The Extraterritorial Force of Title VII: Regulating the Conduct of American Employers Overseas

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I. INTRODUCTION

The ability of Congress to regulate the conduct and affairs of American employers operating within the United States is a long accepted premise. The advancement of employee rights in the area of discriminatory employer practice has dealt a severe blow to the archaic prejudices of the American employer. The passing of Title VII marked a major victory for the advocates of employee rights by changing the face of the employee-employer relationship by protecting workers from the discriminatory policies of their employer and imposing harsh penalties for its violation. With the advent of Title VII came other congressional statues designed to protect the American laborer, the result of which brought employee rights to a new level of congressional protection. As a result of the recent surge of employer regulations, American employees have now turned to the courts to seek the same protection they receive domestically when faced with employment discrimination by their American employers overseas.

The question of whether Title VII may regulate the conduct of American employers who operate internationally is a relatively new one, addressed on rare occasion by the lower federal courts and only very recently by the Supreme Court. The challenges which face attempts at providing extraterritorial reach to congressional statutes

3. Id.
are great, ranging from the immunity of foreign sovereignty to the practical limitations of congressional authority. This Note will explore the issue of Title VII's extraterritorial applicability by examining the judicial history behind attempts at having other congressional acts apply internationally, from the rigid adherence to the notions of national sovereignty and limited jurisdiction to the current trends among courts in mandating broad coverage for congressional acts based on the statutory vagueness of their language. This Note will also review some of the fundamental barriers which face efforts at providing extraterritorial force to Title VII, and discuss the way courts have treated those efforts. Finally, this Note will address the Supreme Court decision of E.E.O.C. v. Arabian American Oil Company, and discuss its potential ramifications in the international labor force.

II. THE EVOLUTION OF EXTRATERRITORIAL CONSTRUCTION

The Supreme Court has traditionally rejected the argument that congressional statutes have the ability to regulate the affairs of American actors overseas. This historical presumption against the extraterritorial reach of congressional statutes reflected a natural tendency by the courts toward upholding the right of nations with regard to retaining absolute sovereignty within their own borders. In what has historically been classified as the "Doctrine of Absolute Sovereignty," the Supreme Court established early on the principal that a nation-state should reign supreme within its own jurisdiction. In one of the first opinions addressing the concept of absolute sovereignty, Chief Justice Marshall explained that:

8. See American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). In a case involving the question of whether American antitrust laws should be applied outside the United States, Justice Holmes remarked that "it is surprising to hear it argued" that antitrust laws should apply to acts "outside the jurisdiction of the United States and within that of other states." Id. at 355. "All legislation" Holmes noted, "is prima facie territorial." Id. at 357 (quoting Ex parte Blair, 12 Ch. D. 522, 528 (Ch. App. 1879); See also Ross v. McIntyre, 140 U.S. 453 (1891); The Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812); Slater v. Mexican National R.R. Co., 194 U.S. 120 (1904).
9. Id.
10. The Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116. The M'Fadden decision involved an unusual set of circumstances in which an American vessel was pirated by a band of militants allegedly acting under the orders of Napoleon Bonaparte of France. The French subsequently claimed title to the vessel and its contents, and later sailed into a port in Philadelphia. Acting upon the request of the ship's original owners, a court ordered the vessel seized, pending the outcome of a legal action filed by the original owners.
[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.\textsuperscript{11}

Although Marshall seemingly crippled the ability of Congress to effectively regulate the conduct of American actors overseas, he was nevertheless careful to point out that Americans would retain a degree of immunity, guaranteed by certain provision of the Constitution, should they travel abroad.\textsuperscript{12} Justice Field modified Marshall's absolutist view of state sovereignty to an extent when the Supreme Court decided \emph{In re Ross}\textsuperscript{13} toward the close of the nineteenth century. The case involved the constitutional legitimacy of the murder conviction of John Ross, who committed the crime on board an American vessel docked at a harbor in Yokohama, Japan.\textsuperscript{14} Court was held in Kanagawa, Japan, by a counsel general of the United States who tried and convicted Ross for murder, sentencing him to death.\textsuperscript{15} On appeal to the Supreme Court, Justice Field determined that the court which heard the case had the express authority to do so.\textsuperscript{16} The Supreme Court held that jurisdiction conferred to the court directly, both by treaty and statute.\textsuperscript{17} It was on the basis of this express jurisdictional mandate that Justice Field determined that the court which heard the case had acted within a permissible scope of authority, and was therefore entitled to invoke its jurisdiction over Ross.\textsuperscript{18} Justice Field, however, urged that a strong presumption necessarily exists against the proposition that an Act of Congress may effectively regulate the conduct of American citizens outside the

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\item \textsuperscript{11} Id. at 136. The Court concluded that "[a]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the other nation itself. They can flow from no other legitimate source." \textit{Id.}
\item \textsuperscript{12} Chief Justice Marshall stressed the necessity of protecting Americans from arrest or detention, he emphasized that foreign ministers were entitled to broad immunity, and that troop movements which traversed another nation with that nation's consent were entitled to protection. \textit{Id.} at 136-47. Aside from these limited instances, it was clear that Marshall's dogmatic adherence to the principals of absolute sovereignty would effectively restrict congressional legislation to an entirely domestic focus. \textit{Id.}
\item \textsuperscript{13} 140 U.S. 453 (1891).
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.} at 460.
\item \textsuperscript{18} \textit{Id.}
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Field stressed that there must exist an express authority and jurisdiction for Congress to act, granted directly under the provisions of the Constitution, and that such authority must necessarily be limited to the purpose for which the authority was granted.

In the majority opinion, Justice Field stated that "[t]he Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of either one being obligatory upon the other." In their conclusion, the majority suggested that while the Constitution itself may not be given jurisdictional effect outside the United States, it can, by operation of treaty or statute, be given limited extraterritorial force subject to the acquiescence of the nation where the law is to be applied.

This rather narrow construction of extraterritorial coverage was carried into the twentieth century by Justice Holmes in American Banana Company v. United Fruit Company, when he reiterated Justice Field's territorial restrictions in discussing the limitations of antitrust laws overseas. The plaintiff in the case, an Alabama corporation doing business in Panama, sought to bring an antitrust action to recover damages from an incident where, at the instigation of a major regional competitor, Costa Rican soldiers seized part of the corporation's plantation and cargo. In deciding whether the plaintiff may lawfully assert an antitrust claim for damages as a result of the seizure in Panama, Justice Holmes answered in the negative, explaining that:

[t]he foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined to its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is prima facie territorial." [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

19. Id. at 461-479.
20. Id. at 461-62 (referring to Congress' power to create a Court. U.S. Const. art. III, § 2.)
21. Id. at 460.
23. Id.
25. Id. at 356 (quoting Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904)).
Although the Court objected to the Corporation's assertion that the Sherman Act had territorial force in Panama, Justice Holmes did suggest that an explicit provision providing for such coverage, if closely related to a constitutional concern, may have been regarded as a legitimate exercise of congressional authority. Nevertheless, Justice Holmes seemed to suggest that such a provision would be the subject of a great deal of scrutiny before being given extraterritorial effect.

Although the Supreme Court had initially fashioned a seemingly impregnable rule, the current trend of the Court suggests that this caveat is by no means absolute. Two decades after deciding *American Banana Company*, the Supreme Court in *Blackmer v. United States* criticized the majority's reasoning in *American Banana*, questioning the rigid adherence to the notions of limited jurisdiction and national sovereignty. Signaling a much more amenable approach to the issue of territorial limitations, the Supreme Court embarked on a more liberal and more ambitious policy of granting congressional acts extraterritorial effect. On a writ of certiorari, the Supreme Court affirmed a circuit court's decree that Harry Blackmer, an American citizen residing in Paris, was guilty of contempt for failure to respond to subpoenas served on him while living in France. In support of the circuit court's decision, Chief Justice Hughes set forth what has since proven to be a commonly used standard for judging the territorial limitations of a congressional statute.

