INTERNATIONAL LAW—TITLE VII—TITLE VII DOES NOT APPLY TO AMERICAN CITIZENS EMPLOYED BY UNITED STATES CORPORATIONS IN FOREIGN COUNTRIES BECAUSE CONGRESS FAILED TO EXPRESS A CLEAR TRANSNATIONAL INTENT—*EEOC v. Arabian American Oil Company*, 111 S. Ct. 1227 (1991).

There is no dispute that Congress may permissibly extend its regulatory authority beyond United States borders.[1] In considering a statute's transnational operation, the United States Supreme Court has traditionally presumed that the statute will apply only to actions occurring within the United States absent a contrary congressional intent.[2] Thus, the analysis of the statute's extraterritoriality invokes a careful evaluation of legislative intent.[3] Recently, considerable debate has surrounded the transnational application of Title VII of the Civil Rights Act of 1964 (Title VII),[4] which prohibits an employer from discriminating against individuals on the basis of race, color, religion, gender or national origin.[5] In deciding whether Title VII applied extraterritorially and restricted the conduct of United States employers toward their American workers abroad, the Court determined

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[1] *See* Steele v. Bulova Watch Co. Inc., 344 U.S. 280, 282 (1952). The *Steele* Court stated that when Congress "prescrib[es] standards of conduct for American citizens [it] may project the impact of its laws beyond the territorial boundaries of the United States." *Id. See also* Simon & Brown, *International Enforcement of Title VII: A Small World After All?*, 16 EMPLOYEE REL. L.J. 281, 283 (1990-1991) ("courts generally concede that Congress does in fact *possess* sufficient authority to extend the jurisdictional reach of Title VII to American employees of U.S. companies abroad. The disputed question is whether Congress ever intended to *exercise* that authority").

[2] *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949). The *Foley Brothers* Court declared that the unexpressed intent of Congress regarding a statute's extraterritorial application may be discerned through the canon of construction which restricts the statute's operation to the territorial boundaries of the United States absent an expressed transnational intent. *Id.* (citing Blackmer v. United States, 284 U.S. 421, 437 (1932)).

[3] *See* Blackmer v. United States, 284 U.S. 421, 437 (1932) (application of the Act of July 3, 1926 in foreign countries involves an analysis of statutory construction, not congressional power); United States v. Bowman, 260 U.S. 94, 97-98 (1922) (transnational operation of the United States Criminal Code depends on Congress's purpose as evidenced by statutory language and the nature of the described crimes).

[4] 42 U.S.C. § 2000e (1982).

[5] *Id.* at § 2000e-2. Title VII provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
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> (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, be-

whether the statute's alleged expression of transnational intent was sufficient to overcome the presumption against extraterritoriality.[6]

The Court has employed two approaches in ascertaining the extraterritorial intent of Congress.[7] Where the statute's application in a foreign country would disrupt international comity, the Court has demanded a clear, explicit expression of transnational intent.[8] Absent such interference, however, the Court has relied on a variety of sources to discern congressional intent.[9] Confronted with a claim that Title VII operated in foreign countries, the Supreme Court, in *EEOC v. Arabian American Oil Company (ARAMCO)*,[10] recently required a clear expression of transnational intent to defeat the presumption against extraterritoriality, regardless of the implications for international comity.[11]

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cause of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

6 *See* Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 599 (1990) (the general refusal of United States courts to apply employment statutes abroad stems from "an often used, but poorly understood, tool of judicial construction: the presumption against extraterritoriality").

7 *Compare* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (presumption against extraterritoriality requires Congress to express affirmatively its transnational intent if a statute's extraterritorial operation would interfere with international relations) *and* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (a clear, express statement of extraterritorial intent is necessary to rebut the presumption where a statute, if applied abroad, would displace the domestic law of a foreign nation) *with* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (presumption against extraterritoriality is a means by which courts may assess the unexpressed intent of Congress regarding the transnational application of a statute).

8 *See Benz*, 353 U.S. at 147 (due to the unavoidable international discord which would result from the operation of the Labor Management Relations Act in foreign countries, the presumption against extraterritoriality required a clear expression of transnational intent); *McCulloch*, 372 U.S. 10, 21-22 (1963) (in light of the disruption of international comity caused by the transnational application of the National Labor Relations Act, the statute's lack of a clear statement of extraterritoriality failed to overcome the presumption).

9 *See Foley Bros.*, 336 U.S. at 285 (examination of the Eight Hour Law's language, legislative history and administrative interpretations failed to reveal evidence of Congress' unexpressed transnational intent).

10 111 S. Ct. 1227 (1991).

11 *Id.* at 1230 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

In 1979, Ali Boureslan, a naturalized American citizen, began his employment with Aramco Services Company (ASC) at its principal offices in Houston, Texas.[12] The following year, Boureslan received a transfer from ASC to its parent company, Arabian American Oil Company (Aramco), at its principal place of business in Dhahran, Saudi Arabia.[13] Both ASC and Aramco were Delaware corporations licensed to do business in Texas.[14] In 1982, Boureslan's Aramco supervisor in Saudi Arabia allegedly directed repeated racial, religious and ethnic slurs at Boureslan.[15] Boureslan was discharged two years later.[16]

Upon his dismissal, Boureslan filed a complaint with the Equal Employment Opportunity Commission (EEOC).[17] Boureslan then brought suit against Aramco and ASC in the

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[12] *Id.* at 1229-30. Boureslan, born in Lebanon, worked as an engineer for Aramco. *Id.* at 1230.

