Japanese employers doing business in this country. Accommodation was not a mandated conclusion.

Moreover, the Second Circuit did not explain why it was necessary to expand upon the traditional construction of the BFOQ defense. The court listed "acceptability to those persons with whom the company or branch does business" as a relevant factor supporting a BFOQ defense.<sup>203</sup> Client or customer preferences had been previously rejected by other circuits as a rationale for a BFOQ.<sup>204</sup> The Second Circuit never explained why an exception could be made in this context.

On a more fundamental level, it is doubtful that a national origin BFOQ exception, even when read narrowly, is justifiable. The BFOQ exception is meant to accommodate essential business needs.<sup>205</sup> As discussed previously, the Supreme Court in *Dothard* judged the BFOQ defense valid on the grounds that females generally do not possess the strength necessary to maintain prison security.<sup>206</sup> Thus, a relatively immutable characteristic, such as physical strength, served to validate a BFOQ defense.

A national origin BFOQ exception in this instance rests upon the assumption that only those of Japanese origin possess the requisite knowledge and understanding of Japanese business practices and cultural values, and that this knowledge and understanding cannot be obtained by non-Japanese persons.<sup>207</sup> This is a national origin stereotype because it relies upon "factually unsupportable assumptions that all people of a particular national origin have acquired a particular trait, character, or ability by virtue of their national origin and its concomitant culture."<sup>208</sup> Unlike in *Dothard*, this BFOQ exception does not depend upon immutable characteristics. It is difficult, but not impossible, for a non-Japanese person to obtain sufficient knowledge and understanding of Japanese business practices and cultural values. It is diffi-

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203. *Id.* at 559.

204. *Diaz*, 442 F.2d at 385; *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

205. *Diaz*, 442 F.2d at 386.

206. *Dothard*, 443 U.S. at 334-37 (1977).

207. See Note, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "of Their Choice"*, 86 COLUM. L. REV. 139, 165 (1986) (analyzing what is needed to mount a successful BFOQ defense).

208. Gray, *The National Origin BFOQ under Title VII: Limiting the Scope of the Exception*, 11 EMPLOYEE REL. L. J. 311, 314 (1985) [hereinafter Gray].



cult, if not impossible, to prove that no non-Japanese businessperson possesses such knowledge and understanding.<sup>209</sup> National origin is not a short-cut to describing an applicant's knowledge of Japanese culture and business practices. There is theoretically nothing that prevents a class of non-Japanese persons from acquiring the requisite knowledge of Japanese customs and practices. Unlike strength, looks, and other physical characteristics, knowledge and experience of Japanese culture may be acquired by a class of non-Japanese persons.

Formulating a national origin classification on the basis of knowledge of and exposure to Japanese culture is unlike a gender based classification of size, weight, and strength. A gender classification is a legitimate short-cut for describing differences in strength and other physical characteristics. These physical characteristics are generally understood to be beyond the control of the class endowed with those characteristics. For example, it is conventionally acknowledged that females as a class cannot raise their strength level<sup>210</sup> so as to be indistinguishable from males.<sup>211</sup> The same degree of predictability, however, does not exist for national origin classifications. Being of Japanese national origin is not dispositive of whether a person possesses the requisite knowledge to hold a key executive position.

Some may emphasize the historically closed nature of Japanese society and the substantial differences between Japanese and American culture in order to show the many practical impediments justifying a BFOQ exception.<sup>212</sup> Such practical reasons, however, merely highlight the difficulty of obtaining such knowledge rather than demonstrating the *impossibility* of acquiring the necessary experience and information. Mere difficulty in acquiring the characteristics of a certain class, cannot be an adequate justification for a BFOQ exception. Indeed, to accept the "closed nature of Japanese society" as a basis for a BFOQ exception would be to allow the Japanese to stress the xenophobic aspects of their culture and to legitimize national origin discrimination.

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209. *Id.* at 315.

210. *See* N.Y. Times, July 21, 1991, Section 4 at 3 (discussing the arguments for and against sending women into combat). Some argue that gender differences such as strength are not genetic differences, but instead are a culturally conditioned difference.

211. *See Women and Superiority*, Washington Post, June 21, 1991, at C3 (noting that in a culture where strength is worshipped, a strong belief that men are the superior sex prevails). Furthermore, societal expectations of women may prevent them from engaging in activities and events which would promote strength. *Id.*

212. *See* The Independent, Oct. 6, 1990 at 33 (stating that Naomi Wolf, in her book *The Beauty Myth*, supports the position that social expectations of beauty prevent women from obtaining self worth).

Moreover, Japan's increased economic activity and investment in the United States has resulted in many Americans receiving significant exposure to Japanese business practices and cultural values.<sup>213</sup> Many American companies have in fact instituted Japanese-influenced labor and management policies.<sup>214</sup> In this context, it cannot be argued that Americans are completely incapable of obtaining a sufficient understanding of Japanese business practices and cultural values.

Instead of relying on the BFOQ defense, the Japanese employer is advised to focus instead on an employment policy premised on actual employment qualifications approach would best serve Japanese employers. The qualifications approach, with its focus on knowledge of Japanese business and culture, avoids excluding qualified non-Japanese persons.<sup>215</sup> National origin would cease to be an issue and Japanese companies could be assured that they are hiring from a qualified pool of applicants. Whether the criteria at issue serves essential business needs is the ultimate focus with respect to either a national origin BFOQ or the qualifications approach. As explained earlier, however, this is a difficult burden for a national origin BFOQ to meet.

#### D. DISPARATE IMPACT

Japanese employers who make employment decisions on the basis of citizenship may also be vulnerable under Title VII's disparate impact analysis. Disparate impact analysis was first developed by the Supreme Court in *Griggs v. Duke Power Co.*<sup>216</sup> In *Griggs*, the employer required all successful applicants for certain jobs to have either a high school education or to have passed a general intelligence test.<sup>217</sup> These requirements operated to disqualify black applicants at a substantially

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213. See *supra* note 18 and accompanying text (explaining the widespread involvement of Japanese subsidiaries in the United States). See also Comment, *Japanese Labor Relations*, *supra* note 22, at 622-23 (noting how Honda implemented Japanese-style labor practices at its Marysville, Ohio plant).

