# CASE COMMENT

## THE NEED FOR EXTRATERRITORIAL JURISDICTION IN THE APPLICATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: *BOURESLAN V. ARAMCO*

Discrimination in employment, as one phase of the total civil rights problem, has its international implications. Each incident pointing up our deficiencies in extending to all our citizens full and equal rights and opportunities casts doubt upon our sincerity and motives in the international sphere. Because the majority of the world's people are non-white and have a growing influence in international relations, these incidents cannot have but significant adverse effects upon foreign relations, both politically and economically.[1]

### I. INTRODUCTION

International law recognizes the need to eradicate employment discrimination.[2] In addition to international treaties and conventions, national labor legislation also plays a significant role in effectuating the international community's policy against employment discrimination in the United States.[3] Extraterritorial jurisdiction

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1. *Civil Rights: Hearings on H.R. 7152, as Amended by Subcomm. No. 5 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2302 (1963) (submitted by Mr. Powell from the Committee on Education and Labor).

2. *See* I. LARSON, EMPLOYMENT DISCRIMINATION § 4.10 (1984). The United Nations has been instrumental in implementing non-discriminatory principles in the workplace on an international level. The principles also help to serve as guidelines to national programs. *Id.; see, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979); *see also* T. MERON, HUMAN RIGHTS IN INTERNATIONAL LAW 273-74 (2d ed. 1984). In 1944, the International Labor Organization ("ILO"), an organization affiliated with the United Nations, was created to adopt international labor standards that are embodied in conventions and recommendations. *Id.* Many of the ILO conventions and recommendations also focus on equal opportunity and treatment in employment. *Id.; see, e.g.*, Workers with Family Responsibilities Convention, 1981 (No. 1956); Convention Concerning Employment Policy 1964 (No. 122); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Equal Remuneration Convention, 1951 (No. 100); Recommendation, 1951 (No. 90).

3. *See* T. MERON, *supra* note 2, at 275. "Thus, the utility of these instruments lies in the availability of machinery for their acceptance by states and their effective implementa-

allows a national law to operate outside of its traditional boundaries to international situations in light of potential conflicts with foreign nations.[4] The expansion of United States multinational corporations into foreign markets, however, raises the issue of whether United States labor legislation should have extraterritorial application.[5]

Title VII of the Civil Rights Act of 1964 ("Title VII")[6] protects individuals against job discrimination based on their race, color, religion, sex, or national origin.[7] Over the past two decades, the federal district courts have afforded Title VII extraterritorial jurisdiction by extending this protection to American citizens employed abroad by American employers.[8] Although Title VII never explicitly granted enforcement outside the United States territories, the district courts have generally justified their application of extraterritorial jurisdiction implicitly through statutory construction.[9] The district courts have drawn a negative inference of the law's alien exemption provision to justify extending Title VII's scope to acts of employment discrimination perpetrated abroad.[10] The relevant part of this provision provides that Title VII "should not apply to an employer with respect to employment of aliens outside of any state."[11]

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tion." *Id.; see also* Supplemental Brief for En Banc Rehearing of Appellee (ASC) at Appendix C, Boureslan v. Aramco, 863 F.2d 8 (5th Cir. 1988) (No. 87-2206). The ILO Convention No. 111, Discrimination (Employment and Occupation), which prohibits employment discrimination based on "race, colour, sex, religion, political opinion, national extraction or social origin," has been ratified by 109 nations. *Id.; see supra* note 2.

4. *See* V. NANDA & D. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5.01 (1988).

5. *See* Brereton, *U.S. Multinational Companies: Operations in 1985*, 67 SURV. CURRENT BUS. 26 (1987) In 1985, United States multinational corporations' total assets were $4,291,764 million and its foreign affiliates aggregately employed approximately 6.4 million people. *Id.* No statistical evidence of the number of American citizens employed abroad by United States multinational corporations could be ascertained. *But see* Labor Letter, Wall St. J., Feb. 12, 1985, at 1, col. 5. According to a survey of United States company consultants, the number American citizens employed abroad for United States employers in 1984 declined by an average of 148 to 135. *Id.*

6. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

7. *See id.* § 2000e-2(a)(1). "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, or national origin." *Id.*

8. *See infra* notes 60-68 and accompanying text.

9. *Id.*

10. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (amended in 1972 to include federal employees). "This title shall not apply to an employer with respect to the employment of aliens, outside of any state. . . ." *Id.*

11. *Id.*

The Fifth Circuit Court of Appeals *en banc* in *Boureslan v. Aramco*,[12] reheard the first federal court of appeals decision addressing the extraterritorial application of Title VII and affirmed the majority panel's reversal of this line of case law which rejected the negative inference of the alien exemption provision.[13] The majority adopted the majority panel's application of the well established canon of statutory construction that, unless Congress indicates to the contrary, the court is to construe federal legislation to have only domestic application.[14] In the absence of the requisite congressional intent in Title VII's statutory language and legislative history, the majority upheld the presumption against extraterritoriality.[15] On the other hand, the dissent asserted that extraterritorial application of United States national civil rights laws does not unreasonably infringe upon another nation's sovereignty in applying its own labor laws nor place the American employer at a disadvantage for labor in foreign markets.[16] Moreover, the dissent contended that overseas enforcement of Title VII promotes the international consensus against employment discrimination.[17]

This Comment examines the *Boureslan* majority's application of the presumption against extraterritoriality and whether, by denying Title VII extraterritorial jurisdiction, the majority was faithful to the canon of statutory construction. Part II discusses the presumption against extraterritorial application and how the United States Supreme Court and the Federal Courts of Appeals have applied these principles in interpreting analogous federal labor legislation. Part III examines Title VII's statutory language and legislative history[18] and how the courts have construed them.

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12. 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd*, 857 F.2d 1014 (5th Cir. 1988), *aff'd on reh'g*, 892 F.2d 1271 (5th Cir. 1990).

13. *See Boureslan*, 892 F.2d at 1273 (citing *Boureslan*, 857 F.2d at 1018).

14. *See id.* at 1272; *Boureslan*, 857 F.2d at 1017-21.

15. *See Boureslan*, 892 F.2d at 1273 (citing *Boureslan*, 857 F.2d at 1019).

16. *See id.* at 1277, 1283.

17. *See id.* at 1283.

18. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 9-11 (1968). The legislative history of Title VII is unusual in nature because H.R. 405, reported by the House Education and Labor Committee of the 87th Congress, is incorporated into H.R. 7152, which the 88th Congress passed as the Civil Rights Act of 1964. *Id.* at 9. After extensive hearings, the House Judiciary Committee approved H.R. 7152 through bipartisan support. *Id.* The House debated and passed H.R. 7152 within ten days due to President Kennedy's assassination and the priority given to this civil rights legislation. *Id.* at 10. Despite the lack of a Senate report, H.R. 7152, which included the Senate's amendments, progressed to a vote without debate or resolution of any discrepancies. *Id.* at 10-11. H.R. 7152 returned to the House and was approved, as amended by the Senate, after only one hour of debate. *Id.* at 11; *see gener-*

Part IV discusses the facts of *Boureslan* and the treatment accorded those facts by the majority and dissenting opinions. Lastly, Part V analyzes the majority's reasoning for upholding the presumption against extraterritoriality, criticizes the dissent's analysis of the canon of statutory construction, and recommends that Title VII should be afforded extraterritorial jurisdiction. The Comment concludes that the *Boureslan* majority adhered to the canon of statutory construction by denying Title VII application overseas in light of the absence of the requisite congressional intent. The majority properly deferred policy considerations to Congress. Although this Comment concludes that the dissent's analysis in statutory construction is technically incorrect, it emphasizes the dissent's opinion because it sets forth national and foreign policy considerations that support the need for Congress to make Title VII enforceable outside the United States.