[13] *Id.* at 1230. Aramco conducted its operations, including the exploration, production and refining of oil and gas, entirely within Saudi Arabia. Boureslan v. Aramco, 857 F.2d 1014, 1016 (5th Cir. 1988). Thus, Boureslan's transfer from the subsidiary to its parent company necessitated a transfer from the United States to Saudi Arabia. *Id.*

[14] *Aramco*, 111 S. Ct. at 1230.

[15] *Id. See generally* Comment, *United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail?*, 8 LOY. L.A. INT'L & COMP. L.J. 135, 144 (1985) (American corporations doing business in Saudi Arabia are subject to Saudi regulations regarding the employment of women and non-Moslems).

[16] *Id.*

[17] *Aramco*, 111 S. Ct. at 1230. Congress created the EEOC to administer Title VII. *Id.* Section 2000e-4 provides in part:

> (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. . . .
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> (g) The Commission shall have power—
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> (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals; . . .
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> (4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter; . . .
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> (6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

42 U.S.C. § 2000e-4 (1982). *See generally* W. CONNOLLY & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY § 4.01 at 4-2 (1990) (EEOC has

United States District Court for the Southern District of Texas alleging that his termination constituted employment discrimination on the basis of race, religion and national origin in violation of state law and Title VII.[18] The district court concluded that Title VII did not apply abroad and granted the companies' motion to dismiss for lack of subject matter jurisdiction.[19] The district court also dismissed Boureslan's state law claims for lack of pendent jurisdiction.[20] The district court asserted that a clear intent to override the presumption against exterritoriality did not exist because neither the statute's language nor legislative history indicated congressional intent to extend Title VII protections to American citizens employed abroad by United States corporations.[21]

The United States Court of Appeals for the Fifth Circuit affirmed.[22] The Fifth Circuit panel granted the EEOC's motion to

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authority "to issue regulations, to institute proceedings and to bring an action in federal court to terminate discriminatory employment practices").

Under Title VII, an employment discrimination claim must:

(1) [B]e timely;

(2) [B]e filed by either an aggrieved person or someone filing on his or her behalf, or a member of the Commission;

(3) [B]e filed against a party covered by Title VII: employers, unions, apprenticeship training programs, or employment agencies;

(4) [A]llege a type of discrimination prohibited by Title VII: race, color, religion, sex, national origin, or retaliation;

(5) [A]llege an adverse employment action;

B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 983-84 (1983). These requirements give the EEOC considerable control in the maintenance of Title VII claims. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 267-68 (1980) ("Congress prescribed an administrative obstacle course which must be run by every private plaintiff seeking to sue under Title VII. It did this by placing the EEOC at the courthouse door and requiring a person allegedly discriminated against to invoke the Commission's processes by filing a charge with it prior to bringing suit").

[18] *Aramco*, 111 S. Ct. at 1230.

[19] Boureslan v. Aramco, 653 F. Supp. 629, 631 (S.D. Tex. 1987). The district court announced that a presumption of territorial intent arose from the statutory lack of an explicit statement of extraterritoriality. *Id.* at 630. The court also declined to apply Title VII abroad as a matter of policy, stressing that the transnational execution of the statute would interfere with the sovereignty of foreign countries. *Id.* at 631. In view of the potential conflict between Title VII and Saudi labor laws, the district court stated that "it should be Congress that mandates extraterritorial application." *Id.*

[20] *Id.* (citing United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)).

[21] *Id.* at 630. The district court suggested that because the legislative history of Title VII contained only minimal references to extraterritoriality, Congress most likely did not intend to execute the statute in foreign countries. *Id.* The court emphasized that in the 1964 enactment of Title VII Congress was solely concerned with domestic employment discrimination. *Id.*

[22] Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988). In a 2-1 decision, the

Fifth Circuit required a clear expression of intent on the part of Congress to apply Title VII abroad to rebut the presumption against extraterritoriality. *Id.* at 1019. The court of appeals found nothing in the statute's language indicating the requisite intent. *See Id.* at 1018. The Fifth Circuit noted that although the alien exemption provision of Title VII precludes application of the statute to "an employer with respect to employment of aliens outside of any state," 42 U.S.C. § 2000e-1, such language does not support a negative inference that Congress intended Title VII to regulate the employment relationship of United States employers and their American workers abroad. *Boureslan*, 857 F.2d at 1018 (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973)). Similarly, the court did not find anything in Title VII's legislative history warranting extraterritorial application. Additionally, the court posited that the legislative history of a statute should be afforded a secondary level of importance in ascertaining congressional intent to that of the statute's language. *Id.* (citing United States v. Smith, 795 F.2d 841 (9th Cir. 1986)). Observing the policy arguments against requiring a United States employer to abide by Title VII in a foreign land with often contrary religious and social practices, the Fifth Circuit concluded that neither Title VII's language nor its legislative history were sufficient to overcome the "high hurdle" of the presumption against extraterritoriality. *Id.* at 1020, 1021. *See* Turley, *supra* note 6, at 624 ("The Fifth Circuit essentially demanded an express statutory mandate for applying Title VII extraterritorially").