While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction

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26. *Id.* at 355-56. Justice Holmes reasoned that:

> [n]o doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive.

*Id.* The Court referred to *The Hamilton*, 207 U.S. 398, 403 (1907); *British South Africa Co. v. Companhia de Mocambique*, A.C. 609 (1893).

27. Justice Holmes then concluded by reaffirming the majority view remarking:

> [f]or another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

*Id.* at 356.


29. 213 U.S. 347.


31. *Id.*

32. *Id.*
of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power... Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.\(^\text{33}\)

The Court in *Blackmer* acknowledged Congress’ ability to regulate the conduct of American actors overseas, conceding that even in the absence of express language providing for extraterritorial jurisdiction, such force may nevertheless be permitted where the language of the act reveals an intent to have the act so construed. The Court nevertheless urged that any attempt to give extraterritorial force to an Act of Congress should be weighed by the compelling interests of having the act so construed, against the other nation’s interest in having its own laws apply.\(^\text{34}\) Chief Justice Hughes’ continued references to the substantial federal interest in serving subpoenas, suggesting that “[t]he mere giving of such a notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government; and the citizen has no standing to invoke any such supposed right,”\(^\text{35}\) echoed the Court’s concern over the possibility of infringing on another nation’s sovereignty with a law which may not reflect a substantial concern of Congress. Unlike the potential problems which might have arisen with a conflict between American and Panamanian laws in *American Banana Company*,\(^\text{36}\) (that is, the Sherman Act versus the significantly less developed concepts of antitrust violations covered by Panamanian law), Chief Justice Hughes carefully pointed out that such a conflict was not possible with the limited effect of subjecting American citizens to effective service abroad.\(^\text{37}\) Nonetheless, the Court’s implicit repudiation of the iron-clad barriers of state sovereignty and limited jurisdiction paved the way for increasingly receptive views concerning extraterritorial jurisdiction.

A more substantial regulation of American conduct overseas was addressed only a few years later by the Supreme Court in *Foley*

\(^{33}\) *Id.* at 437.

\(^{34}\) *Id.* at 438-39.

\(^{35}\) *Id.* at 439.

\(^{36}\) *American Banana Co.*, 213 U.S. 347.

Brothers v. Filardo.\textsuperscript{38} In a leading case addressing the issue of congressional intent, the Supreme Court sought to ascertain the congressional objective behind the projected reach of the Federal Eight Hour Law\textsuperscript{39} by searching the text of the statute for implicit language which would offer "any" indication of a congressional intent to have coverage extend overseas.\textsuperscript{40} Demonstrating a more tolerable disposition in assessing whether an act has extraterritorial reach, the Supreme Court also examined the legislative history of the Federal Eight Hour Law to determine whether anything dispositive in the Statute's history would support the conclusion that the Act was intended to apply overseas.\textsuperscript{41} Although relying in part on the Court's most restrictive caveat set forth in the Blackmer decision,\textsuperscript{42} the Supreme Court in Foley Brothers employed a much more receptive view of extraterritorial reach by broadening the seemingly restrictive scope of Blackmer.\textsuperscript{43}

The decisions of Blackmer and Foley Brothers signaled the virtual death of the absolutist view of territorial restraints on jurisdiction espoused by Chief Justice Marshall and employed by the Court for over a century. The traditional view of sovereignty has yielded to the emergence of a belief that the United States must maintain relations with those citizens beyond its geographic borders. Indeed, this notion has increasingly been a predominant driving force behind efforts to provide extraterritorial focus to a number of congressional acts.\textsuperscript{44} In discussing the ability of the Fifth and Sixth Amendments to regulate the conduct of American citizens in England, the Su-

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\item \textsuperscript{38} Foley Bros. v. Filardo, 336 U.S. 271 (1948).
\item \textsuperscript{39} Eight Hour Law, 40 U.S.C. §§ 321-326 (repealed. Pub. L. 87-581, title II, § 203, Aug. 13, 1962, 76 Stat. 360). Section 325 provided, in effect, that every contract to which the United States is a party shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than eight hours in any one day upon such work unless he is compensated at the rate of one and a one-half times the basic rate of pay, for all work in excess of eight hours per day.
\item \textsuperscript{40} Foley Bros., 336 U.S. 271.
\item \textsuperscript{41} Id. at 282.
\item \textsuperscript{42} 284 U.S. 421.
\item \textsuperscript{43} See Foley Bros., 336 U.S. 271.
\item \textsuperscript{44} See, e.g., Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962) (holding that §§ 1 and 2 of the Sherman Act were appropriately applied to the conduct of American actors operating in Canada since their activities had an impact within the markets of the United States and upon its foreign trade); United States v. American Tobacco Co., 221 U.S. 106, 120 (1911) (holding that "[a]n agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it."); see also United States v. Pacific & Arctic R.R. & Navigation Co., 228 U.S. 87 (1913); Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); see also infra notes 47 and 48.
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preme Court flatly rejected the territorial restraints discussed by the
Court in *Ross v. McIntyre*, Justice Black exclaimed that “[a]t
best, the *Ross* case should be left as a relic from a different era.”
Similarly, the Court’s decision in *American Banana Company*
that the Sherman Act had limited territorial effect, was also overruled by
a series of decisions which found that the statute applied in all cases
overseas where there was some impact on industry within the United
States. In the second half of this century the Supreme Court has
demonstrated little restraint in determining territorial limitations.
Fewer statutes are found to lack the requisite congressional intent
for overseas coverage. In the areas of antitrust, securities, and trade
regulations in particular, courts have given the *Foley Brothers*
standard little deference in their analysis of congressional intent.

In the areas of antitrust, securities and international trade law,
federal courts have acted with little restraint in expanding the broad
language of congressional regulations to control the conduct of
American actors overseas. The application of American antitrust
laws to regulate American actors operating abroad has evolved from
the prohibitive doctrines espoused by the Justice Holmes in *Ameri-
can Banana Company* to broad jurisdictional mandates ordered by
courts acting on the vague language of the American antitrust regu-
lations. Most courts generally employ a balancing method, weigh-
ing the government interests in having antitrust regulations apply ex-
traterritorially against a number of factors, including the interests
and concerns of the foreign nation where those laws are to apply, the
extent of the corporation’s business relations in that country and the
potential effects of anti-competitive conduct on markets in the
United States. While the recent approaches assumed by the courts

45. 140 U.S. 453 (1891).
47. See supra note 1.
48. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443-44 (2d Cir.
1945) (holding that jurisdiction existed over foreign aluminum producers engaged in price-
fixing because they intended their actions to have an effect on American markets); Timberline
Lumber Co. v. Bank of Am. 549 F.2d 597 (9th Cir. 1976). The Court suggested that a three-
prong analysis be used as an “evaluation and balancing of the relevant considerations in each
case. . . .” Id. at 613. The Court determined that the elements to be weighed include the
“degree of conflict with foreign law or policy, the nationality or allegiance of the parties and
the locations or principal places of business of corporations, the extent to which enforcement
by either state can be expected to achieve compliance, [and] the relative significance of effects
on the United States and elsewhere. . . .” Id. at 614; Mannington Mills, Inc. v. Congoleum
Corp., 595 F.2d 1287, 1292 (3d Cir. 1979) (holding that a “substantial effect” on United
States commerce would sustain jurisdiction).
49. See supra note 34.
often lead to a great deal of uncertainty over the current reach of American antitrust regulations, the trend over the past fifty years evidences an extremely tolerant view by the courts towards attempts subjecting American actors operating overseas to the prohibitions of American antitrust laws.50