## II. The Presumption Against Extraterritoriality

### *A. The Canon of Statutory Construction*

Congress has the constitutional authority to promulgate legislation in regulating American citizens and their conduct outside the United States.[19] The Supreme Court has determined, however, that federal legislation should only be afforded extraterritorial jurisdiction where Congress evinces an intent to have the legislation extend extraterritorially.[20] The requisite congressional intent must be manifested in the statutory language, legislative history, or administrative interpretations.[21] An underlying justification of this canon of statutory construction is that traditionally the Court has presumed that Congress enacts laws that are to apply domestically to avoid interfering with another nation's sovereignty.[22]

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*ally* B. Schwartz, Statutory History of the United States Civil Rights, Part II 1291 (1970).

19. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952); Skiriotes v. Florida, 313 U.S. 69, 73 (1941); Blackmer v. United States, 284 U.S. 421, 436 (1932). From the international perspective, *see* I. Brownlie, Principles of Public International Law 303 (1970); M. Shaw, International Law 352-57 (2d ed. 1986). Extraterritorial jurisdiction by a state based on regulation of its citizens outside its territory is commonly referred to as the "nationality principle" of jurisdiction in international law. *Id.*

20. *See Steele*, 344 U.S. at 285; Foley Bros., Inc. v. Filardo Bros., 336 U.S. 281, 285 (1949); United States v. Bennett, 232 U.S. 299 (1944); *Blackmer*, 284 U.S. at 437; United States v. Bowman 260 U.S. 94 (1922).

21. *See Foley Bros.*, 336 U.S. at 285-90.

22. *See id.* at 285; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 402 comment b (1987). Territorial jurisdiction exercised by the state

### *B. Requisite Congressional Intent for Federal Labor Statutes*

Although there is a presumption against extraterritoriality, it is rebuttable.[23] The Supreme Court has required explicit congressional intent to overcome the presumption against extraterritoriality where a law's global reach would yield potential conflicts with another nation's territorial jurisdiction.[24] Although federal anti-competition legislation has generally been afforded extraterritorial application,[25] federal labor legislation has been traditionally denied extraterritorial jurisdiction[26] because labor is construed as primarily a domestic concern.[27]

In *McCulloch v. Sociedad Nacional de Marineros de Hondu-*

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in which the activity or conduct has occurred is the traditional jurisdictional procedure. *Id.* Alternatively, the state of nationality of the actor can also exercise jurisdiction under exceptional circumstances. *Id.* The concurrent exercise of jurisdiction by the state nationality and by the territorial state may culminate in actual or potential conflicts. *Id.*

23. *See* Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 557 (7th Cir. 1985) (citing Tamari v. Bache & Co. (Lebanon) S.S.L., 730 F.2d 1003, 1107-08 & n.11 (7th Cir. 1984)).

24. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1962) (requiring the threshold level of congressional intent to be affirmatively expressed); *Foley Bros.*, 336 U.S. at 286 (requiring clearly expressed congressional intent to overcome the presumption against extraterritoriality).

25. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962) (holding a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained occurs in foreign countries); Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1291 (3d Cir. 1979) (exporting and other commercial transactions between the United States and a foreign country that adversely and materially affect United States trade are not exempt from United States antitrust laws in light of the act or agreement happening outside United States territories). For anticompetitive acts dealing with trademarks and patents, *see* Lanham Act, 15 U.S.C. §§ 1051-127 (1988); *see, e.g., Steele*, 344 U.S. at 287 (district court may award injunctive relief for trademark infringements and unfair competition perpetrated abroad by a United States corporation because extraterritorial reach does not interfere with Mexico's trade practices).

26. *See* Airline Stewards & Stewardesses Ass'n Int'l v. Trans World Airlines, Inc., 273 F.2d 69, 70 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960) (denying the extraterritorial application of the Railway Labor Act); Airlines Stewards & Stewardesses Ass'n Int'l v. Northwest Airlines, Inc., 267 F.2d 170 (8th Cir. 1959), *cert. denied*, 361 U.S. 901 (1959) (denying the extraterritorial application of the Railway Labor Act); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) (denying the extraterritorial application of the Labor Management Relations Act of 1947); Sandberg v. McDonald, 248 U.S. 185 (1918) (denying the extraterritorrial application of the Seaman's Act of 1915).

27. *See Foley Bros.*, 336 U.S. at 286 ("an intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose"). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 414 comment c. "Jurisdiction may be exercised . . . over activities of a branch or subsidiary related to international transactions, . . . but not generally over predominantly local activites, such as industrial and labor relations. . . ." *Id.*

*ras*,[28] the Supreme Court refused to apply the National Labor Relations Act ("NLRA")[29] extraterritorially after finding that Congress did not intend the Act "to have application to foreign registered vessels employing alien seamen."[30] The Court concluded that extraterritorial application of the NLRA would be an affront to Honduran sovereignty if the United States regulated the internal management disputes of an American corporation overseas employing Honduran citizens.[31] In light of the potential international jurisdictional conflicts and the absence of affirmative congressional intent, the Court declined to extend concurrent application of the NLRA and deferred to Congress whether the NLRA should have an extraterritorial scope.[32]

The Supreme Court has also examined whether Congress intended the Eight Hour Law to have extraterritorial application.[33] Due to the absence of a clear expression of congressional intent, the Supreme Court in *Foley Bros., Inc. v. Filardo*[34] denied to apply the Eight Hour Law extraterritorially because enforcement of the Act would conflict with the sovereignty of Iran and Iraq in regulating local work conditions according to their own mores and customs.[35] In reviewing the statutory language, legislative history and administrative interpretations the Court concluded that Congress failed to clearly express its intent.[36] Therefore, the Court applied the presumption against extraterritoriality.[37] The Court reasoned that despite the Eight Hour Law's broad inclusive language,[38] the Act failed to distinguish between "laborers who are aliens and those who are citizens of the United States."[39] In the absence of this distinction, the Court ruled that Congress must have intended that the Eight Hour Law should be limited to regulating domestic

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28. 372 U.S. 10 (1962).

29. 29 U.S.C. §§ 151-68 (1982 & Supp. 1986).

30. *See McCulloch*, 372 U.S. at 19-20 (neither the legislative history nor the specific language couched in "commerce" terms reflected the boundaries of the Act's impact).

31. *See id.* at 21.

32. *See id.* at 21-22 (citing The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) and holding that extraterritorial application of the NLRA intrudes upon the international laws of the high seas and an "act of Congress ought never be construed to violate the law of nations if any other possible construction remains").

33. Contract Work Hours Standard Act, 40 U.S.C. §§ 321-26 (repealed 1962).

34. 336 U.S. 281 (1949).

35. *See id.* at 286.

36. *See id.* at 285-90.

37. *See id.*

38. *See id.* at 287 (rejecting the assertion that the statutory language of "every contract" implied work contracts perfomed in foreign countries).

39. *See Foley Bros.*, 336 U.S. at 286.

work conditions; otherwise, Congress would be preempting the labor laws of Iran and Iraq.[40]

### *C. Congressional Reaction to the Presumption Against Extraterritoriality*

The Age Discrimination in Employment Act ("ADEA")[41] is the most closely related labor statute to Title VII. Both civil rights statutes share a common goal of eradicating employment discrimination and contain similar substantive provisions.[42] Several federal circuit courts of appeal have refused to apply the ADEA extraterritorially prior to its amendment in 1984.[43] The courts concluded that no affirmative congressional intent can be ascertained from the ADEA's statutory language, legislative history, and administrative interpretations to overcome the presumption against extraterritoriality.[44] They buttressed their reasoning on three factors. First, the ADEA incorporates the Fair Labor Standards Act's procedure and policies, which explicitly deny extraterritorial application.[45] Second, the courts have merely reaffirmed the "general policy of applying the presumption against extraterritoriality of labor

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40. *See id.* at 290-91.

41. 29 U.S.C. §§ 621-34 (1982 & Supp. V 1988) (prohibiting employers from arbitrarily discriminating against persons over the age of 40).

42. *See* Lorillard v. Pons, 434 U.S. 575, 584 (1977).