In a strong dissent, Judge King declared that contrary to the majority's assertion, an express, affirmative statement of congressional intent to apply a statute abroad need not be shown in order to defeat the presumption against extraterritoriality. *Bareslan*, 857 F.2d at 1022 (King, J., dissenting). Rather, the dissent maintained, only when a statute's extraterritorial application would violate international law must there be an explicit expression of congressional intent to overcome the presumption. *Id.* at 1023 (King, J., dissenting) (citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963)). Judge King explained that absent such a violation, a court may use the "traditional methods of statutory interpretation" in examining a statute's language and legislative history for extraterritorial intent. *Id.* at 1024 (King, J., dissenting).

The dissent contended that applying Title VII extraterritorially would not implicate problems of international comity due to two aspects of the statute: (i) the negative inference drawn from the alien exemption provision, such that Title VII seeks only to regulate the actions of U.S. employers and citizens, and (ii) the bona fide occupational qualification (BFOQ) clause, designed to decrease conflicts with foreign laws, and provides an exception to the extraterritorial application of Title VII where sex, religion, etc., constitutes an essential element of a given job. *Id.* at 1030 (King, J., dissenting). Consequently, applying a less strict standard for determining congressional intent, Judge King found evidence of extraterritorial intent in the alien exemption provision and denounced the majority's reading of the alien exemption provision as "meaningless" and "superfluous." *Id.* at 1032, 1033 (King, J., dissenting). *See* Cherian, *Current Developments in Transnational Employment Rights*, 40 LAB. L.J. 259, 262 (1989) (panel majority failed to realize that because congressional statutes do not usually apply to aliens in foreign countries, Congress would have had no reason to enact the alien exemption provision unless it intended to protect American employees abroad); Gallozzi, *Jurisdiction—Extraterritorial Application of U.S. Statute Proscribing Employment Discrimination—Congressional Intent*, 83 AM. J. OF INT'L L. 375, 380 (1989) (an unwarranted restriction of Title VII resulted from the failure of the panel majority to consider jurisdictional principles involved in international law); Comment, *Boureslan v. Aramco: Equal Employment Opportunity for U.S. Citizens Abroad*, 12 FORDHAM INT'L L.J. 564, 588 (1989) (decision of the panel majority creates an "ominous loophole" of transnational employment discrimina-

intervene[23] and, thereupon, the court granted the request of Boureslan and the Commission for a rehearing.[24] The Fifth Circuit vacated the panel's decision, reheard the case en banc and affirmed the district court's dismissal of Boureslan's complaint.[25]

The United States Supreme Court granted certiorari[26] and agreed to address the unsettled state of Title VII's extraterritorial application.[27] After analyzing the Title VII language, the Court declared that Boureslan and the EEOC failed to produce sufficient evidence to rebut the presumption against extraterrito-

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tion through which United States corporations may engage in the very discriminatory practices that Title VII was intended to prohibit).

23 *See* Cherian, *supra* note 22, at 263. Cherian, a Commissioner of the EEOC, asserted that the EEOC sought intervention because the panel decision constituted a "serious threat to our Title VII jurisdiction to protect American workers abroad." *Id.*

24 Boureslan v. Aramco, 863 F.2d 8 (5th Cir. 1988). One commentator has proposed that "Judge King's eloquent and well-reasoned dissent, coupled with the participation of the EEOC and numerous civil rights organizations in the *amicus* effort, may have prompted the Fifth Circuit to reexamine this issue en banc." *See* Gallozzi, *supra* note 17, at 380. *But see* Prentice, *The Muddled State of Title VII's Application Abroad*, 41 LAB. L.J. 633, 639 (1990) ("Judge King's dissent was sufficiently persuasive to induce her Fifth Circuit colleagues to rehear the case, but not to change their minds").

25 EEOC v. Aramco, 111 S. Ct. 1227, 1230 (1991). The en banc majority reiterated the panel majority's holding that Title VII failed to overcome the presumption against extraterritoriality because the statute did not contain the requisite clear statement of transnational intent. *Boureslan*, 892 F.2d at 1274. Again in dissent, Judge King claimed that the alien exemption provision constituted the requisite showing of transnational intent in that Congress would not have exempted aliens if it did not intend to protect citizens extraterritorially under Title VII. *Id.* at 1275 (King, J., dissenting). The dissent also sounded an insightful warning concerning the merely territorial operation of the statute, declaring that "[t]he salutary goals of Title VII cannot be fully realized if the fortuitous location of an American employee at the overseas office of an American firm could mean the difference between equal opportunity and discrimination at will." *Id.* at 1282 (King, J., dissenting). *See* Simon & Brown, *supra* note 1, at 283 ("the *Boureslan* majority's analysis differed from the dissent and from previous case law in the weight the court accorded the presumption against extraterritorial application").