The judicial system has also seen a substantial growth in the jurisdictional reach of United States securities laws over the past twenty years as well.61 Relying on the statutory vagueness of the 1933 and 1934 Securities Acts, courts have displayed a great deal of ingenuity in their attempts to regulate the overseas affairs of both American and foreign business entities.62 Under the most current theory which has gained steady support, courts typically establish jurisdiction upon a finding of either fraudulent conduct that has occurred within the United States,63 or that fraudulent conduct outside the United States has had an impact on securities markets within the United States.64 In either event, courts often perceive the threat of an adverse effect on American markets directly or indirectly, as being the event which triggers the justifiable application of American securities laws.65 Likewise, in the area of foreign trade, courts have


51. See supra notes 38-40. See also Thomas, Extraterritoriality In An Era Of Internationalization Of The Securities Markets: The Need To Revisit Domestic Policies, 35 Rutgers L. Rev. 452, 452-54 (1983).


54. Leasco Data Processing Equip. Corp., 468 F.2d 1326, 1344; Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968) (holding that the depressive effects of the fraudulent activities of a Canadian Corporation on an American stockholder was sufficient to warrant application of the 1934 Securities Act).

55. See, e.g., United States v. Scophony Corp. of America, 333 U.S. 795, 810-15 (1948) (holding that a British corporation was "transacting business" and was "found" in the Southern District of New York within the meaning of § 12 of the Clayton Act, so that it could be sued there). United States v. Watchmakers of Switzerland Information Center, 133 F. Supp. 40 (S.D.N.Y. 1955) (finding foreign subsidiaries of an American incorporated entity subject to United States jurisdiction because they had committed the America parent to Swiss restric-
broadly construed the language of congressional acts and trade agreements as a basis for regulating the conduct of both American and foreign actors abroad.\textsuperscript{56}

Courts have generally acknowledged that their broad interpretations of congressional legislation in these areas largely reflects a growing concern over corporate attempts to gain competitive advantages and increase profitability under the substantially less restrictive regulations of other countries. The resulting effect which have adversely impacted on American markets prompted increased demands both by the domestic business community and by federal regulatory agencies that these actors be subject to congressional regulations. The concern over a potential for conflict with foreign law is minimal, since many nations adhere to a strict policy of laissez-faire, and make little attempt at regulating American corporations. Although the objective of the Court toward permitting such liberal construction of these statutes reflects the concern of the American business community in retaining a competitive edge vis-a-vis their foreign adversaries, it remains to be seen whether this policy will expand significantly into other areas of international concern.

### III. Presumptions Against Extraterritorial Application

Two arguments have essentially been put forth by proponents who seek to limit the jurisdiction of Title VII to a domestic focus. The first argument rests upon historical precedent established by the Supreme Court which embraces the right of all nations to retain absolute authority over the activities of commercial actors within their borders.\textsuperscript{57} The Supreme Court has normally rejected the notion that laws should have extraterritorial focus, stressing instead that each nation is entitled to complete sovereignty within their own jurisdiction, and that their laws should neither be contradicted nor amended by the laws of other nations.\textsuperscript{58} Despite this seemingly invincible canon, the current trend of Supreme Court decisions suggests a more

\textsuperscript{56} See Griffin, Possible Restrictions of International Disputes Over Enforcement of U.S. Antitrust Laws, 18 STAN. L. INT'L L. 279, 279 n.1 (1983); See also Note, Compelling Production of Documents in Violation of Foreign Law, 50 FORDHAM L. REV. 877, 877 n.1 (1982); Staff of Subcomm. on Investigation, Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess., Crime and Secrecy: The Use of Offshore Banks and Companies, 145-253 (Comm. Print 1983).

\textsuperscript{57} See supra note 8. The Supreme Court had traditionally relied on the position that a nation reigns supreme within its own jurisdiction, both on the principal of sovereignty as well as the principal of limited territorial jurisdiction.

\textsuperscript{58} \textit{Id.}
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Amenable approach to this concept, noting that certain subjects are so interrelated with Constitutional guarantees that particular laws addressing these rights should be permitted to regulate conduct of American commercial actors overseas. The second argument is grounded in ascertaining whether a congressional intent to have the act apply internationally is evident in the statutory language. The argument follows that in addition to the statutory silence with regard to the issue, there is also a complete absence of any dispositive language in the statute which could be construed as providing for such coverage. Citing to the fact that Congress has amended certain acts with provisions providing for extraterritorial coverage, the argument suggests that the absence of any such provision in Title VII indicates a congressional intent to limit the jurisdiction of Title VII to domestic claims.

The Supreme Court has traditionally found laws providing for extraterritorial coverage invalid, echoing the historical notion that nations are entitled to absolute authority to regulate the affairs of actors under its jurisdiction. This tenacious adherence to the principal of sovereignty has been a chief obstacle for attempts to have laws regulate the commercial activity of employers overseas. In the 1949 landmark decision of Foley Brothers, however, the Supreme Court laid down what has since been commonly used by courts as a standard for determining whether a law should have extraterritorial reach. The case involved an American citizen who was hired by an American contracting company to work overseas as a cook, and travel with the company on construction projects through the Middle and Far East. The plaintiff was then sent to work in Iraq, where he frequently worked more than eight hours a day. He then requested overtime pay for the work done in excess of the eight hour shifts. After having his request denied several times by his employer, the employee brought an action in the New York Supreme Court, al-

59. Id.
60. 336 U. S. 281. This case, along with the opinion in Blackmer v. United States, 284 U.S. 433 (1932), marks a turning point for the jurisdictional construction of congressional acts. Id. The Court's decisions in these cases represents a judicial cornerstone for future interpretations of the jurisdictional reach of congressional acts. Id.
61. However, in the areas of securities, antitrust and international trade in particular, courts have made exceptions to this rule since the paramount need to regulate the evasive tactics of American companies is thought to supersede the concerns of the nations where they operate. See supra notes 38-41.
62. Id. at 283-84.
63. Id.
64. Id.
leging that his employer had violated section 324 of the Federal Eight Hour Law (hereinafter "Law") for failing to reimburse him for the excess work. On a grant of certiorari, the Supreme Court reversed a New York Court of Appeals decision granting plaintiff relief, under the assumption that the Law had territorial effect in Iraq. In delivering the majority opinion, Justice Reed conceded that since Congress no doubt had the authority to extend the Law to work performed in other nations, the inquiry should instead focus upon whether Congress had intended to make the Law applicable to such work.

The Supreme Court determined that there were three approaches which could be undertaken to ascertain whether Congress had intended that the Law be given extraterritorial effect. The Court first examined the language of the Law, for purposes of determining whether there was any indication of a congressional purpose to provide for extraterritorial jurisdiction. The Court searched the statutory language for any inferences that may reveal a congressional intent to extend coverage extraterritorially. The Court also looked to the laws of Iraq, to determine whether there were laws which would permit congressional authority to extend over the labor laws of Iraq. Second, the Court declared that the legislative history

66. Id. (referring to the Eight Hour Law, 40 U.S.C. § 324 (1912) (repealed Pub. L. 87-581, title II, § 203, Aug. 13, 1962, 76 Stat. 360)). Section 325(a) of the Act provided that: (n)otwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. 40 U.S.C. § 325(a). (Section 325 has since been repealed).