43. *See* DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1986) (holding that a 65-year-old United States citizen who worked in Canada for six years prior to his termination had no protection under the ADEA where the American employer filled his position with a younger employee); Ralis v. RFE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985); Zahourek v. Arthur Young & Co., 750 F.2d 827 (10th Cir. 1984) (holding a 43-year-old United States citizen employed in Honduras who sought a transfer back to the United States and was subsequently fired by the United States corporation had no protection under the ADEA because the employment occurred in a foreign workplace); Thomas v. Brown Roots, Inc., 745 F.2d 279 (4th Cir. 1984); Cleary v. United States Lines, Inc., 728 F.2d 607 (3d Cir. 1984) (holding a 64-year-old United States citizen employed in England had no protection under the ADEA upon his termination by the parent company located in the United States because there was lack of sufficient nexus between the parent corporation and its foreign affiliate).

44. *See id.*

45. *See Cleary*, 728 F.2d at 608-09. The *Cleary* court held that Congress is presumed to be aware of the court's interpretation of the domestic scope of the FSLA and yet it incorporated like provisions in the ADEA; therefore, Congress intended the ADEA to have no extraterritorial application. *Id.; cf. Thomas*, 745 F.2d at 828 (affirming *Cleary); Pfeiffer*, 755 F.2d at 555-56 (affirming the *Cleary* analysis but asserting it to be debatable in light of the inexact fit betwen the FSLA and the ADEA); *DeYoreo*, 785 F.2d at 1283 (affirming *Pfeiffer); Zahourek*, 750 F.2d at 828 (affirming *Pfeiffer). See generally* Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982 & Supp. III 1985).

laws."[46] Lastly, the ADEA lacks language similar to alien exemption provision of Title VII, which has been construed to afford Title VII extraterritorial application.[47] Congress reacted to these judicial decisions by amending the ADEA with explicit jurisdictional language to overcome the presumption against the extraterritorial application of federal labor statutes.[48] The amendment provides that the term "employee includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."[49]

## III. The Statutory Language and Legislative History of Title VII

### *A. Definitions*

The legislative history of Title VII provides that Congress intended to regulate equal employment opportunities pursuant to its commerce clause powers.[50] The Act's pivotal terms of "commerce" and "industry affecting commerce" must be carefully examined to determine the scope of Title VII's coverage.[51] Some commentators have stated the wording "between a state and any place outside

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46. *Cleary*, 728 F.2d at 609; *see Pfeiffer*, 755 F.2d at 557.

47. *See Cleary*, 728 F.2d at 609 (citing Bryant v. International Schools Service, Inc., 675 F.2d 472, 482 (D.N.J. 1980)); *see also Ralis*, 770 F.2d at 1124; *Pfeiffer*, 755 F.2d at 559.

48. *See* H.R. Rep. No. 1037, 98th Cong., 2d Sess. 49, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2974, 3000.

> When considering this amendment, the Committee was cognizant of the well established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for United States corporations or their subsidiaries.

*Id.*

49. Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (Supp. 1988).

50. *See generally* United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of Civil Rights Act of 1964 at 3076-78 (1968) (reprinting a memorandum submitted by Deputy Attorney General Nicholas deB. Katzenbach as to the constitutionality of Title VII, which was inserted in the record by Senator Clark, a floor leader of the House-approved H.R. 7152).

51. These terms are based on the definition of employer, which embodies the term "commerce" and "industry affecting commerce," and are of great significance to understanding the statutory scheme. "[E]mployer means a person engaged in an industry affecting commerce. . . ." Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e(b) (1982). "[T]he term commerce means trade, traffic, commerce, transportation, transmission, or communication among the several states, or between a state and any place thereof. . . ." *Id.* § 2000e(h). "[T]he term industry affecting commerce means any activity, business, or industry in commerce or in labor disputes would hinder or obstruct commerce or the free-flow of commerce and includes any activity or industry affecting commerce within the meaning of the Labor Management Reporting and Disclosure Act of 1958" *Id.* § 2000e(g).

therefore" found in the definition of commerce indicates that Congress at the very least intended Title VII to apply to American employers' operations abroad.[52] The legislative history also reveals that Congress intended Title VII to have international application by employing standard "commerce" type language.[53] The Supreme Court, however, has ruled that this type of statutory scheme is inconclusive proof to overcome the presumption against extraterritoriality when couched in terms of "commerce."[54]

### *B. The Alien Exemption Provision and the Courts' Interpretation*

As indicated above, this provision explicitly denies Title VII coverage to aliens employed outside the United States.[55] The legislative history provides little guidance as to the implications of the alien exemption provision.[56] In *Espinoza v. Farah Mfg. Co.*,[57] how-

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52. *See* Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1469-70 (1985); Note, *Civil Rights in Employment and the Multinational Corporations*, 10 CORNELL INT'L L.J. 87, 93-94 (1976).

53. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 3091 (1968) (recorded by Chairman Emmanuel Cellar, the key sponsor to the Act in the House Judiciary Committee). "Title VII covers employers engaged in industries affecting commerce that is to say interstate and foreign commerce. . . ." *Id.*

54. *See, e.g., McCulloch*, 372 U.S. at 21 (denying the NLRA's definitions of "commerce" and "affecting commerce" definitions meaning for the NLRA's scope to extend outside the United States); *Benz*, 353 U.S. at 144 (denying the Labor Management Relations Act of 1959, 29 U.S.C. §§ 401-531 (1982) ("LMRA"), extraterritorial jurisdiction because its "commerce" and "industry affecting commerce" terms do not clearly express extraterritorial reach); *see generally* H.R. REP. No. 245, 80th Cong., 1st Sess. (1947) (revealing that the NLRA and LMRA commerce provisions are comparable).

55. *See supra* note 10.

56. *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 at 1004 (1968). Upon enacting Title VII, the congressional debate focusing on the alien exemption provision entertained the sole issues of exempting religious and educational institutions. *Id.; see also* Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 LAB. L.J. 394, 399-400 (1983). The alien exemption provision's language was apparently derived from a civil rights bill introduced by Adm. Clayton Powell in 1949 and was simply adopted into Title VII of the Civil Rights Act. *Id.* The Clayton Bill was introduced at a time when the constitutional rights of aliens were questionable and there was heightened dislike for aliens within the United States; therefore, it is asserted that the bill's language was carefully drafted to ensure that aliens were not precluded from "certain domestic labor protective legislation." *Id.* at 400 n.26; *see also* Note, *Civil Rights in Employment and the Multinational Corporations*, 10 CORNELL INT'L L.J. 87, 95 n.45 (1976) (citing the Fair Employment Practice Act, H.R. 44-53, 81st Cong., 1st Sess. (1949), reported out of the COMMITTEE ON EDUCATION AND LABOR, H.R. REP. No. 1165, 81st Cong., 1st Sess. (1949)).

57. 414 U.S. 86 (1973) (holding that denial of employment opportunities by requiring employees to be United States citizens is not an unlawful employment practice under Title

ever, the Supreme Court determined the scope of Title VII by drawing a negative inference from this provision.[58] The Court concluded that the alien exemption provision denies Title VII coverage to aliens outside the United States.[59] Thus, the negative inference drawn from the provision provides Title VII protection to aliens within the United States.

Despite the Supreme Court's limited interpretation of the alien exemption provision's negative implication, the Federal District Court of Colorado in *Love v. Pullman* interpreted the identical Title VII language more broadly.[60] The court drew an alternative negative inference from this provision, and concluded that Congress explicitly denied Title VII protection to aliens outside the United States.[61] This conclusion intimated the court's belief that Congress intended to provide Title VII coverage to citizens employed outside the United States by an American employer who would otherwise have been covered by Title VII.[62] To substantiate this alternative negative inference, the court relied upon the Supreme Court's reasoning to afford federal antitrust legislation extraterritorial application,[63] and stated that "nothing in the legislative history addresses this specific point" but that nothing contradicts it.[64]

In *Bryant v. International Schools Serv., Inc.*,[65] the first federal case squarely addressing the extraterritorial jurisdiction of Title VII, the New Jersey District Court found *Love's* reasoning persuasive.[66] In the absence of explicit congressional intent to extend

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VII because it is different than discriminating against employees based on national origin).