26 EEOC v. Aramco, 111 S. Ct. 40 (1990). Both Boureslan and the EEOC filed petitions for certiorari. *Id.*

27 *Aramco*, 111 S. Ct. at 1230. *Compare* Bryant v. International Schools Servs., Inc., 502 F. Supp. 472 (D.N.J. 1980) (Title VII operates extraterritorially to regulate the hiring procedures of an American corporation employing United States citizens as teachers in Iran), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) *and* Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D.Md. 1986) (Title VII operates extraterritorially regarding a United States corporation employing American citizens in Germany and compensating them with benefit packages) *with* Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988) (neither language nor legislative history of Title VII warrant its application to United States corporation's dismissal of American worker in Saudi Arabia), *aff'd on reh'g*, 892 F.2d 1271 (5th Cir. 1990) (en banc).

riality.[28] Accordingly, the Court held that Title VII does not apply transnationally to regulate the conduct of United States employers toward their American employees abroad.[29]

To appreciate fully the multinational import of *Aramco*, it is necessary to examine the foundation upon which the Supreme Court based its decision.[30] The nascent pronouncement regarding the extraterritoriality of congressional statutes was proffered in *American Banana Co. v. United Fruit Co.*[31] In *American Banana*, an Alabama corporation alleged that a New Jersey corporation violated the Sherman Anti-Trust Act[32] by monopolizing the Panamanian banana trade.[33] Relying on the principle that " '[a]ll

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[28] *Aramco*, 111 S. Ct. at 1236. The Court dismissed as ambiguous Title VII's express application to employers engaged in commerce "between a State and any place outside thereof." *Id.* at 1231 (quoting 42 U.S.C. § 2000e(g) (1982)). Moreover, the Court determined that even though Title VII explicitly exempted coverage for aliens working abroad, such language did not clearly manifest a congressional intention to protect American citizens employed in foreign countries. *Id.* at 1233-34 (citing 42 U.S.C. § 2000e-1 (1982)).

[29] *Id.* at 1229.

[30] The turn-of-the-century strict rule against extraterritoriality gradually developed into a less exacting presumption. *See* Turley, *supra* note 5, at 602. This development is apparent in a series of United States Supreme Court decisions. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (creation of international discord by a statute's application in foreign countries requires the extraterritorial intent of Congress to be clearly expressed); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (where the extraterritorial application of a statute would interfere with international relations, Congress must produce an affirmative, clear expression of transnational intent for the statute to operate abroad); Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 285 (1952) (congressional intent to apply a statute abroad must appear for the statute to extend beyond the territorial jurisdiction of the United States); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (language or legislative history of a statute must disclose Congress's transnational intent in order for the statute to operate in foreign countries); Blackmer v. United States, 284 U.S. 421, 437 (1932) (unless an extraterritorial intent appears, a statute will only apply within the United States); United States v. Bowman, 260 U.S. 94, 97-98 (1922) (a criminal statute may be either territorially or extraterritorially construed depending on the nature of the crime); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (any doubt as to Congress's transnational intent mandates the solely territorial application of a statute).

[31] 213 U.S. 347, 357 (1909). *Accord* Sandberg v. McDonald, 248 U.S. 185 (1918) (lack of specific language manifesting intent to regulate employment contracts between alien seamen and their foreign employers when the vessel enters American waters precludes the application of the Seaman's Act of 1915). *See* Turley, *supra* note 5, at 655 ("The Supreme Court initially required clear expressions of congressional intent because all extraterritorial claims were viewed as running afoul of international law").

[32] 15 U.S.C. § 1 (1988) (originally codified at ch. 647, § 1, 26 Stat. 209, 210 (1890)).

[33] *American Banana*, 213 U.S. at 354. The defendant, a United States corporation, allegedly bought the operations of many of its competitors and acquired a control-

legislation is prima facie territorial,' "[34] the Court initially noted that the law of the country where an act occurs generally determines the act's lawfulness.[35] Because no contrary intent was indicated, the *American Banana* Court explained that the statute extended only as far as the legislature's territorial authority.[36]

Reflecting both the stringent *American Banana* view and an emerging trend to relax that standard, the Court in *United States v. Bowman*[37] promulgated a dichotomous framework to assess congressional intent regarding the extraterritorial application of criminal statutes.[38] In *Bowman*, an American steamship took on 600 tons of oil while docked in Rio de Janeiro.[39] American shipping line officials reported the number as 1000 tons and received payment for the inflated figure.[40] Charged with conspiracy, the defendants claimed that the United States Criminal Code (Criminal Code)[41] did not apply because the alleged misconduct occurred on the high seas and in Brazil.[42] The *Bowman* Court, however, found that the Criminal Code did regulate such con-

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ling interest in others. *Id.* The defendant subsequently organized a selling company in order to fix prices. *Id.* When the plaintiff began to build a banana plantation and a railway in Panama, the defendant ordered the plaintiff to sell his interests or to cease construction. *Id.* Upon the plaintiff's refusal to comply, the defendant allegedly prompted Costa Rican soldiers to seize the plaintiff's operations. *Id.*

34 *Id.* at 357 (citations omitted). For example, the New Jersey Supreme Court explained that "[t]he allegation of an act done in another sovereignty, to be a violation of our own, is simply alleging an impossibility, and all laws to punish such acts are necessarily void." State v. Carter, 27 N.J. 499, 503 (1859).