214. See Comment, *Japanese Labor Relations*, *supra* note 22, at 606-07 (describing Japanese influence on American companies). Over 200 American firms had adopted quality control circles by 1981. *Id.* at 606. Motorola implemented a Participative Management Program that stresses employee participation, communication, and trust as a way to increase product quality and worker productivity. *Id.* at 607. Westinghouse Corporation examined the possibility of implementing Theory Z management techniques, which emphasize quality control, employee input, and consensus. *Id.*

215. See Note, *Yankees*, *supra* note 147, at 249-53 (arguing for a BFOQ based on business and cultural familiarity).

216. 401 U.S. 424 (1971).

217. *Id.* at 425-46.

higher rate than white applicants.<sup>218</sup> The Supreme Court concluded that neither requirement was significantly related to successful job performance.<sup>219</sup> On this basis, the Court held that facially neutral employment practices, which are not job-related and which have a discriminatory impact on protected groups, are violative of Title VII.<sup>220</sup> Furthermore, the Court established that an employer could violate Title VII even when acting in complete good faith and without any discriminatory intent.<sup>221</sup>

A citizenship-based hiring requirement, while arguably facially neutral,<sup>222</sup> clearly disqualifies persons of non-Japanese origin. Because Japan is largely homogeneous,<sup>223</sup> any employment policy that requires Japanese citizenship excludes individuals, at the very least, on the protected classes under Title VII of race, color, and national origin.<sup>224</sup> Under *Griggs*, the Japanese employer must show that the citizenship requirement is significantly job-related in order to justify disparate impact.<sup>225</sup> Citizenship is similar to national origin in that it is an overly broad classification that focuses on how an applicant obtained his or her skills instead of whether the applicant actually possesses the skills.<sup>226</sup>

This argument however fails to address the impact of such a qualification on potentially qualified non-Japanese citizens. There is no justification for the citizenship qualification, unless the Japanese employer is prepared to demonstrate that the great majority of non-Japanese citizens do not possess, and cannot in the future possess, those essential cultural values. To otherwise permit such a qualification would be to permit the Japanese employer, without having to carefully examine the actual qualifications each candidate possesses, to erroneously and discriminatorily view all non-Japanese as lacking certain job require-

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218. *Id.* at 430 n.6. The Court observed that only 12% of black males had completed high school in North Carolina versus 34% of white males. *Id.* In regard to the intelligence tests used by the company, 58% of whites passed the tests while only 6% of blacks did so. *Id.*

219. *Id.* at 429-30.

220. *Id.* at 431, 436.

221. *Id.* at 432.

222. See 42 U.S.C. § 2000e-(2)(a) (1988) (making no mention of citizenship as a protected category). See also *Espinoza*, 414 U.S. at 95 (holding that refusing to hire persons because of their noncitizenship status does not represent discrimination on the ground of national origin under Title VII).

223. See Note, *Yankees*, *supra* note 147 and accompanying text (explaining that as of 1971, 99% of Japan's population consisted of persons of Japanese origin).

224. 42 U.S.C. § 2000e-(2)(a) (1988).

225. *Griggs*, 401 U.S. at 436.

226. See *supra* notes 195-198 and accompanying text (explaining why a national origin BFOQ cannot succeed).

ments. Viewing large groups of persons in such an abstract way is precisely what Congress intended to eliminate when it enacted Title VII. As the Supreme Court observed, "[w]hat Congress has commanded is that any test used must measure the person for the job and not the person in the abstract."<sup>227</sup> Automatically excluding all members of a protected class is precisely what Congress attempted to eliminate through the enactment of Title VII.<sup>228</sup> Under these circumstances, it is difficult to demonstrate that citizenship is significantly job-related.

This analysis is not significantly altered by the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*.<sup>229</sup> Prior to *Wards Cove*, complainants/employees could make out a prima facie case by presenting statistical evidence that demonstrated that certain employer practices disparately impacted members of a protected class.<sup>230</sup> The employer then had the burden of proving that the disputed practice was a business necessity.<sup>231</sup> *Wards Cove* drastically changed this situation, requiring the employee "to isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities."<sup>232</sup> This additional requirement places the heavy burden of proving strict causation on the employee. *Wards Cove* also lessened the employer's burden of proof, permitting it to defend its practices on the basis that the challenged practice is reasonably related to the employer's business.<sup>233</sup>

This marked change in disparate impact analysis will not be of significant help to the Japanese employer. It is not reasonable to require applicants to be Japanese citizens when such a requirement would exclude a large pool of potentially qualified candidates. Moreover, as discussed earlier, it is extremely difficult to connect citizenship status with the requisite knowledge necessary to work in a Japanese company.<sup>234</sup> Therefore, even under *Wards Cove*, Japanese companies that make employment decisions on the basis of citizenship violate Title VII.

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227. See *Griggs*, 401 U.S. at 436 (noting that by enacting Title VII Congress made job qualifications the compelling factor so as to force race, religion and sex to become irrelevant).

228. *Id.*

229. 490 U.S. 642 (1989).

230. See *Teamsters*, 431 U.S. at 339 (1977) (stating that statistical proof by itself can establish a prima facie case); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (stating the same).

231. *Griggs*, 401 U.S. at 432.

232. *Wards Cove*, 490 U.S. at 657. A prima facie Title VII case is not made out simply with a showing that there is a racial imbalance in the work force. *Id.*

233. *Id.* at 659. The Court stated that employers do not have to show that the challenged practice is essential. *Id.*

234. Gray, *supra* note 208, at 314-15.

The Third Circuit avoided reaching such a conclusion in *MacNamara v. Korean Air Lines*.<sup>235</sup> In *MacNamara*, an American district sales manager for Korean Airlines sued the airline for race and national origin discrimination after it dismissed and replaced him with a Korean national.<sup>236</sup> The airline claimed that its actions were exempt from Title VII and other anti-discrimination statutes because of the United States-Korea Friendship Treaty (Korea Treaty), which provides that Korean employers doing business in the United States may employ specialists of their own choosing.<sup>237</sup> The Third Circuit studied the Treaty's legislative history and concluded that article VIII, the "specialist of their choice" provision, was meant to exempt companies only from local percentile laws.<sup>238</sup> The court found that the Korea Treaty did not exempt Korean companies from any other United States law and therefore, Korean companies doing business in the United States were subject to Title VII.<sup>239</sup>