58. *See id.* at 95 (the term "individual" also entitles aliens Title VII protection as illustrated by the definition of employer at 42 U.S.C. § 2000(e)(1)).

59. *See id.*

60. *See* Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978) (Canadian porters while employed in the United States are protected by Title VII).

61. *Id.*

62. *Id.*

63. *See Continental Ore Co.*, 370 U.S. at 690 (a United States exporter may bring suit in the United States under § 4 of the Clayton Act where he was deprived a market in Canada due to alleged conspiracy, in violation of §§ 1 and 2 of the Sherman Antitrust Act, which had adverse consequences to him in the United States).

64. *See Love*, 13 Fair Empl. Prac. Cas. (BNA) at 426 n.4.

65. 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (the Court of Appeals reversed the lower court's holding because plaintiff's failed to demonstrate a prima facie case of discrimination mandated by Title VII).

66. *See id.* at 474-76 (upholding a cause of action brought by two American teachers alleging that their employer, a United States corporation that contracted with the Iranian government, discriminated against them by withholding benefits, which were made available

the Act beyond the United States territories, the court nonetheless concluded that the *Love* alternative negative inference of the alien exemption provision overcomes the presumption against extraterritoriality.[67] The *Love* line of reasoning gained more acceptance in the district court.[68] This alternative negative inference, however, has been questioned.[69] The district court's precedent in supporting the extraterritorial application of Title VII, in light of the presumption against the extraterritorial application of federal legislation, was challenged in *Boureslan v. Aramco* before the United States Court of Appeals for the Fifth Circuit.[70]

## IV. *Boureslan v. Aramco*

### A. *The Facts of the Case*

In 1979, Ali Boureslan, a naturalized citizen of the United States, was employed by Aramco Services Company ("ASC"), a Delaware corporation, as a cost engineer in Houston, Texas.[71] Boureslan had worked approximately sixteen months with ASC and alleged no discriminatory treatment while employed in the United States.[72] Upon his request, Boureslan obtained a transfer to the Arabian American Oil Company ("Aramco"), ASC's parent corporation.[73]

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by other corporations employing American citizens in Iran).

67. *See id.* at 482-83. (the negative inference fairly interprets congressional intent to afford Title VII extraterritorial coverage without addressing the foreign policy implications).

68. *See* Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986) (applying the reasoning in *Bryant*, 675 F.2d at 472); Kern v. Dynaelectron, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984) (assuming Title VII's extraterritorial jurisdiction without interpreting Title VII based on the canon of statutory construction); EEOC v. Institute of Gas Technology, 23 Fair Emp. Prac. Cas. (BNA) 825 (N.D. Ill. 1980) (applying Title VII extraterritorially without determining whether the requisite congressional intent was satisfied).

69. *See Bryant*, 675 F.2d at 477 n.23. "Our holding in no way answers the questions raised by jurisdictional challenge. No court has decided the extraterritorial applicability of Title VII and we find it unnecessary to do so to decide this case." For an interpretative view, *see* Kirschner, *supra* note 56, at 398-99 (since the majority or the concurring opinion never entertained the extraterritorial impact of Title VII, *Bryant* lacks precedent). *But see* I. LARSON, *supra* note 2, at § 5.60 (the Third Circuit, by "not[ing] that the district court's holding that the statute may be extraterritorially applied . . . apparently indicate[d] a *sub silentio* upholding of jurisdiction. . .").

70. *See Boureslan*, 857 F.2d at 1017-21.

71. *See id.* at 1015-16.

72. *See* Brief for Appellees (Aramco) at 3, Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988) (No. 87-2206) [hereinafter Brief for Appellees].

73. *See Boureslan*, 857 F.2d at 1016.

On November 11, 1980, Boureslan started work at Aramco[74] in Saudi Arabia as a construction engineer.[75] He contended that, in September of 1981, his supervisor at Aramco began "a campaign of harassment" against him because of his Lebanese ancestry, Arab race and Muslim religion.[76] Boureslan alleged that in retaliation for having brought a formal grievance process against his supervisor, Aramco manipulated its policies and procedures to justify his discharge in June 1984.[77] He alleged that his termination was "pretextual in nature because of his race, religion, and national origin."[78]

After filing timely charges with the Equal Employment Opportunity Commission ("EEOC"), Boureslan brought an action pursuant section 703 of Title VII against ASC and Aramco in the Federal District Court for the Southern District of Texas.[79] Contrary to the reasoning in *Love*, the district court dismissed Bourselan's claim, holding that the negative inference of the alien exemption provision was inconclusive proof of congressional intent to afford Title VII extraterritorial jurisdiction.[80] Upon reviewing the statutory language and legislative history of Title VII, and prior Supreme Court cases denying extraterritorial application to other federal labor statutes, the district court concluded that Congress never implicitly or explicitly addressed the extraterritorial impact of Title VII.[81]

The Fifth Circuit Court of Appeals granted Boureslan's appeal and request for rehearing.[82] On appeal and rehearing, Boureslan argued against the district court's narrow construction of the extraterritorial scope of Title VII.[83] He also argued that the alien ex-

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74. *See* Brief for the Appellees, *supra* note 72, at 3. For discussion on whether Aramco is an employee under Title VII. Aramco conceded that it was subject to Title VII because it alleged only subject matter jurisdiction. *Id.* Although Aramco's assets are benefically owned by the Government of Saudi Arabia and its work force is composed of less than twelve percent of American citizens, it is a United States employer incorporated in Delaware. *Id.*

75. *See id.* at 3.

76. *See Boureslan*, 857 F.2d at 1016.

77. *See* Brief for Appellant (Boureslan) at 4, Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988) (No. 87-2206) [hereinafter Brief of the Appellant].

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

79. *Boureslan*, 653 F. Supp. 629 (S.D. Tex. 1987).

80. *See id.* at 630 (holding *Bryant* suspect in light of the Supreme Court's interpretation in Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973), of the alien exemption provision).

81. *See id.* at 630-31.

82. *See Boureslan*, 857 F.2d at 1015 (joined by the EEOC as amicus curiae); *see also Boureslan*, 892 F.2d at 1271.

83. *See Boureslan*, 857 F.2d at 1015.

emption provision is meaningless unless the *Love* alternative negative inference is drawn.[84]

### *B. The Majority Opinion*

The Fifth Circuit Court of Appeals reaffirmed the rulings of the lower court and the majority panel and dismissed the action for lack of subject matter jurisdiction.[85] The court applied the canon of statutory construction and upheld the presumption against the extraterritorial application of federal legislation.[86] Upon examination of the statutory language of Title VII, the majority concluded that no explicit congressional intent could be ascertained.[87]

The majority rejected the district court's decision holding that the alternative negative inference of the alien exemption provision satisfied the requisite congressional intent to afford Title VII protection to United States citizens employed abroad.[88] Contrary to Boureslan's assertion that the alien exemption provision is meaningless without the *Love* alternative negative inference, the Court held that the provision has two clear purposes.[89] The first purpose is obviously to make Title VII inapplicable to aliens outside the United States; the second purpose is to extend Title VII's coverage

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84. *See Boureslan*, 892 F.2d at 1272.

85. *See id.* at 1271.

86. *See id.* at 1272-74.

87. *See Boureslan*, 857 F.2d at 1018-19. On appeal, the majority panel examined the definitional section of Title VII and held that the extraterritorial application of Title VII was not addressed in the pivotal definitions of "employer", 42 U.S.C. § 2000e(b), and "commerce", 42 U.S.C. § 2000e(g), or in the alien exemption provision, 42 U.S.C. § 2000e(g). *See id.* at 1018. This reasoning was adopted by the majority on rehearing. *See Boureslan*, 892 F.2d at 1271. The majority on rehearing, however, further examined the plain language of the Act to buttress its conclusion that Congress never explicitly addressed the extraterritorial reach of Title VII. First, the majority reexamined the broad definition of "employer" and held that the extraterritorial scope of Title VII was not intended by Congress because foreign employers who employ United States citizens and who engaged in United States commerce would be interpreted as employers under Title VII. *See id.* at 1273 (citing Spiess v. C. Itoh & Co. (America), Inc., 643 F.2d 353 (5th Cir. 1981)). Second, the majority reexamined the state discrimination employment provisions in Title VII, 42 U.S.C. §§ 2000e-5(c) to (e), and held that Congress did not intend Title VII to apply extraterritorially because it would have made specific references in the above provisions to avoid conflicts with foreign discrimination laws. *See Boureslan*, 892 F.2d at 1273. Third, the majority construed the venue provision in Title VII, 42 U.S.C. § 2000e-5(f)(3), and the EEOC's investigatory powers provision, 42 U.S.C. § 2000e-9, and concluded that no explicit congressional intent was found in the above provisions which are typical provisions in which Congress ordinarily addresses extraterritoriality. *See Boureslan*, 892 F.2d at 1273. Finally the majority reexamined the alien exemption provision, which was reargued on rehearing. *See id.* at 1272-73.