67. 297 N.Y. 217, 78 N.E.2d 480 (1948). The New York Court of Appeals concluded that "[w]ords of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad." Id. at 225, 78 N.E.2d 484.

68. Foley Bros., 336 U.S. at 284-85.

69. Id. at 285-89.

70. Id. In determining whether there was any indication in the Act to have it apply in Iran, the Court concluded that: [t]here is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control. There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq. Id. at 285.

71. Id. at 285-86.

72. The issue of whether another nation's law conflicts or supports the legislative effect of the act on the citizen within that country's border has, to a large extent, yielded to the issue
of an act may also be used to reveal a Congressional intent to provide extraterritorial jurisdiction in the absence of any express statutory language.\textsuperscript{73} Justice Reed noted that while there ordinarily exists a presumption that Congress concerns itself primarily with domestic conditions, there may be instances where the legislative history may evidence a congressional purpose to broaden the jurisdictional scope of an act.\textsuperscript{74} The Court found that the Law was drafted as a result of Congress' concern with domestic labor conditions, focusing exclusively on the need for improved labor conditions in the United States.\textsuperscript{75} The Court also searched subsequent amendments to the Law, to determine whether there was language which might reveal a Congressional purpose to extend coverage outside the jurisdiction of the United States.\textsuperscript{76} Where neither of the first two approaches adequately demonstrated an implied purpose toward broadening a law's jurisdiction, the Court suggested that administrative interpretations of whether enforcement of the act is consistent with international law. See, e.g., Weinberger v. Rossi, 456 U.S. 25 (1982); Lauritzen v. Larsen, 344 U.S. 571, 577-78 (1952); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 101, 121 (1963); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 950 n.155 (D.C. Cir. 1984); United States v. Hensel, 699 F.2d 18, 27 (1st Cir. 1983); Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1357 (D.C. Cir. 1981); Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980). This conflict with international law has also been addressed by section 403 of the Restatements (Third) of Foreign Relations Law. The American Institute of Law has determined that "as a matter of international law 'a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable'." \textit{R}\textit{ESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 134 (1984)}.


75. \textit{Foley Bros.}, 284 U.S. at 285-86.

76. \textit{Id.} at 286-87.
of the Law "in its various phases of development" may be used as a third method to shed light on the potential scope of jurisdiction. The Supreme Court cited various Executive Orders, noting that there was no indication that any effort had been made to enforce the Law in territories outside United States jurisdiction. Finally, the Court considered letters from the Secretary of War, Secretary of Treasury, Department of State and so forth, remarking on the absence of any presumption in those letters that the Law had extraterritorial effect. The Court ultimately concluded that application of any one of the three approaches either by itself or in tandem was insufficient for purposes of establishing the existence of a congressional intent to provide extraterritorial coverage.

In a somewhat analogous situation, a number of lower courts have wrestled with the issue of whether the Age Discrimination In Employment Act (hereinafter "ADEA"), offered adequate Congressional intent to grant extraterritorial reach to the Acts. Since the ADEA was silent on the question of territorial focus, the courts have unanimously concluded that Congress had not intended to have the ADEA apply extraterritorially. In 1984, however, Congress amended the ADEA by including in the definition of employee "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." Thus, Congress added a clear statement providing for extraterritorial application, obviating the need for judicial guesswork. Opponents of Title VII extraterritorial application have cited to the fact the ADEA has been traditionally treated by the courts as an essentially domestic act, limited in force to United States jurisdiction. Citing the lack of congressional

77. Id. at 288.
78. Id. at 288-90.
79. Id.
80. Id. The Court in fact wound up concluding that the "administrative interpretations of the Act, although not specifically directed at the precise problem before us, tend to support petitioners' contention as to its restricted geographical scope." Id. at 290.
83. Id.
84. 29 U.S.C. § 621.
intent in proving extraterritorial force to the ADEA, and the fact that the Fair Labor Standards Act ("FSLA") provided for no extraterritorial application, the Tenth Circuit in 1984 noted that "courts should be loath to circumvent such intent." Therefore, the argument follows that since ADEA, (a regulation of employer conduct like Title VII and sharing a similar legislative history as Title VII), has been construed as a domestic act by the courts and, consequently, Title VII should be treated in a similar manner.

IV. Judicial Scrutiny: The Question of the Extraterritorial Application of Title VII

Title VII of the Civil Rights Act of 1964 was enacted by Congress in an effort to eliminate discrimination in the workplace. Reflecting the evolving attitude of the American public towards emerging beliefs in equality and individual rights, Congress declared Title VII "a national policy to protect the right of persons to be free from . . . discrimination." The Supreme Court in Griggs v. Duke Power remarked that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

The majority of legislation, executive orders and Supreme Court decisions addressing the scope of Title VII have focused on essentially domestic disputes. Notwithstanding the vast number of American laborers employed outside the United States, claims over the

86. Zahourek v. Arthur Young & Co., 750 F.2d at 829. The Court referred to the fact that the FLSA was an integral part of the ADEA, stating that it was properly used as evidence to determine congressional intent. Id.

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).
90. Id. at 429-30.
conditions of their employment rarely arise. A district court decision in 1976 was the first case to ever address the territorial limitations of Title VII. Since then, however, the issue of the extent of Title VII's jurisdictional authority has been addressed on several occasions by the courts, and only recently, by the Supreme Court.92 Both the Department of Justice and the Equal Employment Opportunity Commission (hereinafter "EEOC"), the agencies responsible for administering Title VII, have maintained that the Act was intended to apply extraterritorially.93 Nevertheless, Congress has remained virtually silent on the matter, offering no indication on whether Title VII is a domestic or international regulation. The absence of legislative interpretation has therefore left the issue to the courts, where the debate was ultimately addressed by the Supreme Court.

The issue of whether Title VII regulates the employment practices of American employers overseas has rarely been addressed by the federal courts and only recently presented itself before the Supreme Court.94 Before the Supreme Court passed judgment, the only circuit to address this issue has been the Fifth Circuit, which held that Title VII "does not reflect the necessary clear expression of Congressional intent to extend its reach beyond our borders."95 Since no specific provision exists prescribing the territorial limitations of Title VII, courts have searched the language of the Act and its executive and legislative history to ascertain whether Congress had intended an extraterritorial application. The primary argument supporting extraterritorial application of Title VII is based upon the

Americans Living Abroad (1973) (reporting the 1970 census).
92. See supra note 4.
93. The Department of Justice and the Equal Employment Opportunity Commission (EEOC), the agencies responsible for administering Title VII, agree that the statute applies extraterritorially. During legislative debate over proposals to prohibit United States employers from participating in foreign boycotts requiring religion-based employment discrimination, Justice Scalia, then Assistant Attorney general, argued that the amendment were not necessary because Title VII already prohibited employment discrimination. See Discriminatory Arab Pressure on U.S. Business: Hearings before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. 88 (1975) (statement of Antonin Scalia, Assistant Attorney General). EEOC General Counsel William A. Carey agreed that Title VII applies extraterritorially. Referring to § 2000e-I he wrote: "[I]f [that section] is to have any meaning at all, it is necessary to construe it as expressing a Congressional intent to extend coverage in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." Letter from William A. Carey, EEOC General Counsel, to Sen. Frank Church (Mar. 17, 1975), reprinted in Note, Civil Rights, Employment and The Multinational Corporations, 10 Cornell Int'l L.J. 87, 102-03 (1976).
94. See supra note 4.
negative inference from section 702, the alien exemption provision of Title VII. The provision precludes alien laborers from asserting Title VII claims against employers when they work outside the United States. Proponents argue that the provision's language which excludes extraterritorial protection for aliens working overseas reveals an implicit congressional intent to extend such protection to American citizens. The argument focuses on the provision's silence with regard to American employees, urging that since they are noticeably absent from this exemption, Congress must have intended to grant them protection overseas. This argument, appropriately entitled the "negative implication argument", has found support in a number of recent court decisions.