The Third Circuit, however, refused to apply a Title VII disparate impact analysis to determine whether the airline's practices were discriminatory.<sup>240</sup> The court observed that disparate impact analysis is mainly an exercise in demonstrating statistical disparities, and concluded that foreign companies from nations with homogenous populations are unfairly susceptible to statistical disparities which suggest discrimination.<sup>241</sup>

When a foreign company requires that its employees be citizens of its home country, it follows that almost all of its employees will be of the same national origin and race. Thus, a foreign employer from a racially homogeneous nation can violate a Title VII disparate impact analysis simply by hiring its own nationals or citizens.<sup>242</sup> In Japan's and Korea's cases, simply exercising their article VIII(1) rights with re-

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235. *MacNamara*, 863 F.2d at 1135. Although *MacNamara* involved the Korea-United States Friendship Treaty, the court's analysis is relevant because the Korea Treaty has the same employer choice provision as contained in the Japan Treaty. See Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Korea, art. VIII(1), 8 U.S.T. 2217, 2223, T.I.A.S. No. 3947 [hereinafter Korea Treaty] (providing that companies are permitted to employ "accountants and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice"). Furthermore, when the court conducted its disparate impact analysis, it relied heavily on the fact that Korea's population (like Japan's) is homogenous. *MacNamara*, 863 F.2d at 1148.

236. *MacNamara*, 863 F.2d at 1137-38.

237. Korea Treaty, *supra* note 235, art. VIII(1), 8 U.S.T. at 2223.

238. *MacNamara*, 863 F.2d at 1142-46.

239. *Id.* at 1146-47.

240. *Id.* at 1147-48.

241. *Id.* at 1148.

242. *Id.*

spect to hiring key employees would result in a Title VII violation under a disparate impact analysis.<sup>243</sup> The Third Circuit found this an unfair result and consequently declined to apply a disparate impact analysis.<sup>244</sup>

The Third Circuit's concerns are misplaced, especially after *Wards Cove*. The court is mistaken in its claim that a disparate impact case can be proven solely by demonstrating statistical disparity. Prior to *Wards Cove*, a disparate impact case could be established only if, after the employee demonstrated statistical disparity, the employer was unable to identify the practices that made for the disparity and unable to justify the practices as job-related.<sup>245</sup> After *Wards Cove*, however, to establish a disparate impact case, in addition to demonstrating statistical disparity, an employee must also identify the specific policy and practices that create the discriminatory impact.<sup>246</sup> Even then, the employer has an opportunity to demonstrate that the policy is reasonably related to employment.<sup>247</sup>

In both instances, statistical disparity is not enough to trigger a finding of disparate impact. There must also be a finding that the rule or policy which makes for the statistical disparity is not a legitimate business reason. Therefore, despite statistics which suggest discrimination, the employer has a legitimate opportunity to prevail. Indeed, after *Ward's Cove*, the employer need only prove that its policy is reasonably<sup>248</sup> justified by the business in order to prevail. The Third Circuit erred in concluding that disparate impact theory would result in unfair findings against certain foreign companies, and therefore, should not be applied across the board. To the contrary, disparate impact theory,

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243. *Id.* The Third Circuit was not concerned about finding discrimination under a disparate treatment analysis because liability could not be imposed without first finding that the employer intended to discriminate. *Id.* at 1145-47.

244. *Id.* at 1148.

245. *Powers v. Alabama Dept. of Education*, 854 F.2d 1285, 1293 (11th Cir. 1988) (holding that once an employee demonstrates a statistically significant disparity, the burden of proof shifts to the employer).

246. *Wards Cove*, 490 U.S. at 657 (1989).

247. *Id.* at 659.

248. The Court in *Wards Cove* never expressly used the term "reasonable." Instead, it stated:

The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice. . . . At the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster.

*Wards Cove*, 490 U.S. at 659. A fair summation of these sentences is that the employer must present evidence which shows that the policy is *reasonably* justified by the business.

which requires the employer to remove artificial, arbitrary, and unnecessary barriers to employment,<sup>249</sup> is fully applicable in the foreign employer context.

In sum, under both the disparate treatment and disparate impact theories, the practice of hiring only Japanese nationals violates Title VII. A Japanese employer should define the qualifications necessary for the position, and then hire qualified applicants. This avoids liability under both the disparate impact and disparate treatment theories, while providing the employer with qualified employees.

## VI. RULES FOR CONFLICT RESOLUTION BETWEEN TREATY AND TITLE VII

Clear conflict thus arises between the Japan Treaty, which permits the Japanese employer to select employees of its choice,<sup>250</sup> and Title VII, which limits that right if it is based on discriminatory motive or if it results in a discriminatory impact.<sup>251</sup> When faced with such a conflict, the courts have attempted to accommodate as much as possible the rights and obligations generated by both.<sup>252</sup> The Second Circuit in *Avagliano* resolved an apparent conflict by holding that in the case of a Japanese company asserting its rights under the Japan Treaty, the proper approach is to expand the traditionally narrow BFOQ exception set forth in Title VII.<sup>253</sup> The Third Circuit, in *MacNamara*, applied a different form of accommodation, finding that Title VII prevailed under a disparate treatment/intentional discrimination analysis but that the Korea Treaty prevailed in disparate impact/unintentional discrimination analysis.<sup>254</sup>

In attempting to accommodate article VIII(1) and Title VII in the face of an apparent conflict, these and other courts have followed the Supreme Court's maxim that "an act of congress [sic] ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."<sup>255</sup> Here there is a conflict, but as demon-

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249. *Griggs*, 401 U.S. at 436.

250. See *supra* notes 10 and 11 and accompanying text (describing the protections provided by the Japan Treaty).

251. See *supra* note 165 and accompanying text (noting that Title VII mandates that the employer's choice not result in a discriminatory effect).

252. See *supra* notes 237-239 and accompanying text (describing the conflict between Title VII and the Korea-United States Friendship Treaty).

253. *Avagliano*, 638 F.2d at 559.

254. *MacNamara*, 863 F.2d at 1146-47 nn.14-15.

255. *Murray v. The Charming Betsy*, 2 Cranch 64, 117-18 (1804). See also *Weinberger v. Rossi*, 456 U.S. 25, 29-31 (1982) (examining international law to determine the meaning of the word "treaty" as used in an Act of Congress).

strated, the forms of accommodation fashioned by the Second and Third Circuits are unsatisfactory. Section V of this Article offers a better solution by suggesting that a Japanese employer enumerate its hiring criteria and then have such criteria analyzed to determine if they are relevant to the job at issue. Title VII does not prohibit employment decisions made on the basis of relevant job qualifications, and the nature of many of the qualifications are such that all or substantially all non-Japanese persons will be unable to meet them.<sup>256</sup> This approach avoids the legally unjustifiable terrain of the national origin BFOQ defense and disparate treatment/disparate impact theory, while permitting the Japanese employer to select from among qualified applicants.