88. *See id.; see also supra* notes 60-67 and accompanying text.

89. *See Boureslan*, 892 F.2d at 1273 (citing *Bourselan*, 857 F.2d at 1018).

to aliens within the United States.[90]

On rehearing, the majority also adopted the majority panel's conclusion that the legislative history of Title VII provided no basis to overcome the presumption against extraterritoriality.[91] The three general policy statements from the legislative history offered by the EEOC[92] were held to be inconclusive proof of congressional intent to support extraterritorial jurisdiction of Title VII.[93] Rather, the majority reasoned that these statements lacked specificity in light of the language of the statute and legislative history, which are laden with terms such as "United States" and "states."[94]

The majority supported its use of the presumption against extraterritoriality by noting the serious foreign policy issues that may arise on account of a conflict between our national civil rights laws and other nation's mores and customs.[95] The majority panel's rea-

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90. *See id.; see also supra* notes 57-59 and accompanying text.

91. *See Boureslan*, 892 F.2d at 1273 (citing *Bourselan*, 857 F.2d at 1019).

92. *See* Brief of the Equal Employment Opportunity Commission Amicus Curiae at 8-14, Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988) (No. 87-2206) [hereinafter EEOC Brief]. The Equal Employment Opportunity Commission offered these statements to show that Congress intended all citizens to be protected by Title VII regardless of geographical restrictions. *Id.* at 13. The first statement provided that "to remove obstructions to the free flow of interstate and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution. *Id.* (citing HOUSE REPORT ON CIVIL RIGHTS ACT OF 1964, H.R. REP. No. 914, 88th Cong., 1st Sess. 26, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2402). The second statement provided that "[a] key purpose of the bill, then is to secure to all Americans the equal protection of the laws of the United States and of the several states." EEOC Brief at 14. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 1, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2488 (statement of Rep. William McCulloch, ranking minority member of the House Judiciary Committee). The last statement was the continuation of the minority report which states that "the rights of citizenship means little if an individual is unable to gain the economic wherewithal to enjoy or properly use them." *Id.* (quoting H.R. REP. No. 914, 88th Cong., 1st Sess. 29, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2516).

93. *See Espinoza*, 414 U.S. at 94 (the EEOC's interpretation is to be afforded "great deferrence" except where its interpretations can be proven through "compelling indications"). *Accord Boureslan*, 857 F.2d at 1019. The majority gave no deferrence to the EEOC's interpretation in light of *Espinoza* because the majority held that the EEOC was inexperienced in determining jurisdictional issues. *Id.* at 1019. *But cf. E.E.O.C. Will Look Closely at Overseas Bias Charges*, 130 Lab. Rel. Rep. (BNA) at 388 (1989) (citing speech by Commissioner Joy Cherian at City University of New York's Baruch College on March 8, 1989). Subsequent to *Boureslan*, the EEOC declared that it will continue "to adhere 'very strictly' to the requirements that Title VII must conflict with the laws of the foreign country before conduct prohibited by Title VII will be excusable." *Id.*

94. *See Boureslan*, 892 F.2d at 1273 (citing *Bourselan*, 857 F.2d at 1019). "The Act's language and legislative history make repeated references to the 'United States,' 'states,' and procedures relating to state proceedings without parallel references to foreign countries." *Boureslan*, 857 F.2d at 1019.

95. *See Boureslan*, 892 F.2d at 1273 (citing American Banana Co. v. United Fruit Co.,

soning, adopted by the majority on rehearing, also argued that extending Title VII protection to American employees abroad would seriously impair international operations of American employers who would be forced to abandon their operations or abstain from employing United States citizens.[96] Refusing "to read between the lines" of Title VII, the majority upheld the presumption against extraterritoriality and concluded that any resulting inequities to American employees working abroad are policy issues best addressed by Congress.[97]

### *C. The Dissenting Opinion*

The dissent asserted that the majority misapplied the canon of statutory construction by requiring explicit, affirmative language to overcome the presumption against extraterritoriality.[98] Because Congress addressed the extraterritorial scope of Title VII in the alien exemption provision, the dissent contended that the majority distorted the presumption to avoid reaching foreign policy issues.[99] The dissent noted that there are, in fact, two presumptions and applied a two-pronged test to determine which applied and whether it could be overcome.[100] Two presumptions were employed because "not every exercise of extraterritorial jurisdiction violates

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213 U.S. 347 (1909)). "The respect for the right of nationals to regulate conduct within their own borders is a fundemental concept of sovereignty that is not lightly tossed aside." *Id.* In initially setting forth the precedent upholding a presumption against extraterritoriality, the majority noted that "[t]he fear of outright collisions between domestic and foreign law, collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries lies behind the presumption against extraterritoriality." *Boureslan*, 857 F.2d at 1017 (citing *Pfeiffer*, 755 F.2d at 557).

96. *See id.* at 1020.

97. *See Boureslan*, 892 F.2d at 1274. "Congress demonstrated in the [ADEA, the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-116 (1979 & Supp. 1989), and the Export Administration Act, 50 U.S.C. App. §§ 2401-20 (Supp. 1989)] its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights." *Id.; see Boureslan*, 857 F.2d at 1029. "Given the serious, potentially devisive policy to such an application either in the Act itself or the debates in Congress is a compelling argument that Congress did not turn its attention to this possibility. It is not for this court to decide this policy issue for the legislative branch." *Id.*

98. *See Boureslan*, 892 F.2d at 1274 n.1; *see also Boureselan*, 857 F.2d at 1021-23. The dissent argued that the broad jurisdictional language of the statute is not required to overcome the presumption against extraterritotiality. *Id.*

99. *See Boureslan*, 857 F.2d at 1283.

100. *See Boureslan*, 892 F.2d at 1274-75 (citing *Boureslan*, 857 F.2d at 1021-31). The dissent did not reiterate Judge King's analysis in the rehearing opinion, thus all references for purposes of this Comment will refer to the decision in the initial appeal.

international law."[101] The first presumption provided that the court is not to apply federal legislation extraterritorially unless Congress indicates to the contrary; the second provides that the court should not construe a statute to unreasonably frustrate international law.[102]

The dissent asserted that a more structured analysis of the foreign policy issues is needed to avoid defeating congressional intent.[103] The first prong, therefore, focused on whether extraterritorial application of a statute would violate international law by infringing upon another nation's sovereignty.[104] To determine whether international law was violated, the dissent implemented the jurisdictional rule of reason in section 403 of the *Restatement of the Foreign Relations Law of the United States*.[105]

The second prong focused on whether the presumption in the first prong can be overcome based on the finding of the requisite congressional intent.[106] The dissent asserted that the two presumptions require different levels of congressional intent to be overcome.[107] After concluding that extraterritorial jurisdiction does not

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101. *See id.* at 1025; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402.

102. *See Boureslan*, 857 F.2d at 1022-24.

103. *See id.* at 1024-25.

104. *See id.* at 1025-26.

105. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2). Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desireability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

*Id.*

106. *See Boureslan*, 857 F.2d at 1024.