The negative implication argument was first established by the District Court of Colorado in a 1976 decision. In Love v. Pullman Company, the District Court addressed the question of whether Canadian porters, working for a Delaware based employer operating in Quebec, would have protection under Title VII. Citing to section 2000e-1 of the Act, the Court answered in the negative, explaining that because 2000e-1 specifically denied coverage to aliens who were not employed within the United States, by negative inference, American laborers in Quebec would be entitled to Title VII protection. The District Court noted that:

American citizens who were employed by Pullman in Canada are entitled to full relief without any subtraction. This conclusion rests on the negative inference of section 702 of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1. Since Congress explicitly excluded aliens employed outside any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered by the act.

This argument was reinforced four years later when the District Court

97. The provision provides in relevant part: "[t]his subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corpora- tion..." (emphasis added). Id.
99. Id.
100. 13 Fair Empl. Prac. Cas. (BNA) 423 (D.Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978).
101. Id. at 426 (n.4).
Court of New Jersey decided *Bryant v. International Schools*. The District Court decided that the plaintiffs, American teachers who were working in Iran, were entitled to assert a Title VII claim against their American based employer for discriminatory promotional policies. The plaintiffs in the case, Dottie Bryant and Theresa Lillibridge, were hired by the defendant, a New Jersey based corporation, to teach in an American school in Iran. Plaintiffs claimed that their contacts with the school, which were negotiated in Iran, provided fewer benefits than the contracts of their male colleagues, negotiated in the United States. Consequently, the plaintiffs consequently brought this suit in the Federal District Court of New Jersey, in October, 1978. Both Lillibridge and Bryant alleged that they had been the victims of unlawful sex discrimination, and sought monetary damages for benefits which they believed were unlawfully denied by their employer. The corporation asserted that Title VII did not apply to corporate conduct that occurred outside the United States. Even if the Act were to apply, however, the corporation argued that the government of Iran forbade the school from supplying duplicate benefits to the plaintiffs, who were married to men working with the government under contracts that contained the benefits the plaintiffs had not received.

In addressing the defendant’s argument that Title VII was limited to a purely domestic focus, the District Court held that the statutory language of Title VII reveals a congressional intent to give extraterritorial effect to the Act. The Court relied almost exclusively on the language of *Love v. Pullman*, when it determined that the negative implication of the alien exemption provision in section 702 offered adequate evidence of a congressional intent to extend Title VII coverage overseas. The Third Circuit Court reversed on the grounds that the plaintiffs had not established a prima

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103. *Id.*
104. *Id.* at 482.
105. *Id.* at 474.
107. *Id.*
108. *Id.* at 478-80.
109. *Id.*
110. *Id.* at 481-83.
111. *See supra* note 87 (discussing the negative implication of § 702).
facie case of sex discrimination. The Court, however, noted that the case raised "significant questions regarding the applicability of Title VII to the overseas employment practices of a private American employer." The Court, however, failed to address the traditional obstacles facing such coverage, which presume all laws to have domestic focus in the absence of compelling evidence to the contrary. Instead, both the Love v. Pullman Court and the Bryant Court were satisfied that a congressional purpose to provide for extraterritorial coverage was evidenced through the alien exemption provision.

On February 2, 1990, the Fifth Circuit Court of Appeals in a 9-5 decision affirmed a lower court's determination that Title VII was intended by Congress to have a domestic focus only. Ironically, the Fifth Circuit had affirmed a district court's holding which applied Title VII to an action arising in another country only a few years prior to this decision. In a case where an American employer in Saudi Arabia initiated a policy which required helicopter pilots to convert to Islam as a condition of approval to fly over Mecca, the Fifth Circuit affirmed the decision under the assumption that Title VII was enforceable against the American employer. The Fifth Circuit, however, failed to specifically address the jurisdictional limitations of the Title VII since the employer was held not to violate the Act. Consequently, the court in Boureslan emphasized this fact when it ruled that Title VII was to be given a domestic focus and has no operation with respect to events overseas. The plaintiff in this latest decision was Ali Boureslan, an American citizen who worked for a Delaware based oil company with its principal

113. 675 F.2d 563 (3d Cir. 1982).
114. Id. at 565.
115. This logic was supported by the Maryland District Court in 1986, which agreed that the 'alien exemption' provision satisfied the Foley Brothers standard of evidencing a congressional intent to give international force to an act. Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986).
117. Kern v. Dynalectron Corp, 577 F. Supp. 1196, 1201 (N.D. Tex. 1983) aff'd 746 F.2d 810 (5th Cir. 1984). The case involved the question of whether an American employer's policy of requiring all helicopter pilots to convert to Islam as a condition of approval to fly over Mecca, Saudi Arabia. Id. The plaintiff, a pilot who claimed that such a policy discriminated against him on the bias of his religion, challenged the policy under Title VII. Id. The District court analyzed the issue assuming that Title VII had jurisdictional effect in Saudia Arabia. Id. The Fifth Circuit affirmed the District Court's decision that the policy was not violative of Title VII, but failed to discuss whether the District Court had improperly construed the jurisdictional scope of Title VII. Id.
118. Id.
119. Id.
120. Boureslan, 892 F.2d 1271 at 1273.
operations in Dhahran, Saudi Arabia. Boureslan, who was born in Lebanon, claimed that shortly after he began his employment in Saudi Arabia, his supervisor subjected him to a series of racial, ethnic and religious slurs that culminated in his dismissal in 1984. Boureslan subsequently filed charges against his employer, ARAMCO, with the Equal Employment Opportunity Commission and later brought a Title VII action in the Southern District Court of Texas, alleging discriminatory employer practices because of his race, religion and national origin. The action was subsequently dismissed by the district court for a lack of subject matter jurisdiction, and an appeal to the Fifth Circuit followed.

The Court of Appeals affirmed the findings of the district court, holding that Title VII was never intended to regulate the practices of American employers with regard to their employment of American citizens outside the United States. The Court of Appeals relied primarily upon three essential arguments in support of its position. The majority opinion, written by Judge W. Eugene Davis, set its arguments in the context of early Supreme Court precedent which placed significant emphasis on the fundamental concept of sovereignty, thereby creating the strong presumption against extraterritorial effect. The majority stressed that "[t]he critical question that governs this appeal is whether Congress included language in Title VII that reflects a clear Congressional intent to overcome the presumption against extraterritorial application of the act." The plaintiff, Ali Boureslan, claimed that the necessary language giving Title VII extraterritorial effect was found in section 702 of the Act, the alien exemption provision. By employing the negative inference argument that had proved successful in Love v. Pullman and Bryant v. International Schools, Boureslan maintained that Congress' express preclusion of extraterritorial protection

121. Id. at 1272.
122. Id. at 1271-72.
124. Id.
125. Boureslan, 892 F.2d 1271 at 1274.
126. Id. at 1272-74.
127. Id. at 1272-73. The Court cited to the emphasis on the principals of sovereignty contemplated by the Supreme Court in American Banana Co. v. United Fruit Co., 213 U.S. 347 at 356; and Blackmer v. United States, 284 U.S. 421 at 437.
128. Id. at 1272 (referring to the language of Foley Bros. v. Filardo, 336 U.S. 281 at 285).
129. Id. at 1273 (citing to the alien exemption provision, 42 U.S.C. § 2000e-1 (1988)).
130. 13 Fair Empl. Prac. Cas. 423.
to alien laborers manifested a clear intent to include such protection for American citizens.\textsuperscript{132}