If, however, a court concludes that no such accommodation is possible, then a true conflict exists. American courts have developed two mutually exclusive approaches to such a situation. One approach, termed the Doctrine of Implied Repeal, holds that when a clear conflict exists between a treaty and a federal statute, the most recently enacted or ratified one takes precedence.<sup>257</sup> Under this approach, because Title VII was enacted in 1964, eleven years after the Japan Treaty, Title VII controls. The other approach employed by American courts is that the subsequently enacted federal statute supersedes a treaty only if Congress intended to override the treaty.<sup>258</sup> Under this clear intent approach, the Treaty controls because Title VII is silent with respect to the rights of Japanese employers who make employment choices pursuant to the Treaty.

The clear intent approach is the more justifiable approach. The Doctrine of Implied Repeal applies a *per se* rule to find that the later en-

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256. See Sethi, *supra* note 32, at 519 (detailing how to successfully establish a BFOQ defense). Foreign employers should precisely define the required job characteristics that a foreign national would possess. *Id.* This BFOQ defense should thus be employed only with respect to senior executives in overseas affiliates and temporary specialized positions. *Id.*

257. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that state law supercedes a treaty previously entered into with Hawaii); *Vorhees v. Fischer & Krecke*, 697 F.2d 574 (4th Cir. 1983) (noting that when a treaty conflicts with an Act of Congress, the latter in time prevails); *United States v. Enger*, 472 F. Supp. 490, 542 (D. N.J. 1978) (affirming that conflicts between treaties and Acts of Congress are resolved by the doctrine of implied repeal).

258. See, e.g., *Cook v. United States*, 288 U.S. 102, 120 (1933) (holding that a statute will not modify a prior treaty unless "such purpose on the part of Congress has been clearly expressed"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, (1963) (concluding that an Act of Congress will not supercede a treaty unless Congress' intention is clearly expressed); *MacNamara*, 863 F.2d at 1146 (agreeing with the above); *Spiess*, 643 F.2d at 356 (5th Cir. 1981) (stating that "only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern").



actment controls. This approach never entertains the possibility that Congress may have intended for the earlier enactment to remain as an exception to the general rule embodied in the later enactment. Ignoring Congressional intent is problematic insofar as dealing with treaties, which are generally the product of careful negotiations between two sovereign nations. In such instances, courts should exercise caution and first determine that Congress affirmatively intended to preempt an international treaty.<sup>259</sup> The Doctrine of Implied Repeal does not permit such flexibility, and therefore, the clear intent approach is preferable. Under the clear intent approach, assuming that there is an actual conflict between article VIII(1) of the Japan Treaty and Title VII, then the Treaty controls and the Japanese employer may hire Japanese nationals even though the effect of such a practice violates Title VII.

## VII. EQUAL PROTECTION

To avoid such an outcome, employees who allege employment discrimination may claim that their Japanese employer's actions violate the Equal Protection Clause of the Fourteenth Amendment.<sup>260</sup> The Equal Protection Clause requires the federal government to treat those who are similarly situated in an equal manner.<sup>261</sup> An equal protection argument might emphasize that the United States, through article VIII(1) of the Japan Treaty, provided Japanese employers with a legal means by which to classify employment eligibility on the basis of citizenship or national origin. Providing the Japanese employer the legal authority to so condition eligibility for certain positions is arbitrary and has no relation to any compelling or important state interest. In short, the United States, in creating such a legal basis, has denied non-Japanese employees equal protection.

The equal protection argument has two great advantages for those alleging employment discrimination by Japanese employers. First, the Constitution, as the supreme law of the United States, takes precedence over any inconsistent treaty.<sup>262</sup> Part of the complication in analyzing the conflict between Title VII and the Japan Treaty is that because both were ratified by the federal legislature, both have equal

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259. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). *See also McCulloch*, 372 U.S. at 21-22 (supporting *Benz*).

260. *See infra* notes 260-276 (explaining the historical development of the equal protection claim).

261. U.S. CONST. amend. XIV. The Supreme Court has applied the Equal Protection Clause to the federal government, finding it impliedly incorporated into the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

262. U.S. CONST. art. VI, cl. 2.

legislative authority. The authority of the Treaty is not clearly superior to the statute, and resolution of any conflict between the two must be resolved by the conflict rules described in section VI. By contrast, any conflict between the Constitution and the Treaty will have only one, very predictable outcome — the Constitution will clearly prevail.

Second, while all persons are entitled to equal protection under the law, equal protection jurisprudence has developed in such a way that special constitutional protection is extended to many of the *same* groups protected under Title VII. Specifically, classifications based on race, national origin, and alienage are given special protection by requiring that the government demonstrate a compelling state interest as justification for the grant or denial of benefits based on such classification.<sup>263</sup> Similarly, special protection is extended to gender classification by requiring that the state demonstrate a substantial relationship between the classification and the state interest before granting or denying benefits.<sup>264</sup> Here, the United States ratified the Japan Treaty and arguably placed its imprimatur on Japanese national origin and/or citizenship-based hiring practices. Applicants rejected under this criteria can claim that there is no justification for such action and that it constitutes denial of equal protection of the laws, thereby triggering significant constitutional protection.

Despite these advantages, an equal protection argument is probably not viable because of the difficulty in demonstrating state action. The Equal Protection Clause protects individual rights only with respect to state and federal government action.<sup>265</sup> Any constitutional argument must therefore first determine that the proscribed activity involved state action. Here, the argument is that the United States encouraged employment discrimination when it ratified the Japan Treaty.

The Supreme Court did, at one point, give credence to such an argument. In *Reitman v. Mulkey*,<sup>266</sup> the Supreme Court affirmed a California Supreme Court decision which held a California constitutional pro-

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263. NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 611 (2d ed. 1983) [hereinafter NOWAK]. See also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that all restrictions based on race can only be justified by "pressing public necessity"); *Graham v. Richardson*, 403 U.S. 365, 372-74 (1971) (striking down a statute that made non-citizens ineligible to receive public assistance).