35 *American Banana*, 213 U.S. at 356 (citing Slater v. Mexican National R.R. Co., 194 U.S. 120, 126 (1904)). The *American Banana* Court also contended that seemingly unrestricted statutory language such as "[e]very person who shall monopolize" and "[e]very contract in restraint of trade" will apply only to persons "subject to such legislation, not all [persons] that the legislator subsequently may be able to catch." *Id.* at 357.

36 *See id.* at 356. *See also* Turley, *supra* note 6, at 604 (*American Banana* represented the "rigid view of extraterritorial jurisdiction" of the early twentieth century); Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1477-78 (1985) ("For much of the nineteenth century, the Court adhered to the principle of territoriality, the traditional and primary basis of jurisdiction").

37 260 U.S. 94 (1922).

38 *See id.* at 97-99. The Court explained that the construction of a criminal statute relating to extraterritoriality depends on the nature of the crime and the territorial restriction on a government's authority to sanction certain conduct under international law. *Id.* at 97-98.

39 *Id.* at 95.

40 *Id.* The Americans, joined by one British citizen, thereby defrauded the United States government, a major stockholder in the shipping company. *Id.*

41 18 U.S.C. § 2 (1990) (originally codified at ch. 194, § 2, 40 Stat. 1015 (1918)).

42 *Bowman*, 260 U.S. at 96-97.

duct.[43] The Court stated that because crimes such as arson and burglary logically occur within the legislators' territorial jurisdiction, there must exist a clear expression of transnational intent in order to defeat the presumption against extraterritoriality.[44] Conversely, the *Bowman* Court maintained, a criminal statute sanctioning conduct which could reasonably be expected to occur beyond United States boundaries, such as fraud or obstruction, may overcome the presumption merely by the natural inference that Congress intended the statute to apply extraterritorially.[45]

A decade later, the Court continued to move away from the strict *American Banana* view of territoriality in *Blackmer v. United States*.[46] In *Blackmer*, an American citizen residing in Paris refused to return to the United States and respond to subpoenas which required him to appear as a witness at a criminal trial.[47] The citizen was subsequently charged with contempt.[48] In advancing an extraterritorial scope for a congressional act,[49] that defined the subpoena power of United States courts, the *Blackmer* Court un-

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[43] *Id.* at 99. The Court proclaimed that due to the vast array of places in which fraud upon the United States government could occur, including foreign countries and the high seas, Congress must have intended the Criminal Code to apply transnationally. *Id.* at 102.

[44] *Id.* at 98. The Court elaborated that the territorial nature of such crimes required a specific provision of extraterritoriality, in that the absence of an express statement negated any transnational purpose that Congress may have held. *Id.*

[45] *Id.* at 98. The Court de-emphasized Congress's failure to provide expressly for the transnational operation of the Criminal Code. *Id.* Rather, the Court contended that the logical inference from the nature of the covered offense, fraud without regard to locality, was such that "Congress could not have meant to confine [the statute] to the land of the United States." *Id.* at 99. *See* Note, *The Extraterritorial Effect of Federal Criminal Statutes: Offenses Directed at Members of Congress*, 6 HASTINGS INT'L & COMP. L. REV. 773, 780 (1983) (*Bowman*'s reasonable inference of extraterritoriality constituted the Court's introduction of an "exception to the normally strict rule of interpretation" which is applicable "when there [is] no indication as to jurisdictional reach, but failing to allow extraterritorial effect would defeat the clear purpose of the legislation").

Thus, *Bowman* marked the beginning of the end for the *American Banana* approach. *See* New York Cent. R.R. Co. v. Chisholm, 268 U.S. 29 (1925). In *Chisholm*, the Court enunciated a test for extraterritorial intent which focused on either the statute's express language or the circumstances for evidence of such intent. *Id.* at 31 (citing United States v. Bowman, 260 U.S. 94, 98 (1922)).

[46] 284 U.S. 421 (1932).

[47] *Id.* at 433. The subpoenas required the defendant to appear before the Supreme Court of the District of Columbia as a witness for the United States. *Id.*

[48] *Id.* Because of the citizen's failure to respond to both subpoenas, the trial court fined the defendant $60,000 and ordered that his property be seized in order to satisfy the penalties. *Id.*

[49] Ch. 762, § 1, 44 STAT. 835 (1926) (currently codified at 28 U.S.C. § 711 (1926).

derscored the specific procedures by which the act provided for service of process on American citizens in foreign countries.[50] Cautioning that the statute would accommodate merely a territorial scope unless a contrary intent exists,[51] the Court concluded that the act's clear language supported the statute's application to Americans residing abroad.[52] Anticipating the importance of international comity[53] as a factor in the extraterritoriality rubric,[54] the Court clarified that the mere service of process on an American citizen residing abroad did not infringe upon the foreign nation's authority.[55]

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[50] *Blackmer*, 284 U.S. at 433-36. The Act permitted a United States consul in the country of the desired witness to effect personal service. *Id.* at 434-35 (citing Ch. 762, § 2, 44 Stat. 835 (1926)). The statute provides:

> Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpoena issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

Ch. 762, § 2, 44 Stat. 835 (1926) (currently codified at 28 U.S.C. § 712 (1926)).