The majority disposed of Boureslan's argument by first noting that the domestic focus of Title VII, as evidenced through the Act's references to "United States", "states" and "state proceedings" is inconsistent with a congressional intent to give an act "international focus."\textsuperscript{133} The majority also pointed out that Title VII is "curiously silent in a number of areas where congress ordinarily speaks if it wants to extend its legislation beyond our borders."\textsuperscript{134} Citing Congress' failure to address potential conflicts with foreign discrimination laws, while making similar accommodations for state discrimination laws, the majority noted the failure of Title VII to resolve potential venue problems that may occur with foreign violations.\textsuperscript{135} The majority also proposed that if extraterritorial coverage is given to Title VII, nothing would prevent American employees from asserting Title VII actions against their foreign employers overseas as well.\textsuperscript{136} Since Title VII does not exempt foreign employers from its scope, the majority contended that if Boureslan was to prevail, nothing could prevent other citizens from filing Title VII claims against their foreign employers.\textsuperscript{137} Finally, the majority cited to a number of congressional acts which have recently been amended with specific provisions granting extraterritorial coverage.\textsuperscript{138} The majority argued that since Congress had made specific provisions to give extraterritorial reach to those acts, its failure to "provide the usual nuts-and-bolts provisions for enforcing those rights" to Title VII, indicates that there was no intent on the part of Congress to provide for such coverage.\textsuperscript{139}

In a rather lengthy and heated dissent, Judge King challenged

\textsuperscript{132} 892 F.2d 1271. Boureslan argued that if the Court did not use the negative inference of section 702, the provision would serve no purpose. \textit{Id.}

\textsuperscript{133} \textit{Id.} at 1274.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} (citing to 42 U.S.C. \textsection{} 2000e-5(f)(3) (1988) which establishes that venue "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed. . . . ").

\textsuperscript{136} \textit{Id.} at 1274.

\textsuperscript{137} \textit{Id.}


\textsuperscript{139} \textit{Id.} at 1274.

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the majority opinion, finding that the language of Title VII evidenced a clear expression of congressional intent to give extraterritorial reach to the Act.\textsuperscript{140} Citing to the Supreme Court language of \textit{Foley Brothers v. Filardo},\textsuperscript{141} Judge King remarked that “we are guided by a presumption that Acts of Congress are intended to apply only within the territory of the United States unless there is a clear expression of congressional intent to the contrary.”\textsuperscript{142} King explained that the “clear expression of congressional intent” creating extraterritorial reach is manifested in the alien exemption provision.\textsuperscript{143} Judge King contended that “[i]f Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed.”\textsuperscript{144} King pointed out that a provision which specifically precludes coverage of aliens employed overseas, but which is silent as to the disposition of American employees, manifests a Congressional design to provide Title VII protection for American laborers abroad.\textsuperscript{145}

Judge King further contested the holding of the majority when she determined that the legislative history of Title VII revealed a legislative assumption that the Act has extraterritorial reach.\textsuperscript{146} She circumvented the traditional “respect for sovereignty” argument by noting that section 702 does not extend its focus to foreign nationals working in territories outside the United States, but is rather limited to citizens of the United States.\textsuperscript{147} King urged that the limited exemption for American citizens to retain their fundamental rights and opportunities does not encroach upon another nation’s sovereignty in a way which the Supreme Court would find unacceptable under Fo-

\textsuperscript{140} Id. at 1274-79.
\textsuperscript{141} 336 U.S. 281.
\textsuperscript{142} Boureslan, 892 U.S. 1271 at 1275 (citing to \textit{Foley Bros. v. Filardo}, 336 U.S. 281).
\textsuperscript{143} Id. (citing 42 U.S.C. § 2000e-1 (1988)).
\textsuperscript{144} Id. at 1275.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 1276. Judge King determined that:

\begin{quote}

[a]lthough the legislative history of section 702 is not remarkably illuminating, I have found nothing in the published records that contradicts my interpretation of the provisions’s extraterritorial language. Rather, it seems clear that section 702 is a ‘limited exemption’ for employers and that “the intent of the [alien] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.”
\end{quote}

\textit{Id.} (quoting Civil Rights: Hearings on H.R. 7152 before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963) (testimony of Rep. Roosevelt explaining provisions of H.R. 405, which was incorporated into Title VII of H.R. 7152).
\textsuperscript{147} Id. at 1277.
King's strongest argument against the limited territorial presumption established by the Supreme Court in *Foley Brothers v. Filardo*,¹⁴⁹ is found in her recitation of Justice Reed's opinion in *Foley Brothers* on the distinctions he drew between alien and American laborers.¹⁵¹ One of the principal arguments asserted by the Court in *Foley Brothers* in opposition of extraterritorial jurisdiction for the Eight Hour Law centered on the absence of any provision in the Act which distinguished the protections of alien employees from American employees.¹⁵² An extraterritorial application therefore, would necessarily involve foreign as well as American laborers.¹⁵³ The Supreme Court suggested that a federal law regulating the protection of alien laborers overseas would necessarily intrude upon that nation's "local concerns" and would be an unlawful extension of congressional authority.¹⁵⁴ The Court, however, maintained that such protection may lawfully be extended to American employees overseas had there been an indication from the language of the Act that Congress had intended to distinguish the protections for American laborers from those granted to alien workers.¹⁵⁵ The Court explained that:

> [n]o distinction is drawn therein between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. . . . The absence of any distinction between citizen and alien labor indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress.¹⁵⁶

Judge King concluded from this argument that "[b]y explicitly ex-

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¹⁴⁸. *Id.*
¹⁴⁹. 336 U.S. 281.
¹⁵⁰. *Boureslan*, 892 F.2d at 1277-78.
¹⁵¹. *Id.*
¹⁵³. *Id.*
¹⁵⁴. *Id.*
¹⁵⁵. *Id.*
¹⁵⁶. *Id.* at 286 (emphasis added).
empting aliens employed abroad from the scope of Title VII, Congress addressed the factor that the Supreme Court had identified as most likely to violate principles of foreign sovereignty in the extraterritorial application of United States labor laws.\textsuperscript{5}

Judge King also suggested that the legitimacy for Title VII's extraterritorial scope might be prescribed by the approach set forth in section 403 of the Restatements (Third) of Foreign Relations Law of the United States.\textsuperscript{158} Section 403 provides that "as a matter of international law 'a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'"\textsuperscript{159} Although the majority never addressed this issue in its opinion, ARAMCO had made the argument that extraterritorial application of Title VII would be "unreasonable" under section 403.\textsuperscript{160} King conceded that an affirmative congressional requirement to apply Title VII extraterritorially would be needed if such application were unreasonable, but she noted further that no such showing would be necessary, and normal statutory construction could overcome the presumption, if the application was reasonable.\textsuperscript{161} King proceeded to judge the extraterritorial application of Title VII under the standard set forth in section 403(2) of the Restatement and determined that it would not be unreasonable for Congress to require that American companies comply with Title VII in their employment of American citizens in other countries.\textsuperscript{162} She explained that:

\begin{itemize}
  \item \textsuperscript{157} Boureslan, 892 F.2d at 1278.
  \item \textsuperscript{158} RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §403 (1984).
  \item \textsuperscript{159} Id. at 403(1).
  \item \textsuperscript{160} Boureslan, 892 F.2d 1271.
  \item \textsuperscript{161} Id. at 1279-82. According to the Restatement (Third) of Foreign Relations Law, decisionmakers must not only examine national and territorial links, but they must also consider whether exerting jurisdiction is reasonable. Under the Restatements, the jurisdictional analysis calls for a two-step process. First, the decision maker must determine whether the dispute has a sufficient nexus (territorial or nation) to justify the assertion of jurisdiction. The Restatement provides:

  A state has jurisdiction to prescribe law with respect to (1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory. . . Id. at 401-402.