264. *Craig v. Boren*, 429 U.S. 190, 199-204 (1976) (invalidating a statute establishing a different drinking age for males and females); *Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (invalidating a state alimony statute that imposed obligations on husbands but not wives).

265. See *Bolling*, 347 U.S. at 499 (1954) (applying the Equal Protection clause to the federal government). See also *infra* notes 266-276 (illustrating the Supreme Court's interpretation of the state action requirement).

266. 387 U.S. 369 (1967).

vision invalid on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>267</sup> The provision in question, article I, section 26, prohibited the state from denying persons the right to sell, lease, or rent their residential real property to any person they chose.<sup>268</sup> The California Supreme Court determined that there was state action because section 26 authorized private discrimination.<sup>269</sup> The Supreme Court affirmed this conclusion, noting that section 26 made "[t]he right to discriminate . . . one of the basic policies of the [s]tate."<sup>270</sup> In reaching this conclusion, the Court stressed that "[h]ere we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was *intended* to authorize, and does authorize, racial discrimination in the housing market."<sup>271</sup>

This expansive approach of attributing the actions of private citizens to the state was gradually curtailed by the Court in subsequent decisions. In *Flagg Bros. v. Brooks*,<sup>272</sup> the Court held that a warehouseman's attempted enforcement of a lien over goods entrusted to him for storage pursuant to a self-help provision of the New York Uniform Commercial Code was not attributable to the state and was therefore not state action.<sup>273</sup> Justice Rehnquist, writing for the Court, reasoned that the state's enactment of the provision, "merely announced the circumstances under which its courts will not interfere with a private sale"<sup>274</sup> and held that such "acquiescence" in a private action does not make for state action.<sup>275</sup> The Court indicated that state action would

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267. *Reitman*, 387 U.S. at 373.

268. *See id.* at 372 n.2 (explaining article I, section 26 of the California Constitution).

269. *Id.* at 379. The Court stated that this type of involvement in private racial discrimination rose to an unconstitutional level. *Id.*

270. *Id.* at 381.

271. *Reitman*, 387 U.S. at 381 (emphasis added). In reaching this conclusion, the Court relied heavily on the findings of the California Supreme Court and justified its reliance by noting that the state supreme court was armed with the knowledge of facts and circumstances "concerning the passage and potential impact of sec. 26, and [was] familiar with the milieu in which that provision would operate. . . ." *Id.*

272. 436 U.S. 149 (1978).

273. *Flagg Bros.*, 436 U.S. at 158-66. Section 7-210 of the New York Uniform Commercial Code permitted a warehouseman's lien to be enforced through a public or private sale of the stored goods. *Id.* at 151 n.1. Petitioner was threatening to sell the respondent's goods at the time respondent brought an action in the District Court for damages, an injunction against the sale, and a declaration that the sale was invalid under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. *Id.* at 153.

274. *Id.* at 166.

275. *See id.* (observing that the focus of the respondent's complaint was that New York *refused* to act). The Court said that this statutory refusal to act was the same as

only be found where the state, through its laws, compelled a party to engage in a particular action.<sup>276</sup> In reaching this conclusion, the opinion never cited to *Reitman*, and never explained the seeming disparity between the two cases.

*Flagg Bros.* signalled a clear trend away from the expansive notions of state action outlined in *Reitman*.<sup>277</sup> Under *Flagg Bros.*, finding state action in the employment policies of Japanese employers is a difficult task. There is no state action unless the Japan Treaty compels Japanese employers to discriminate against non-Japanese persons. While the Treaty permits the Japanese employer unlimited discretion in hiring key employees,<sup>278</sup> this is hardly an express order to hire only Japanese key employees and thereby discriminate on the basis of national origin or citizenship. Moreover, the State Department has recently interpreted the employer choice provision in the Korea Treaty to exempt foreign firms from percentile laws only.<sup>279</sup> This further undercuts any argument a Japanese company defendant may make that the United States encourages employment discrimination by Japanese employers.

Any employee who formulates an equal protection argument in light of *Flagg Bros.* is hampered by the Court's failure to set forth the considerations underlying "state action" jurisprudence. In *Flagg Bros.* and other recent state action cases, the Court has failed to provide a framework for determining whether state action exists, vis-a-vis strong encouragement of private parties, in *Flagg Bros.* and in other modern state action cases.<sup>280</sup> One commentator has ascribed this failure to the

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the State refusing to provide a remedy for property disputes in instances where the statute of limitations had expired. *Id.*

276. *Id.* at 165-66. In holding that Section 7-210 did not delegate to petitioner an exclusive prerogative of the state, the Court noted that the concept of state action would be "intolerably broaden[ed]" if a state's property law constituted state action even though the state did not enforce that law. *Id.* at 161-62 n.10.

277. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-78 (1972) (finding no state action where a private club with a Pennsylvania liquor license refused to serve a black customer); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354 (1974) (determining that actions of "regulated businesses, providing arguably essential goods and services 'affected with a public interest' " were not, by themselves, state action).

278. Japan Treaty, *supra* note 10, art. VIII(1), 4 U.S.T. at 2070.

279. Brief for the United States as Amicus Curiae, at 6-7, *MacNamara*, 863 F.2d 1135, cited in Note, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "of Their Choice,"* 57 FORDHAM L. REV. 765, 781 (1989) [hereinafter Note, *FCN Treaty*].

280. See *National Collegiate Athletic Ass'n v. Tarkanian*, 499 U.S. 179, 192 (1988) (stating that the NCAA is an independent group and its actions were not performed under color of state law); *Jackson*, 419 U.S. at 356-58 (determining that there was no state action where respondent electric company, a regulated, privately-owned utility, cut off petitioner's service).

Court's inability to fashion a general theory of allocating private and public responsibility.<sup>281</sup> In the absence of a guiding doctrine, any state action argument regarding Japanese companies' employment practices is not possible.

Suggestions for a general theory of liability as groundwork for state action analysis are beyond the scope of this Article, but certain observations are possible within the context of employment discrimination. The Court has specifically recognized that Congress intended anti-discrimination policies to be of the highest priority.<sup>282</sup> Thus, one can argue that any state action theory must be flexible enough to find such action where discrimination is committed pursuant to a statute or other legislative vehicle. Justice Marshall suggested such an approach in his dissent in *Jackson v. Metropolitan Edison Co.*<sup>283</sup> The Court should be more amenable to finding state action in this context because Congress has clearly indicated that eliminating discrimination is of the highest priority.