[51] *Blackmer*, 284 U.S. at 437 (citing Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925); United States v. Bowman, 260 U.S. 94, 102 (1922); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909)). The *Blackmer* Court stated that "[w]hile the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction 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." *Id.* (citations omitted). The Court added that "[n]or 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." *Id.*

[52] *Id.* at 436. The Court reasoned that the defendant's American citizenship mandated his compliance with any laws of the United States applicable to him overseas. *Id.* As a consequence, United States courts could permissibly sanction the defendant for his unlawful actions which took place on foreign soil. *Id.* (citing United States v. Bowman, 260 U.S. 94, 102 (1922)).

[53] *Id.* at 439. Comity is defined as the general principle "that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

[54] *Blackmer*, 284 U.S. at 439. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19, 21-22 (1963) (language or legislative history of a statute must contain a clear expression of extraterritorial intent where the statute would initiate international discord if applied abroad); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (Congress must express transnational intent in affirmative, clear manner if statute's extraterritorial application would disrupt international relations).

[55] *Id.* at 439. *See* Skiriotes v. Florida, 313 U.S. 69 (1941). Amplifying the

The Supreme Court completed its movement away from the rigorous *American Banana* approach in *Foley Brothers, Inc. v. Filardo*.[56] Filardo, an American citizen, contracted with a United States corporation to work on construction projects in Iran and Iraq.[57] The employment contract called for compliance with all applicable United States laws.[58] Filardo sought compensation under the Eight Hour Law[59] which provided for an overtime pay rate beyond the eighth hour worked in a single day.[60]

The *Foley Brothers* Court attempted to ascertain Congress's unexpressed intent regarding the statute's transnational operation.[61] The Court scrutinized a variety of interpretive sources, including the statute's plain language, overall scheme, legislative history and relevant administrative interpretations.[62] The Court additionally referred to the overriding congressional concern with domestic labor relations which surrounded the statute's en-

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Supreme Court's concern with international comity, the *Skiriotes* Court set forth the guiding principle upon which later courts relied in establishing the power of Congress to apply its statutes abroad. *Id.* at 73. The Court declared that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Id. Accord* Lauritzen v. Larsen, 345 U.S. 571, 587 (1953) (absent interference with foreign countries and their citizens, Congress is entitled to place statutory obligations upon United States citizens abroad); Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952) (extraterritoriality of a statute rests in a judicial determination of whether Congress intended to use its recognized power to apply the statute in foreign countries).

56 336 U.S. 281, 285 (1949). The *Foley Brothers* Court declared that "[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained." *Id.* (citing Blackmer v. United States, 284 U.S. 421, 437 (1932)).

57 *Id.* at 283.

58 *Id.* The employment contract did not address the issue of an increased overtime pay rate. *Id.*

59 Ch. 352, 27 Stat. 340, § 1 (1892) (currently codified at 40 U.S.C. § 328 (1988)).

60 *Foley Bros.*, 336 U.S. at 282-83. The contract did not expressly contain any of the Eight Hour Law's provisions. *Id.* at 283.

61 *See id.* at 285. The Court acknowledged that Congress innately possessed the authority to project the Eight Hour Law beyond the borders of the United States. *Id.* at 284. Therefore, the Court declared, the relevant question was whether Congress intended to exercise this inherent sovereign power. *Id.* at 284-85.

62 *Id.* at 285-90. The Court dismissed the contention that the statute's express application to "every contract" called for an extraterritorial construction of the Eight Hour Law. *Id.* at 287. Rather, the Court argued that the apparent broadness of such language, unsupported by any other transnational evidence in the statute's legislative history, failed to provide the requisite insight into the alleged unexpressed extraterritorial intent of Congress. *Id.*

actment[63] and to the failure of relevant Executive Orders to specify the law's transnational operation.[64] Emphasizing that the statute's work hours regulation failed to distinguish between citizen and alien employees,[65] the *Foley Brothers* Court concluded that Congress did not intend the Eight Hour Law to apply extraterritorially.[66]

Whereas the *Foley Brothers* Court declined to interpret the Eight Hour Law as having transnational effect, a mere three years later, the Court in *Steele v. Bulova Watch Co., Inc.*,[67] determined that Congress intended the Lanham Act[68] to protect United States nationals from trademark infringement occurring abroad.[69] The plaintiff, a United States watch manufacturer, claimed that the defendant, an American citizen, produced and sold watches in Mexico stamped with the "Bulova" trademark in

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63 *Id.* at 286-88. The Court noted that Congress created the Act to ameliorate labor unrest in the United States resulting from domestic unemployment and the flood of inexpensive foreign labor. *Id.* at 286-87.