  Second, they must decide whether, based on a number of "relevant factors", such an assertion would be reasonable in light of general principles of international fairness and of competing national interests. Id. at § 403(2). The Restatement lists factors such as "the character of the activity to be regulated, the importance of the regulations to the regulating state[,] . . . the importance of the regulation to the international, political, legal or economic system[. . . the extent to which another state may have an interest in regulating the activity." Id.
  \item \textsuperscript{162} Id. at 1281-82.
\end{itemize}
The United States has a strong and legitimate interest in protecting citizens employed abroad by American corporations from discrimination in employment. Title VII is consistent with the norms of the international community, which has adopted numerous accords condemning discrimination, including discrimination in employment; American citizens have a legitimate expectation that they will not lose the protection of Title VII when they accept a position with the foreign office of an American enterprise; and the potential for conflicts with foreign law are minimized by the fact that the statute applies only to United States nationals by the BFOQ [bona fide occupational qualification] defense that has been interpreted in an opinion endorsed by this court to exempt an employer from liability where a violation of Title VII is compelled by foreign law.163

Four months after the Fifth Circuit decided Boureslan and while appeal to the Supreme Court was pending, the Western District Court of Washington relied almost exclusively upon Judge King's dissenting opinion as being the proper determination of Title VII's territorial effect.164 The plaintiffs, Akgun and Contreras, were American citizens who worked for Boeing Services International (hereinafter "BSI"), a subsidiary of the Boeing Company in Turkey.165 Both plaintiffs were married to Turkish nationals and lived in Turkey during their employment with BSI.166 Although initially treated by BSI as civilian components of the United States armed forces stationed in Turkey, BSI later determined that because Akgun and Contreras were married to Turkish nationals, they should no longer be considered members of the Air Force civilian component.167 After firing the plaintiffs for unspecified reasons, BSI rehired them a year later, but placed them under Turkish employment contracts.168 By the terms of the new contracts, the plaintiffs were to be paid in Turkish currency and were also subject to local income taxes.169 These practices resulted in a loss of income for the plaintiffs, who in turn filed charges with the EEOC alleging gender discrimination.170 Upon EEOC approval, suit was filed in the West-

163. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
ern District Court of Washington on August 30, 1989. The Court held that there was sufficient congressional intent in Title VII to indicate an implied grant of extraterritorial coverage. The Court found Judge King’s dissenting opinion to be persuasive in its analysis, basing much of its discussion on the rationale she established in *Boureslan v. ARAMCO*.

In its assessment of congressional intent, the district court refuted BSI’s contention that a strong presumption stands against any proposition that an Act of Congress is to apply extraterritorially. The district court in one sense reversed the implications of *Foley Brothers*, that a presumption exists against an act’s extraterritorial coverage, by stressing that “[o]nly if there is absolutely no evidence of Congressional intent is it presumed that an act is limited in application to territorial jurisdiction.” This determination not only runs against the majority holding in *Boureslan*, but also exceeds the presumptions in Judge’s King’s analysis in her dissent by concluding that the slightest evidence of a legislative intent to have the Act extend extraterritorially would satisfy the *Foley Brothers’* standard. Even in the areas of securities, antitrust and trade law, where the lower courts have taken the lead in giving extraterritorial force to Congressional acts, there is a general consensus that a minimum amount of legislative and executive history supports their conclusion. The district court also reaffirmed previous arguments which had supported the “negative inference” of section 702 of Title VII (alien exemption provision), claiming that the provision offered a sound indication that the drafters impliedly sought to protect Americans working overseas.

V. THE FINAL WORD ON EXTRATERRITORIAL APPLICATION

On January 16, 1991, the Fifth Circuit decision in *Boureslan v. ARAMCO*, was argued on appeal before the Supreme Court. Two

171. *Id.*

172. BSI relied on the language of *Foley Bros., Inc.*, 336 U.S. at 285, which, as noted previously, held that a contrary congressional intent must be evident in the legislation for an act to apply outside the presumed territorial jurisdiction of the United States. *Akgun*, No. 97-104.

173. *Id.*

174. *Id.*

175. *See supra* notes 34-42.

176. *Id.* (citing to Judge King’s analysis that “if no individual was intended to be covered extraterritorially by Title VII, a specific provision excluding only aliens would be superfluous.” *Boureslan*, at 1275 (King, J., dissenting)).

months later Chief Justice Rehnquist, writing for the majority, determined that based on the almost complete lack of statutory language which would manifest a congressional intent to the contrary, Title VII was designed with only a domestic focus in mind. This conclusion was in part the result of a very limited and prohibitive reading of the *Foley Brothers'* jurisdictional caveat and its proteges.

Chief Justice Rehnquist laid the foundation of the majority opinion in the context of the *Foley Brothers'* standard which, as was discussed *infra*, established the principal “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” In addressing petitioners’ first argument, that the broad jurisdictional language of Title VII revealed a congressional intent to extend coverage to Americans overseas, Rehnquist pointed out that the ambiguous language of the Statute, without more, was by itself an insufficient basis from which a congressional intent to provide extraterritorial coverage could be established. Specifically, petitioners referred to the statutory definitions of “employer” and “commerce” which they maintain is statutory language which manifests a Congressional intent to provide for jurisdictional force outside the United States. Respondents on the other hand urged that Congress’ failure to use terms more dispositive of a statute with extraterritorial jurisdiction, such as “foreign nations” or “foreign commerce”, clearly revealed a lack of Congressional intent to establish jurisdiction outside the United States.

While Rehnquist found these competing interpretations both “plausible”, he found neither one persuasive, and instead held that the ambiguity of the language could not reveal a clear Congressional intent.
intent that Title VII was designed to apply extraterritorially. Chief Justice Rehnquist remarked that "[t]he language relied upon by petitioners - and it is they who must make the affirmative showing - is ambiguous, and does not speak directly to the question presented here." The majority also found petitioners' reliance on the "negative inference" argument of the alien exemption provision unpersuasive, and unsupported by any other element in Title VII. Chief Justice Rehnquist maintained that the lack of more persuasive and express statutory language to reinforce petitioners' reliance on the negative inference of Title VII, necessitated a finding that Congress had only intended to exclude alien laborers from the protective umbrella of Title VII, whether employer within the United States or abroad. In ascertaining the persuasiveness of the negative inference of the alien exemption provision, Chief Justice Rehnquist reasoned that if petitioners' assumption were correct, then there would be no way of distinguishing "in its application between United States employers and foreign employers." To illustrate this point, Rehnquist explained that absent a distinction in the statute between American and foreign employers, an American citizen employed by a French company in France would be able to subject that company to the prohibitions of Title VII. Noting the obvious dilemma of a conflict in laws, Chief Justice Rehnquist declared that:

Without clear evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

Rehnquist reinforced this proposition by suggesting that other "elements" lend credibility to his belief that Title VII is a domestic statute. Specifically, Rehnquist cited to Congress' failure to provide