107. *See id.*

unreasonably conflict with international law, the dissent argued that the presumption against extraterritoriality that be overcome by statutory construction as well as legislative history.[108] The presumption against extraterritoriality, therefore, may be overcome through implicit congressional intent.[109] Conversely, upon concluding that extraterritorial jurisdiction conflicts with international law, the dissent asserted that the courts must find affirmative congressional intent to overcome the presumption that "an act of Congress ought never be construed to violate the law of nations if any other possible construction remains."[110] Therefore, express jurisdictional language is necessary because only Congress can prescribe legislation that unreasonably conflicts with international law.[111]

In applying the two-pronged test, the dissent concluded that application of Title VII to United States citizens abroad was reasonable in the interest of advancing the civil rights of United States citizens and the international policy of eradicating employment discrimination.[112] Depriving United States citizens of a remedy against employment discrimination by a United States corporation has cumulative discriminatory effects within the United States that may satisfy the "reasonableness" requirement pursuant to section 403 of the Restatement.[113] Denial of Title VII protection

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108. *See id.* at 1034. *But see Boureslan*, 892 F.2d at 1277 n.3. "Contrary to the majority's characterization" the dissent argued that the legislative history is not "to compensate for a lack of statutory language" because the plain language of the Act is sufficient to overcome the presumption against extraterritoriality. *Id.*

109. *See Boureslan*, 857 F.2d at 1022 (relying on the Court's language in *Foley Bros.); accord Foley Bros.*, 336 U.S. at 285 ("the canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, . . . is a valid approach whereby *unexpressed congressional intent* can be ascertained." (citation omitted; emphasis added)).

110. *See Boureslan*, 857 F.2d at 1023 (citing The Charming Betsy, 6 U.S. (2 Cranch) at 118); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114.

111. *See Boureslan*, 857 F.2d at 1023; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 comment a.

112. *See Boureslan*, 892 F.2d at 1283; *see also supra* notes 2-3 and accompanying text. For further discussion of international civil rights agreements, *see* Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1298 (1987); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 568-71 (3d ed. 1979).

113. *See Boureslan*, 892 F.2d at 1279 (citing *Boureslan*, 857 F.2d at 1027). The Supreme Court has held that economic effects of discrimination are rationally related to Congress' commerce clause powers and therefore regulation of discriminatory practices by private establishments affecting interstate commerce is justifiable. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294 (1964). The dissent finds the cumulative economic labor effects within the United States by a private employer overseas under Title VII similar and applicable to the reasonableness standard of § 403 of the *Re-*

to citizens abroad frustrates career advancements within the United States because acceptance of foreign assignments is necessary to climb the corporate ladder.[114] Women and minorities may be reluctant to accept foreign assignments and prefer to remain in the United States where they are fully protected by Title VII.[115] The extraterritorial application of Title VII is needed to ensure equal employment opportunities abroad so that career advancements within the United States are not adversely effected.[116]

The dissent also asserted that the extraterritorial reach of Title VII does not impinge upon Saudi Arabia's sovereignty because only those American corporations employing American citizens will be subject to it.[117] Furthermore, the *bona fide* occupational qualification defense provided by Title VII[118] will alleviate any direct conflict that may arise.[119] The dissent determined that Title VII's extraterritorial reach does not unreasonably conflict with international law and concluded that the negative inference of the alien exemption provision was a fair and reasonable interpretation which evidenced clear congressional intent to overcome the presumption against extraterritoriality.[120]

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*statement* to justify regulating discriminatory effects abroad. *See Boureslan*, 857 F.2d at 1027 n.16.

114. *See id.* at 1284.

115. *See id.*

116. *See id.*

117. *See id.* at 1283.

118. *See* 42 U.S.C. § 2000e-2(e) (1981).

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex, or nation of origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

*Id.*

119. *See Boureslan*, 892 F.2d at 1283; *see also* Kern v. Dynaelectron, 577 F. Supp. 1196, 1196 (N.D. Tex. 1983) (the *bona fide* occupational qualification defense provided a mechanism for an American employer to discriminate based on religion where the local regulations prohibit non-Muslims from entering the holy city of Mecca and the penalty for violating this law is death). *Cf.* Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd*, 805 F.2d 528 (5th Cir. 1986) (religious discrimination against Jews participating in a medical program in Saudi Arabia due to the friction between Jews and Arabs was not a valid *bona fide* occupational qualification defense); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (1981) (the *bona fide* occupational qualification defense must be narrowly construed to preclude male gender as a valid basis for this defense where chauvanism of South American businessmen was alleged).

120. *See Boureslan*, 892 F.2d at 1283-84.

## V. An Analysis of *Boureslan v. Aramco*

In a lengthy opinion, the dissent found the necessity to extend Title VII's scope extraterritorially based on national and foreign policy considerations, but its reasoning failed to substantiate the congressional intent required to apply Title VII extraterritorially. A closer examination of the dissent's two-pronged test shows that the dissent misapplied the jurisdictional rule of reason as well as the canon of statutory construction. The first part of this analysis will discuss the jurisdictional rule of reason. The second part will discuss the flawed application of the canon of statutory construction on three levels: first, the Supreme Court precedent that only one presumption must be overcome; second, the Supreme Court requirement that explicit congressional intent be shown before applying federal labor statutes extraterritorially; and third, the lack of congressional intent necessary to support a negative implication. The last part of this analysis will discuss the significance of *Boureslan* and the need for congressional action.

### *A. The Jurisdictional Rule of Reason*

The dissent's two-pronged test is flawed because it is based upon application of the *Restatement (Third) of the Foreign Relations Law of the United States*.[121] This *Restatement* provides that the reasonableness test should be applied by the courts as *a matter of law* to determine whether to authorize or exercise the extraterritorial application of a federal statute.[122] The dissent employed this jurisdictional rule of reason as a matter of law in its threshold inquiry of whether the extraterritorial application of Title VII would unreasonably frustrate international law.[123] The dissent's analysis, however, goes beyond the Supreme Court's analyses in *McCulloch* and *Foley Bros.*, which only examined congressional intent and deferred resolution of potential conflicts to Congress.[124]

Undermining the credibility of the *Restatement (Third) of the Foreign Relations Law of the United States* is the fact that the jurisdictional rule of reason has not been ruled upon by any

121. *See supra* note 105 and accompanying text.

122. *See* Restatement (Third) of the Foreign Relations Law of the United States § 403 comment g (concurrent jurisdiction based on the principles of nationality and territoriality may be reasonable as a matter of law to interpret legislation as to its reasonableness in not violating international law); *see also id.* § 402 comment i (a court may prescribe jurisdiction).

123. *See Boureslan*, 857 F.2d at 1024.

124. *See supra* notes 28-40 and accompanying text.

court.[125] Rather, courts traditionally apply the jurisdictional rule of reason under the *Restatement (Second) of the Foreign Relations Law of the United States* in determining whether to apply federal legislation extraterritorially.[126] The courts have not prescribed extraterritorial jurisdiction as a matter of law in the absence of congressional intent, and defer to the legislation and executive branches for foreign policy decisions.[127] To remedy the denial of civil rights to American citizens employed abroad by United States corporations, the dissent engaged in judicial legislation by applying the rule of reason as a matter of law.[128]

### *B. The Canons of Statutory Construction*

#### *1. The Presumption Against Extraterritoriality*

The dissent's two-pronged test employed two presumptions with differing requisite thresholds of congressional intent.[129] The dissent's conclusion that two presumptions exist undermines the Supreme Court's canon of statutory construction by separating the

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125. *See Boureslan*, 857 F.2d at 1025 n.10.

126. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 comment e (1965) (a reasonableness test should be applied to determine whether enforcement of a statute extraterritorially is reasonable); *see also* Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (applied antitrust legislation extraterritorially because adjudication was reasonable in light of international comity to protect its jurisdiction); Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (antitrust laws to have world-wide reach but declined to enforce the Sherman Antitrust Act extraterritorially until a balancing test of twenty-six foreign countries' interest was determined in light of international comity); Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1976) (holding the Sherman Antitrust Act had extraterritorial jurisdiction but declined to enforce the Act because of the unreasonableness in light of international comity and fairness).

127. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 293 (1982) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1962)). "The principal function of section 40 is to provide international legal sanctions for the exercise of judicial restraint, which permits courts to justify their decisions not as judicial legislation but rather as being consonant with the presumed intent of Congress to act in accordance with international legal principles." *Id.*

128. *See* Addison v. Holly Fruit Prod. Inc., 322 U.S. 607, 618 (1944) (quoting Kirschbaum Co. v. Walling, 316 U.S. 517, 522 (1942)).

> While judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative process. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' To blur the distinctive functions of the legislation and judicial processess is not conducive to responsible legislation.

*Id.*

129. *See supra* notes 106-11 and accompanying text.

presumption against extraterritoriality.[130] The second presumption that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" is not a second presumption but a basic principle of international law.[131] This basic principle is rooted in international comity, which provides that the sovereignty of other nations should be respected in determining whether to apply a domestic law extraterritorially.[132]

The dissent's distinction between the two presumptions was buttressed by the Court's reasoning in *McCulloch*.[133] Because the Court never explicitly stated the term "presumption against extraterritoriality" and relied heavily upon the principles of international comity, the dissent concluded that the two presumptions are in force.[134] The dissent's analysis, however, misconstrued the Court's reasoning in *McCulloch* because that case dealt with extraterritorial jurisdiction on the high seas and not extraterritorial ju-

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130. *See supra* notes 23-27 and accompanying text.

131. *See Boureslan*, 893 F.2d at 1272; *accord American Banana*, 213 U.S. at 356-57 (holding a United States-owned company in Panama had no cause of action under the Sherman Antitrust Act for antitrust violations). The Court in *American Banana* demonstrated that the presumption against extraterritorial application incorporates the basic principles of international law.

> [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. . . . For 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. . . . The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.'

*Blackmer*, 284 U.S. at 437 (citation omitted; citing *American Banana* in setting forth the presumption against extraterritoriality); *see also* Amicus Curiae Brief of Rule of Law Committee at 11-12, Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988) (No. 97-2206). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 (the rigidity of the *American Banana* rule has been diminished by the Supreme Court by prescribing jurisdiction to regulate anti-competitive activities).

132. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283 (1982).

> The comity principle was originally developed to explain how a sovereign state, absolutely powerful within its own territory, could give recognition or effect in its courts to another nation's laws without diminishing or denying its own sovereignty. The doctrine is also one of local restraint, limiting the application of sovereign power to extraterritorial events and persons.

*Id.*

133. *See Boureslan*, 892 F.2d at 1274 n.1 (citing *Boureslan*, 857 F.2d at 1021-31); *see also Boureslan*, 857 F.2d at 1023; *supra* notes 28-32.

134. *See Boureslan*, 857 F.2d at 1023.

risdiction in regard to a particular locality.[135]

### 2. *The Requisite Congressional Intent*

The dissent asserted that the canon of statutory construction required merely unexpressed congressional intent for a court to apply a federal statute overseas.[136] However, Judge King understated the importance of Title VII's subject matter.[137] The Supreme Court has determined that only clear express congressional intent will overcome the presumption against the extraterritorial application of federal labor legislation.[138] The Court's reasoning is buttressed by the notion that a nation's sovereignty should be respected because regulation of labor within its territory is primarily a domestic concern.[139]

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135. *See McCulloch*, 372 U.S. at 20-21.

> Therefore, we find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department but also by the Congress. In addition, our attention is called to the well-established rule of international law that the law of flag state ordinarily governs the internal affairs of a ship.

*Id.* The *McCulloch* court was, therefore, restrained from asserting jurisdiction based on the well established law of the high seas that provides that the state flag flown on the ship is the sole state which may exercise jurisdiction over the ship. *See id. But see Skiriotes*, 313 U.S. at 73-74 (a Florida criminal statute forbidding a certain type of sponge diving by its citizens applied to the high seas or to a foreign country where "the acts are directly injurious to the government, and are capable of perpetration without regard to particular locality . . .").

136. *See Boureslan*, 892 F.2d at 1274 n.1.

137. *See Boureslan*, 892 F.2d at 1278-79. The dissent found support for the *Love* alternative negative inference of the alien exemption provision based on *Foley Bros. See id.* The dissent asserted that "the court [in *Foley Bros.*] relied heavily on the fact that the [Eight Hour Law] drew no distinction between citizens and aliens. An extraterritorial application, therefore, would necessarily involve foreign national laborers, thereby creating a risk that the United States would intrude upon an area of local concern to foreign nations." *Id.* at 1278. Thus, the dissent concluded that the necessary congressional intent was found because the alien exemption provision explicitly differentiates between aliens and citizens and precludes coverage of aliens employed outside the United States. *See id.* "[C]ongress addressed the factor that the Supreme Courts had identified as most likely to violate principles of foreign sovereignty in the extraterritorial application of United States labor laws." *Id.* at 1278-79. *But see* STAFF OF COMM. ON FOREIGN AFFAIRS HOUSE OF REP. AND COMM. ON FOREIGN RELATIONS U.S. SENATE, 100TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987 at 1298 (Comm. Print 1987) [hereinafter COUNTRY REPORTS]. Saudi Arabian labor laws are irreconcilable with Title VII because equal opportunities for non-Muslims and women are circumscribed. *Id.* In light of the above conflict with a host country's law and international comity, Congress must explicitly state its intent to have Title VII extraterritorially applied.

138. *See supra* notes 23-40 and accompanying text.

139. *See supra* note 27 and accompanying text. *See also*, *Boureslan*, 892 F.2d at 1278 n.7. The dissent interpreted "the labor conditions of 'primary concern' to foreign nations [to] refer[] to the employment of *aliens* by the United States enterprises abroad." *Id.* Con-

### 3. *The Negative Inference of the Alien Exemption Provision*

The dissent employed the traditional methods of statutory construction and found that the negative inference of the alien exemption provision and the legislative history clearly revealed that Congress intended Title VII to be extraterritorially applied.[140] The dissent found the *Love* alternative negative inference to be a persuasive indication of congressional intent and necessary to give meaning to the provision.[141] Because aliens and citizens are both treated as employees within the United States, the dissent asserted that the Act's exemption of aliens is futile unless United States citizens abroad were given Title VII protection.[142] The dissent's reasoning, however, is repugnant to the canon of statutory construction because a negative implication drawn from the statutory language is not an explicit statement of congressional intent.[143]

The dissent found support for the *Love* alternative negative inference of the alien exemption from the Supreme Court's reasoning in *Espinoza*.[144] Despite the irrelevancy of the Court's interpretation of this provision in light of the Court's failure to apply Title VII extraterritorially, the dissent asserted that the Court's use of a negative inference legitimatized its use of the *Love* alternative negative inference to ascertain congressional intent.[145] Moreover, the dissent relied upon one statement in the legislative history, rejected by the majority on appeal and rehearing, which reveals that the provision was intended by Congress to avoid international jurisdictional conflicts.[146] The dissent reasoned that the legislative

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trary to the dissent, labor conditions in foreign nations are a primary and local concern. *See supra* note 48. "The term 'sovereignty' expresses a nation-state's right to exercise absolute political and legal authority over all persons and property within its territory . . . internal sovereignty being the inherent right of a peoples to govern their internal affairs." Street, *Application of United States and Abroad*, 19 INT'L L. & POL. 357, 372 (1987).

140. *See Boureslan*, 892 F.2d at 1275-76.

141. *See id.* at 1275.

142. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (a facially nondiscriminatory zoning ordinance that discriminates in its application violates the equal protection clause); *see also* Truax v. Raich, 118 U.S. 356 (1915).

143. *See supra* notes 23-40 and accompanying text.

144. *See Boureslan*, 892 F.2d at 1276.

145. *See id.*

146. *See id.* (citing *Civil Rights: Hearings on H.R. 7152, as amended by Subcomm. No. 5 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963) (testimony of James Roosevelt, member of Congress from State of California)).