64 *Id.* at 288-89. The Court explained that whereas many Executive Orders addressed the Eight Hour Law's application in various territories and possessions of the United States, no such directives dealt with the operation of the statute in foreign countries. *Id.* at 288.

65 *Id.* at 286. The Court reasoned that the Eight Hour Law would have differentiated between citizens and aliens if Congress had intended to extend its regulatory authority beyond the United States into locales where labor conditions are not the normal concern of Congress. *Id.*

66 *Id.* at 290. In a concurring opinion, Justice Frankfurter argued that policy considerations should supersede the language of the statute as the primary interpretive guide. *Id.* at 292 (Frankfurter, J., concurring). Justice Frankfurter proclaimed that without an unequivocal statement of congressional policy to the contrary, the Court should not impose the employment standards of the United States on entities not generally subject to Congress's regulatory authority. *Id.*

67 344 U.S. 280 (1952).

68 Ch. 540, 60 Stat. 427, § 1 (1946) (currently codified at 15 U.S.C. § 1051 (1988)). The owner of a trademark used in commerce must register the mark with the Patent and Trademark Office in order to qualify for the infringement protections of the Lanham Act. 15 U.S.C. § 1051 (a). The express intent of Congress in the Act was:

> [T]o regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

Id.

69 *Steele*, 344 U.S. at 286.

violation of the statute.[70] The Court posited that the statute's express regulation of any commerce within congressional control secured extraterritorial application.[71] The Court noted that the Act defined "commerce" as "all commerce which may lawfully be regulated by Congress."[72] The *Steele* Court maintained that such expansive jurisdictional language evidenced congressional intent to regulate the trademark infringement practices of American citizens occurring on foreign soil.[73] Further, the *Steele* Court declared that the extraterritorial application of the Lanham Act and the domestic law of foreign countries did not conflict.[74]

In 1957, the Court in *Benz v. Compania Naviera Hidalgo, S.A.*[75] accepted the *Steele* charge and pronounced a test for transnational intent focusing on whether a statute's extraterritorial application encumbered international accord and foreign relations.[76] In *Benz*, the German and British crew of a Liberian-flagged vessel demanded changes in its employment agreement, made in Germany under British law, and went on strike against its Panamanian employer while the ship was temporarily docked

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70 *Id.* at 281-82. The defendant argued that the United States courts lacked subject matter jurisdiction, and that his registration of the "Bulova" trademark in Mexico precluded a suit against him in the United States. *Id.* at 282.

71 *Id.* at 283. The Court described the regulatory authority of Congress under the Lanham Act as entailing "broad jurisdictional powers." *Id. See* 15 U.S.C. § 1127 (1988) (congressional power to proscribe trademark infringement extends to all marks within commerce under the control of Congress).

72 *Steele*, 344 U.S. at 284. (citing 15 U.S.C. § 1127 (1988)). The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Consequently, the jurisdictional grant of the Lanham Act naturally implicated the regulatory power of Congress over commerce involving foreign countries. *See Steele*, 344 U.S. at 284.

73 *Id.* at 286. The Court observed that the defendant's Mexican operations created a significant impact upon the United States market by filtering the counterfeit watches into the United States, resulting in increased competition. *Id.* The Court described the Lanham Act as encompassing a "sweeping reach" and concluded that the defendant's illicit activities fell within the regulatory umbrella of the Act's "broad jurisdictional grant." *Id.* at 286-87.

74 *Id.* at 289 (citations omitted). The Court explained that because the Mexican courts revoked the defendant's Mexican registration of the "Bulova" trademark, the transnational execution of Title VII would not displace the domestic law of a foreign country. *Id.* Thus, the Court set the foundation for judicial consideration of international comity as a significant factor in a statute's transnational application. *Id.*

75 353 U.S. 138 (1957).

76 *Id.* at 147. The *Benz* Court summarized that "to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *Id.*

in Portland, Oregon.[77] The foreign crew and its union sought protection from the Labor Management Relations Act of 1947 (LMRA).[78] The *Benz* Court pointed to the likelihood that pervasive transnational turmoil would result from LMRA imposition upon an employment contract tenuously and arbitrarily tied to the United States.[79] The Court announced that there must be an affirmative, clear expression of transnational intent for the Court to interfere in the highly sensitive area of international relations.[80]

The *Benz* Court, however, did not find the requisite statement of intent.[81] The Court declared that neither the LMRA's language nor its legislative history revealed a congressional intent to provide LMRA protection for noncitizens employed under foreign law on foreign vessels.[82] Thus, under *Benz*, if the statute's extraterritorial application would disrupt international comity, the statute must contain a clear expression of transna-

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77 *Id.* at 139. The crew sought a reduction in its service term, a wage increase and better working conditions. *Id.* The crew's employment agreement incorporated standard wage and hour provisions established by the British Maritime Board. *Id.*

78 29 U.S.C. § 141 (1988) (originally codified at 61 Stat. 136, ch. 120, § 1 (1947)). The trial court found that because repair and loading crews declined to cross the picket line of the foreign sailors and their union representatives, the vessel and its cargo were damaged. *Benz*, 353 U.S. at 139. The union claimed that the trial court lacked jurisdiction because it was pre-empted by the LMRA. *Id.* The trial court entered judgment against the defendant union for damages, maintaining that the LMRA did not apply to the employment of non-citizens on foreign vessels. *Id.* *See* Note, *supra* note 36, at 1480 ("[t]he LMRA represents a legislative balance between the competing collective interests of labor and management, based on a policy valuing minimal government intrusion in the United States employment environment").