Some may argue that such a result-oriented test cannot form a principled basis for a state action theory. It must be emphasized, however, that what is urged here is a flexibility that accounts for congressional priorities. Requiring a party to demonstrate that the state's law compelled private action is difficult where the state is not a party. It is disingenuous of the Court to suggest that the state may actively encourage a private party only through express orders. Private individuals do not take their cues from express orders alone. If the Congress repealed Title VII, that action would undoubtedly encourage private discrimination as much as any express order to discriminate. Therefore, any state action theory must be flexible enough to encompass subtle forms of state-encouraged discrimination.

These suggestions do not change the current status of state action jurisprudence. An employee seeking to argue that his or her Japanese employer violated the Equal Protection Clause must demonstrate that the Japan Treaty compels the employer to discriminate in its hiring practices, which is not possible under *Flagg Bros.*<sup>284</sup> Thus, at present, an equal protection argument offers no help to employees seeking to

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281. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1698 (2d ed. 1988).

282. See *Newman*, 390 U.S. at 400, 402 (1968) (indicating that bringing an action under the 1964 Civil Rights Act helps bring about the goals that Congress considered of the highest priority when it passed the legislation).

283. *Jackson*, 410 U.S. at 373-74 (Marshall, J., dissenting). Marshall was bothered by the possibility that the majority's analysis might extend to businesses that refused to serve blacks, welfare recipients, and other persons. *Id.* at 374.

284. See *supra* notes 256-259 and accompanying text (explaining the difficulty in proving that the Japan Treaty involves state action).

prevent their Japanese employers from hiring only those of Japanese origin for the positions listed in article VIII(1) of the Treaty.

### VIII. THE IMPACT OF IRCA ON EMPLOYERS' SELECTION PRACTICES

Until 1986, Japanese employers could hire on the basis of citizenship and thereby avoid violating Title VII.<sup>285</sup> This situation changed, however, with the enactment of the Immigration Reform and Control Act of 1986 (IRCA).<sup>286</sup> IRCA was passed to stem the flow of unauthorized aliens into the United States<sup>287</sup> and mandates civil and criminal penalties for employers who knowingly hire unauthorized aliens,<sup>288</sup> and civil penalties for employers who fail to comply with its employment verification procedure.<sup>289</sup> There was some concern that IRCA would lead to discrimination against certain groups.<sup>290</sup>

Consequently, Congress included an anti-discrimination provision in IRCA, section 102(a), that is intended to prevent employment discrimination against legal aliens and citizens of national minority origin.<sup>291</sup> Section 102(a) defines an unfair immigration-related employment practice to mean "discriminat[ing] against any individual (other than an unauthorized alien) with respect to the hiring . . . of the individual for

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285. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3374 (codified at 8 U.S.C. § 1324 (6)). (1987) (explaining that hiring an individual on the basis of citizenship is an unfair immigration-related employment practice and is unlawful).

286. Pub. L. No. 99-603, 100 Stat. 3359 (1987) (codified in scattered sections of 8 U.S.C.).

287. See Comment, *IRCA's Antidiscrimination Provisions: Protections Against Hiring Discrimination in Private Employment*, 25 SAN DIEGO L. REV. 405, 405 (1988) [hereinafter Comment, *IRCA's Antidiscrimination Provisions*] (acknowledging that IRCA was aimed at "economic refugees" who illegally entered the United States to work).

288. IRCA § 101(a)(1), 100 Stat. at 3360 (codified at 8 U.S.C. § 1324a). An employer is subject to fines between \$250 and \$2000 per violation. *Id.*, 100 Stat. at 3366-67. An employer who regularly hires illegal aliens can receive criminal penalties of up to \$3000 per illegal alien hired and six months in jail. *Id.* at 3367-68.

289. IRCA § 101(a)(1), 100 Stat. at 3367 (codified at 8 U.S.C. § 1324a). Employers who do not properly maintain the identity and authorization verification records risk fines of up to \$1000 for each employee without the verification paperwork. *Id.*

290. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 90, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5694. See also Comment, *The Unfair Immigration-Related Employment Practices Provision: A Modicum of Protection Against National Origin and Citizenship Status Discrimination*, 41 U. MIAMI L. REV. 1025, 1026-27 (1987) [hereinafter Comment, *Unfair Immigration*] (stating that minority groups and civil rights groups were concerned that employers would discriminate against Hispanics and other minorities out of fear of civil penalties and criminal prosecution).

291. IRCA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b).

employment . . . (A) because of such individual's national origin, or (B) . . . because of such individual's citizenship status."<sup>292</sup> Section 102(a) only covers United States citizens and lawfully admitted aliens who have filed declarations of intent to become citizens.<sup>293</sup> IRCA's legislative history shows that Congress was aware that Title VII did not cover citizenship discrimination and that it wanted IRCA to resolve that by prohibiting intentional discrimination on the basis of citizenship.<sup>294</sup>

#### A. APPLICATION AND SCOPE

Section 102(a) applies to employers with four or more employees,<sup>295</sup> which undoubtedly encompasses most Japanese employers in the United States. Yet, as with Title VII, there is a question as to whether IRCA applies to Japanese employers who discriminate against those who were not intended to be IRCA's primary beneficiaries. IRCA's legislative history clearly indicates that proponents of section 102(a) were concerned about discrimination against minority citizens such as Hispanic-Americans who, by virtue of their physical and linguistic characteristics, would not be hired or retained by their employers despite their United States citizenship.<sup>296</sup> IRCA, however, makes no reference to protecting white Americans. Therefore, in many instances, Japanese employers can plausibly argue that their hiring practices are not covered by IRCA because they do not significantly effect those racial and national minorities it intended to protect.

Moreover, section 102(a)'s language and its legislative history both establish that it was partially intended to prohibit employers from discriminating in favor of one class of American citizens (majority) over another class of American citizens (minority).<sup>297</sup> There is no suggestion in section 102(a) or its legislative history that IRCA was intended to address employment practices favoring non-citizens over American citi-

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292. ICRA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b).