184. Id. at __, 111 S. Ct. at 1231-1232.
185. Id. at __, 111 S. Ct. at 1231.
186. Id. at __, 111 S. Ct. at 1233-1234. Noting that "[t]he statute as a whole indicates a concern that it not unduly interfere with the sovereignty and laws of the States", Rehnquist cited to numerous provisions in the statute which purportedly reveal a "purely domestic focus". Rehnquist concluded that continued references to "States" and "state proceedings" and the failure to even once mention "foreign nations" or "foreign proceedings", was a clear indication of Congress' intent to restrict the jurisdictional focus of Title VII to a domestic scope. Id.
187. Id. at __, 111 S. Ct. at 1234.
188. Id.
189. Id.
190. Id.
191. Id.
for a single mechanism through which Title VII may be enforced extraterritorially.\textsuperscript{192}

Moreover, the majority also noted that the limited investigative authority that the EEOC is empowered with under Title VII further suggests that Title VII was designed as a domestic statute only.\textsuperscript{193} Specifically, the majority points to the fact the EEOC is jurisdictionally bound to issue subpoenas within areas under the jurisdiction of the United States, and that the EEOC is only permitted to act in accordance with the express authority of the Statute.\textsuperscript{194} Referring to the Court's decision in \textit{General Electric Company v. Gilbert},\textsuperscript{195} which recognized that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations", the majority determined that any effort by the EEOC to influence the affairs of American actors overseas must overcome a strong presumption that its authority is jurisdictionally limited.\textsuperscript{196}

In their conclusion, the majority stressed that "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."\textsuperscript{197} To illustrate this caveat, Chief Justice Rehnquist cited numerous acts which were subsequently amended with an express provision that provided for extraterritorial coverage.\textsuperscript{198} The majority went on to declare that "congress, should it wish to do so, may similarly amend Title VII and in doing so will

\begin{itemize}
\item \textsuperscript{192} \textit{Id.} The majority pointed out that the State's venue provisions, specifically § 2000e-5(f)(3) (1988), are "ill-suited for extraterritorial application as they provide for venue only in a judicial district in the state where certain matters related to the employer occurred or were located." \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at \textit{--}, 111 S. Ct. at 1234 (referring to § 2000e-9, which permits the EEOC to issue subpoenas for witnesses and documents from anyplace in the United States or any Territory or possession thereof.").
\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} 429 U.S. 125 (1976).
\item \textsuperscript{196} \textit{Id.} at \textit{--}, 111 S. Ct. at 1235 (citing to \textit{General Electric Co.}, 429 U.S at 140-146). The Court in that decision went on to hold that the level of deference afforded the EEOC "will depend upon the thoroughness evident in its consideration, the validity of reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." \textit{Id.} at 141 (quoting \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944)). Chief Justice Rehnquist went on to cite numerous instances in EEOC's history where the Commission made pronouncements which supported the conclusion that its authority was to be limited to a domestic focus. \textit{Id.} at 1235. Based on this and other findings in earlier EEOC guidelines, as well as judicial interpretations concerning the extent of its authority, Rehnquist concluded that EEOC would be unable to overcome the strong presumption that Title VII is a domestic act. \textit{Id.}
\item \textsuperscript{197} \textit{Id.} at \textit{--}, 111 S. Ct. at 1235 (quoting \textit{Argentine Republic v. Amerada Hess Shipping Corp.}, 448 U.S. 428, 440 (1989)).
\item \textsuperscript{198} \textit{Id.} at \textit{--}, 111 S. Ct. at 1236.
\end{itemize}
be able to calibrate its provision in a way that we cannot. Justice Scalia concurred in the majority opinion, but disagreed over the narrow scope of authority that the majority accorded the EEOC. Relying upon the Court's decision in *Chevron U.S.A., Incorporated v. Natural Resources Defense Council, Incorporated*, Justice Scalia contended that the EEOC should be entitled to a greater amount of deference concerning matters similar to the one presented before the Court.

Justice Marshall, joined by Justice Blackmun and Justice Stevens, dissented. The dissent focused their argument primarily on the contention that the majority had overstated the strength of the presumption against extraterritoriality. According to the dissent, the majority had elevated the presumption to a "clear-statement" rule, virtually requiring a recitation of extraterritorial intent in the statute itself to the exclusion of "all of the traditional tools" of statutory interpretation historically used to discern congressional intent. Specifically, the dissent stressed that the majority had not properly evaluated the legislative history and language of the statute, together with the administrative interpretations of Title VII, in reaching its conclusion.

VI. CONCLUSION

The pervasive question of whether Title VII had extraterritorial force is a difficult one for the courts to adjudicate. The noticeable legislative silence on the issue, despite increasing numbers of American laborers seeking employment in the expanding markets overseas, presents a major obstacle for proponents of extraterritorial application. At the core of the dilemma is the notion that the regulation of the employment practices of corporations operating overseas, unlike securities, antitrust or trade regulation, is more likely to offend the laws, customs and practices of other nations. Whereas the impact of

199. *Id.*
200. *Id.* at __, 111 S. Ct. at 1236.
201. 467 U.S. 837 (1984) (holding that federal courts are to defer responsibility to define the scope of a particular statute to the appropriate administrative agency when Congress has failed to address the point at issue).
202. *Id.* at __, 111 S. Ct. at 1236-1237. However, Justice Scalia was careful to point out that "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Id.* at 1237.
203. *Id.* at __, 111 S. Ct. at 1237-46.
204. *Id.*
205. *Id.* at __, 111 S. Ct. at 1237.
206. *Id.*
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forcing an overseas employer to abide by the restrictions in the Clayton Act or 1934 Securities Act questions only the integrity of that nation’s business laws, the effect of compelling compliance with a civil rights act poses a more difficult problem. Despite recognition of a generally growing consensus against discriminatory employment practices, such practices nevertheless remain prevalent among a majority of nations.

Victims of discrimination on the basis of race, gender, religion and national origin normally have two foes, the corporate entity and the laws and practices of the nation where it is located. It is one thing to compel a corporation to abate the practices that cause Title VII violations, but quite another where it is the laws, customs or general practice of that nation which dictate that these policies be employed. The notion that an executive or administrative function be assumed by a black individual in South Africa, a woman in South East Asia or a Jew in an Arab state, by our standards a generally accepted concept, are typically deemed offensive and repugnant to the laws and practices of that country. For a court to compel a corporation, under the remedies provided by Title VII, to hire, reinstate, or compensate an individual in a country where that particular employee is considered ‘unacceptable’, would, aside from the potential conflict of laws, permit the United States government to dictate the employment practices of American corporations in countries where their existing laws may be inopposite. This dilemma is especially acute in light of the increasing number of American laborers who now seek employment overseas.

Moreover, and of greater concern for such laborers, is the possibility that American corporations may attempt to shield discriminatory employment practices behind the veil of favorable foreign laws. Using the principles laid down by the Court in E.E.O.C. v. Arabian

American Oil Company,\textsuperscript{208} it is apparent that corporations are generally free to mandate employment policies under the scrutiny of their host nations, unchecked by Congressional legislation. Considering the level of regulation typically imposed on corporations operating overseas, it is evident that these corporations will have virtual autonomy in their employment practices.

The comprehensive scope of the Supreme Court's decision has settled the question of Title VII's jurisdictional effect, at least temporarily. Although the majority effectively removed Title VII protection for thousands of United States citizens now working overseas, the Court did leave open the question of whether it would protect such employees where the discrimination occurred within the United States. Finally, should Congress ever choose to pass legislation that would broaden the jurisdictional force of Title VII overseas, the majority made it abundantly clear that such legislation would, no doubt, pass Constitutional and judicial scrutiny.

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