> In Section 4 of the Act, limited exception is provided for employers with respect to employment of aliens outside of any state and also, to any religious corporations, associations, or societies. The intention of the first exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation

history supported the underlying logic of the *Love* alternative negative inference.[147] Although the dissent's reliance on the legislative history is questionable because of its collaborative nature,[148] the legislative history fails to explicitly state sufficient congressional intent for the court to apply Title VII extraterritorially because a negative inference must still be drawn from the legislative history which is contrary to the canons of statutory construction for federal labor legislation.[149]

### *C. The Necessity for Congressional Action on Title VII*

The sole issue presented in *Boureslan* is a critical question especially in light of the expansion of international trade and markets. The importance of whether the protection of Title VII extends to United States citizens employed by United States multinational corporations on foreign soils was demonstrated by the fact that the case was reheard by the full panel of the Court of Appeals for the Fifth Circuit. The *Boureslan* decision will have profound adverse effects upon many United States citizens and international civil rights laws. Congressional review of the extraterritorial scope of Title VII is necessary to discourage employment discrimination in the United States and in the international sphere.

#### *1. The Restrictive Scope of the Canon of Statutory Construction*

The majority followed precedent by noting, but refusing to resolve, the serious foreign policy implications that are necessarily encountered upon the extraterritorial application of Title VII.[150] The majority indicated that international application of Title VII infringed upon other nations' sovereignty, especially where equal employment opportunities are not recognized.[151] The majority's

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in the employment of aliens outside the United States by an American enterprise. *Id.*

147. *See id.* at 1276-77.

148. *See id.* at 1277 n.3. The dissent panel asserted that H.R. 405, the conclusions of the Committee on Education and Labor, which was submitted into the record of H.R. 7152 and thus became Title VII, is "persuasive indicia of congressional intent" of the meaning of the alien exemption provision. *Id. But see id.* at 1020 n.4. The majority held that a statement offered into the record by members of a House subcommittee that did not partake in the voting of the bill from the Judiciary Committee, and to the full House for a final vote, is not a clear expression of congressional intent. *Id.*

149. *See supra* notes 23-40 and accompanying text.

150. *See Boureslan*, 892 F.2d at 1274.

151. *See Boureslan*, 857 F.2d at 1020-21; *see also* COUNTRY REPORTS, *supra* note 138.

conclusion demonstrated the restrictive scope of the judiciary's powers in the absence of the requisite congressional intent.[152] Pursuant to its power to legislate, Congress must determine whether extraterritorial jurisdiction in the regulation of its nationals is reasonable in light of the serious foreign policy ramifications.[153]

### 2. *National and International Policy*

The legislative history of Title VII reveals that the purpose of the Act was to provide citizens with equal employment opportunities and to demonstrate this country's commitment against employment discrimination to the international community.[154] As indicated by the dissent, denial of Title VII protection to women and minorities employed overseas substantially affects their right to equal employment opportunities within the United States.[155] Fearing discriminatory treatment, women and minorities may be less willing to accept foreign assignments, which might have a detrimental effect upon multinational employers' ability to hire qualified employees.[156] The denial of Title VII protection to citizens employed abroad contravenes our national policy of equal employment opportunities.[157] Moreover, the international enforcement of Title VII demonstrates the commitment of the United States to furthering the international consensus against employment discrimination.[158] Congressional action to amend Title VII is necessary to effectuate our national policy and the international commu-

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152. *See Boureslan*, 892 F.2d at 1274.

153. *See supra* note 19 and accompanying text.

154. *See* Equal Employment Opportunity Act of 1962, H.R. 1370, 87th Cong., 2d Sess. 2156 (1962). "[C]ontinued employment in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity." *Id.; see also Boureslan*, 857 F.2d at 1028 (quoting Special Message to Congress by the President, June 19, 1963, 109 CONG. REC. 1055) "[L]egislative inaction on civil rights would result in 'weakening the respect with which the rest of the world regards us.'" *Id.*

155. *See supra* notes 113-15 and accompanying text.

156. *See Title VII Does Not Apply to U.S. Citizens Employed Abroad by U.S. Companies*, 129 Lab. Rel. Rep. (BNA) 265, 268 (Oct. 31, 1988).

157. *But see* Madigan, *The Applicability of U.S. Employment Laws Abroad: A Legal and Practical Approach*, 4 EMPLOYEE REL. L.J. 319 (1978) (extraterritorial application of Title VII would have injurious effects on United States employment, tax consequences, and trade because United States multinational corporations are likely to relocate outside the United States if Title VII liability was extended worldwide).

158. *See Boureslan*, 892 F.2d at 1279 (citing *Boureslan*, 857 F.2d at 1027-28). "Since Title VII expands on anti-discrimination principles that have been the subject of international concern, there can be no doubt that the desirability of the regulation is generally accepted, and that the regulation is important to the international community and consistent with the traditions of the international system." *Boureslan*, 857 F.2d at 1028.

nity's policy of eradicating employment discrimination.

### 3. *Congressional Precedent*

The ADEA's amendment is of great significance to the determination of the extent of the extraterritorial protection under Title VII, because the amendment and Title VII have analagous purposes.[159] In 1984, Congress amended the ADEA to provide American citizens employed abroad with protection against arbitrary age discrimination perpetrated by American employers.[160] The protections under Title VII, however, are afforded higher constitutional stature by the Court because race, religion, national origin and sex are more suspect characteristics than age.[161] More importantly, the amendment also demonstrates that Congress was concerned with potential for conflict between the ADEA and host country labor laws.[162] The amendment explicitly states that an American employer need not comply with the ADEA where extraterritorial application would violate the laws of the host country.[163] This amendment indicates that labor legislation drafted to eliminate employment discrimination must have extraterritorial jurisdiction unless actual conflicts occur where American employers have substantial control over their foreign affiliates and subsidiaries.[164] Using the ADEA amendment as precedent, Congress should amend Title VII to protect American citizens employed overseas by American employers from employment discrimination based upon race, color, religion, sex, or national origin.[165]

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159. *See supra* note 42 and accompanying text.

160. *See supra* notes 48-49 and accompanying text.

161. *See Boureslan*, 892 F.2d at 1282; *see, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (heightened scrutiny for sex-based classifications); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (First Amendment protection from religious discrimination); Korematsu v. United States, 214, 215 (1944) (heightened scrutiny for racial classifications). *But cf.* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (age discrimination is precluded from any suspect classification protections).

162. *See* Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 INT'L L. & POL. 357, 365-66 (1987).

163. 29 U.S.C. § 623(f)(1) (Supp. V 1985).

164. *See Boureslan*, 892 F.2d at 1279; *see also*, ADEA 29 U.S.C. § 623(g)(3)(A)-(D) (Supp. V 1985); *see also* Street, *supra* note 162, at 365-66 ("this 'degree of control' test involves an assessment of the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control").

165. For a discussion on the questionability of the amendment, *see* Zimmerman, *Extraterritorial Application of Federal Labor Law: Congress's Flawed Extension of the ADEA*, 21 CORNELL INT'L L.J. 103 (1988) (asserting that the ADEA's amendment "is a dangerous precedent" because it is imperialistic legislation that may impair United States foreign relations).

## VI. Conclusion

In light of the principles of international comity and the presumption against the extraterritorial application of federal labor legislation, the majority faithfully adhered to the canon of statutory construction. The presumption against extraterritoriality must be upheld because the negative inference of the alien exemption provision in Title VII does not qualify as express congressional intent. In the absence of the requisite congressional intent, the court's power is restricted by the canon of statutory construction. Furthermore, the majority's unwillingess to resolve potential jurisdictional conflicts indicates that Congress alone has the authority to provide Title VII with extraterritorial jurisdiction.

Despite the dissent's manipulation of the canon of statutory construction and its attempts at judicial legislation, analysis underscores the need for the extraterritorial application of Title VII. The dissent justified both the extraterritorial application of Title VII and the United State's policy of promoting equal employment opportunities, and advanced the international consensus against employment discrimination. In the light of congressional precedent, the principle of international comity should not preclude the extraterritorial application of federal employment discrimination legislation. Congress must amend Title VII to redress the denial of civil rights owed United States citizens working abroad for American employers.

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