293. ICRA § 102(a), 100 Stat. at 3374-75 (codified at 8 U.S.C. § 1324b).

294. H.R. REP. NO. 682, *supra* note 293, at 70.

295. ICRA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b).

296. See *Anti-Discrimination Provision of H.R. 3080: Joint Hearings Before the House Subcomm. on Immigration, Refugees, and International Law and the Senate Subcomm. on Immigration and Refugee Policy*, 99th Cong., 1st Sess. 111 (1985) (statement of Rep. Robert Garcia) (concerning IRCA's detrimental impact on Hispanic-Americans). Rep. Garcia stated, "[E]mployers would run away those who appear foreign, whether by name, race, or accent." *Id.*

297. ICRA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b(a)(3)). See also H.R. REP. NO. 682, *supra* note 262, at 70-71 (indicating that the term "citizenship discrimination" applies when an employer chooses between a minority citizen and a majority citizen).

zens. Thus, Japanese employers can argue that section 102(a) does not apply to their hiring practices because they involve hiring non-citizens.

Despite these ambiguities, given the broad proscription against discrimination on the basis of citizenship, one can reasonably assert that IRCA applies to discriminatory employment practices favoring Japanese nationals over Americans. Section 102(a)'s coverage of citizens and those intending to become citizens supports this conclusion. If Congress had wanted to exclude a specific group (comprised of a very large number of persons) from the coverage of the Act, it would surely have done so. Arguing that section 102(a) does not apply where those discriminated against are white Americans permits an unjustified and unsupportable exception. The Supreme Court determined this to be the case with respect to Title VII in *McDonald v. Santa Fe Transportation Co.*,<sup>298</sup> which extended Title VII protection to white Americans.<sup>299</sup> Thus, it can be concluded that IRCA applies to discriminatory practices against all United States citizens, including white citizens.

#### B. IRCA PREVAILS OVER FCN

Given that IRCA applies to Japanese employment practices in the United States, the question then is whether the Japan Treaty shields Japanese employers from IRCA's requirements. Under the clear intent approach,<sup>300</sup> IRCA's section 102(a) evinces an intent to repeal article VIII(1) of the Japan Treaty, since section 102(a) prohibits citizenship discrimination<sup>301</sup> that article VIII(1) expressly permits.<sup>302</sup> Yet, IRCA does not exempt the Japan Treaty from compliance with section 102(a).

While Congress exempted citizenship-based discrimination mandated by existing federal and state laws, it did not provide any exemption for laws similar to the Japan Treaty, which merely permits employment decisions to be made on the basis of citizenship.<sup>303</sup> The absence of an

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298. 427 U.S. 273 (1976).

299. *McDonald*, 427 U.S. at 290. See also *Griggs*, 401 U.S. at 430-31 (1971) (stating that Congress intended to proscribe discriminatory treatment of any group, majority or minority).

300. See *supra* notes 257-59 and accompanying text (explaining the clear intent approach and why it is preferable to the doctrine of implied repeal).

301. IRCA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. 1324b).

302. See *MacNamara*, 863 F.2d at 1146 (determining that the Korea Treaty's employee choice provision granted Korean firms the right to favor employees or potential employees on the basis of citizenship); Note, *Commercial Treaties*, *supra* note 21, at 953 (hypothesizing that Japanese and United States Treaty negotiators likely intended article VIII(1) to permit foreign firms to hire key employees from among their own citizens).

303. Japan Treaty, *supra* note 10, art. VIII(1), 4 U.S.T. at 2070.



exemption strongly suggests that Congress did not intend to exclude parties acting under Japan Treaty from IRCA's coverage.

The implications of the foregoing are significant to the Japanese employer who adheres to a citizenship-based employment policy. Such a policy is no longer legal, notwithstanding the article VIII(1) of the Japan Treaty. Unlike Title VII, section 102(a) of IRCA gives employees a legal ground upon which they can allege that they were discriminated against by their Japanese employer on the basis of citizenship.

In light of these developments, Japanese employers wishing to avoid claims of employment discrimination should adopt hiring policies premised on employee qualifications.<sup>304</sup> Japanese employers could still hire Japanese citizens, provided they were the best qualified. Making such a determination entails finding what qualifications are necessary for the position, but this additional effort will result in creating a legally justifiable basis for employee selection. Decisions on the basis of qualifications prevents these complications while ensuring that the business hires and retains those best able to perform the work. This will result in a legally justifiable employment policy that avoids overtly discriminating on the basis of such Title VII grounds as race, color, and national origin.

## IX. POLICY

To determine the proper scope and application of the Japan Treaty, Title VII, and IRCA, it is important to consider the policies each promotes and the value of those policies to society. The Japan Treaty, ratified during the economically prosperous post-World War II years in the United States, was intended to facilitate American participation in the international economy.<sup>305</sup> Today, economic growth in the United States hinges a great deal upon Japanese economic activity within its borders.<sup>306</sup> Japanese investment has meant an infusion of capital, utilization of the local labor pool, and a larger tax base.<sup>307</sup> For example, Japanese investment in the United States had created 208,000 new jobs with a payroll of almost \$6 million by 1989.<sup>308</sup>

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304. See *supra* notes 173-176 and 186-194 and accompanying text (contending that a qualifications-based approach is the optimal grounds upon which to base an employment policy).

305. See *supra* note 60 (stating the the main purpose of the treaty was to further United States economic policy gains).

306. See *supra* notes 1-2 and accompanying text (describing Japanese economic activity in the United States).

307. *Id.*

308. Note, *FCN Treaty*, *supra* note 279, at 783.

One policy argument in favor of a broad interpretation of article VIII(1) is that strictly enforcing anti-discrimination laws against Japanese firms doing business in the United States might discourage future Japanese investment.<sup>309</sup> As one commentator noted, insisting that the anti-discrimination law apply despite the Japan Treaty "might discourage foreign businesses from investing in a new industry in the United States, depriving Americans of the benefit of innovative foreign investment."<sup>310</sup> This argument is not supported by recent Japanese activity in the United States. Since *Sumitomo*,<sup>311</sup> which forbid foreign firms incorporated in the United States from asserting their right to hire key employees pursuant to article VIII(1) of the Japan Treaty,<sup>312</sup> Japanese investment in the United States has dramatically increased.<sup>313</sup>

Regardless of the effect that strict enforcement of anti-discrimination laws might have, the United States has an important policy interest to protect. Title VII and IRCA both seek to prevent discrimination in the workplace.<sup>314</sup> The fundamental value underlying both of these laws is that the worth of an employee must be based on qualifications relevant to the job, and not on irrelevant criteria such as race, sex, and citizenship.<sup>315</sup>

Proponents of a broad interpretation of the Japan Treaty tend to view the conflict between the Treaty and Title VII and IRCA as an either/or choice between two antithetical policies — business interests versus strict enforcement of civil rights.<sup>316</sup> Even assuming that this equation accurately captures the essence of the conflict, the FCN proponents do not present any compelling arguments for choosing business interests over the anti-discrimination policies. The necessity of promot-

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309. See Note, *Yankees*, *supra* note 147, at 251-52 (discussing the chilling effect that strict enforcement of Title VII could have on Japanese direct foreign investment).

310. Interestingly, the commentator notes that since the Supreme Court in *Sumitomo* held that foreign companies incorporated in the United States may not assert FCN rights, Japanese investment in the United States has increased considerably. This increase occurred even though the majority of Japanese companies doing business are subsidiaries incorporated in the United States, and therefore directly affected by the *Sumitomo* decision. This empirical evidence suggests that those who argue that the Japan Treaty must prevail over the anti-discrimination laws, in order not to discourage Japanese investment, are wrong. Note, *supra* at note 111.

311. 457 U.S. 176 (1982).

312. *Sumitomo*, 457 U.S. at 183-84.

313. Note, *FCN Treaty*, *supra* note 279, at 783 n.111.

314. IRCA § 102 (a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324(b)). See *supra* note 132 and accompanying text (explaining the underlying but not explicit purpose of Title VII).

315. *Id.*

316. See *supra* notes 55-125 (illustrating the various interpretations of the conflict between the Japan Treaty and Title VII).

ing and preserving business interests is not enough. Indeed, in the legislative debate that preceded passage of Title VII, opponents of Title VII repeatedly used those reasons to argue against passage of the provision. Those arguments proved to be unpersuasive when viewed against the reality of pervasive discrimination in the workplace. True, a reasonable argument can be made that discrimination is not as widespread as it was in the fifties and sixties.<sup>317</sup> It can also be reasonably argued that America's economy is not the dominant force it used to be in the sixties, and that therefore, more effort should be made to strengthen and preserve American business interests. These, however, are not compelling reasons for completely exempting Japanese employers from the limitations of Title VII. At best, these reasons argue for a measured adjustment of burdens of proof and theories of discrimination. It does not argue for a wholesale exemption from the policies of anti-discrimination. Discrimination in the workplace remains a serious problem.<sup>318</sup> As such, business interests should argue to adjust the burdens of proof set forth in various theories of discrimination rather than advocating exempting Japanese employers conducting business in the United States from Title VII or IRCA.

The either business or civil rights scenario overlooks the fact that a qualifications-based approach offers the best of both worlds. It avoids discriminatory classifications such as race, sex, and national origin, while at the same time, assuring the employer that it will be hiring from a pool of qualified applicants. Adhering to a qualifications-based employment policy also promotes community harmony and fosters good will. Title VII and IRCA assume greater importance as more minorities and women join the workforce, making discrimination even more obvious. An employer who engages in discriminatory employment risks multiple lawsuits and a bad reputation in the community. Japanese em-

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317. Contradicting this argument is a recent poll commissioned by the National Law Journal and the legal information service Lexis. It shows that fifty-one percent of Americans believe that "all or most" employers practice some form of discrimination in hiring or promotions. *Most Employees Believe Employers Practice Discrimination, Poll Shows*, Daily Lab. Rep. (BNA) No. 134, at A-8 (July 12, 1990). Although this is not proof of discrimination, it does indicate that most Americans believe that discrimination continues to be a widespread problem, despite the anti-discrimination statutes and their enforcement.

318. See *GAO Finds 'Widespread Pattern of Discrimination' Prompts Calls for Repeal of IRCA Employer Sanctions*, Daily Lab. Rep. (BNA) No. 62, at A-10 (finding that 19% of employers surveyed initiated discriminatory hiring policies in response to IRCA). Ten percent of the employers surveyed discriminated on the basis of national origin, which meant that they asked for verification from or did not hire foreign looking applicants. *Id.*

ployers are particularly vulnerable.<sup>319</sup> Given Japan's recent economic penetration of the United States, many Americans fear the prospect of being "bought up" by the Japanese and are quick to criticize Japanese business practices.<sup>320</sup> A recent newspaper article noted that American advertisers had created several advertisements that attack the Japanese culture and people, all in an effort to prevent sales of Japanese made products.<sup>321</sup> Pursuing a Japanese-only employment policy with respect to key employees is unwise in such an atmosphere.

Japanese employers who insist on the primacy of the Japan Treaty must recognize that even if they are correct, any employment practice which is generally recognized to be discriminatory would have serious consequences for their business. Boycotts, protests, and a further inflammation of anti-Japanese sentiment are all foreseeable consequences. Rather than risk such results, it would be more prudent (from a business perspective) for the Japanese employer to forego the legal rights granted by the Japan Treaty, and focus on employee qualifications in making employment decisions. Japanese companies would ensure themselves of getting the best candidates, while at the same time promoting key social policies.

## CONCLUSION

The Japanese employer doing business in the United States does have the right, under article VIII(1) of the Japan Treaty, to favor its own citizens for certain key positions.<sup>322</sup> Such a right likely prevails over Title VII, but does not prevail over section 102(a) of IRCA. Japanese employers should adopt a qualifications-based employment policy, including requirements for an understanding of Japanese business practices and cultural values. This ensures that the chosen applicant is qualified, while at the same time avoids a Title VII or IRCA violation and promotes good community and social relationships. For all these reasons, the Japanese employer is advised to forego hiring key employ-

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319. See J. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 94-117 (1986) (declaring that the American media's portrayal of the Japanese as "inhuman, lesser human, superhuman" during World War II is still revived in periods of crisis).

320. See Rothenberg, *Ads that Bash the Japanese: Just Jokers or Veiled Racism?*, N.Y. Times, July 11, 1990, at A1 (describing a television commercial for a New York area Pontiac dealer that announces "[i]t's December, and the whole family's going to see the big Christmas tree at Hirohito Center. Go on, keep buying Japanese cars.").

321. *Id.*

322. See *supra* note 76 and accompanying text (providing the explicit language of art. VIII(1)).

ees on the basis of citizenship or national origin and instead rely on demonstrably relevant qualifications.