79 *Benz*, 353 U.S. at 142, 147. The *Benz* Court proclaimed that the fortuitous placement of the vessel in an American port at the outbreak of the labor dispute created a situation in which "the possibilities of international discord are so evident and retaliative action so certain." *Id.*

80 *Id.* at 147. Observing the undisputed, but discretionary, power of Congress to apply a statute to a foreign vessel in American waters, the Court maintained that "if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters." *Id.* at 142. The *Benz* Court reasoned that "[t]he question . . . therefore narrows to one of intent of the Congress as to the coverage of the Act." *Id.*

81 *Id.*

82 *Id.* The Court noted that the LMRA's entire background reflected congressional concern with employment discord between American workers and corporations. *Id.* at 143-44. The Court determined that it could not "read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. . . . We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts." *Id.* at 146-47.

tional intent to defeat the presumption against extraterritoriality.[83]

The Court continued to assert the *Benz* doctrine in *McCulloch v. Sociedad Nacional de Marineros de Honduras*.[84] In *McCulloch*, Honduran sailors attempted to gain union representation via the National Labor Relations Act (NLRA)[85] while working on Honduran-registered vessels legally owned and operated by a foreign subsidiary of a United States corporation.[86] Despite vehement objection by foreign governments, the National Labor Relations Board granted the foreign sailors' petition and ordered a union election pursuant to NLRA regulations.[87] The *McCulloch* Court first observed the substantial disruption in international comity that the NLRA's extraterritorial application had already created and would continue to generate.[88] The Court further noted that administering the NLRA against all foreign vessels in American ports would provoke profound conflicts of maritime law and international relations.[89] As a result, the *McCulloch* Court employed the *Benz* standard and demanded an explicit statement of transnational intent to overcome the presumption against extraterritoriality.[90] Further complying with the *Benz* mandate, the

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83 *See id.* at 147. Absent the instigation of international discord, the *Foley Brothers* approach presumably still controls; Congress's extraterritorial intent need not be explicitly stated, but rather may be ascertained from all of the available indicia of legislative intent. *See* EEOC v. Aramco, 111 S. Ct. 1227, 1240 (1991) (Marshall, J., dissenting) (rather than the stringent *Benz* approach, the *Foley Brothers* weak presumption governs where statute's transnational operation would not interfere with foreign law).

84 372 U.S. 10 (1963).

85 29 U.S.C. § 151 (1988). Driven by decades of violent labor unrest in the United States, Congress enacted the NLRA in 1935 to remedy the exploitation of American workers. *See* Ordman, *Fifty Years of the NLRA: An Overview*, 88 W. VA. L. REV. 15, 16 (1985). The NLRA granted to workers the right to organize and to have their own representatives bargain collectively on their behalf. *Id.* at 18. Moreover, the Act prohibited both management and unions from engaging in unfair labor practices. *Id.* at 19. Through the NLRA, Congress "fostered an industrial democracy." *Id.* at 18.

86 *McCulloch*, 372 U.S. at 12, 13. A bargaining agreement between the Honduran subsidiary and Sociedad Nacional de Marineros de Honduras, the defendant labor union, set forth the provisions of the sailors' employment contracts. *Id.* at 14.

87 *Id.* at 12, 16-17.

88 *Id.* at 19. The Court described the transnational operation of the NLRA as triggering "highly charged international circumstances." *Id.* at 21.

89 *Id.* at 19. The *McCulloch* Court also relied on the statement of Chief Justice Marshall in *The Charming Betsy* case that " 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' " *Id.* at 21 (quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).

90 *Id.* at 21-22. The Court stated that "for us to sanction the exercise of local

McCulloch Court examined both the statute's language and its legislative history for the necessary clear intent but concluded that neither source evinced the requisite showing.[91]

Against this framework of statutory interpretation, the Supreme Court decided *EEOC v. Aramco*.[92] The *Aramco* Court considered whether Title VII of the 1964 Civil Rights Act[93] contained an extraterritorial reach and regulated the practices of United States employers regarding American citizens employed abroad.[94] The *Aramco* majority held that the conduct of United States corporations employing American citizens abroad is not subject to Title VII restrictions.[95]

Writing for the majority, Chief Justice Rehnquist initially identified the Court's duty as one of statutory interpretation.[96] The Chief Justice stated that the Court must determine whether Congress intended the Title VII employment safeguards to protect American citizens working abroad for United States employers.[97] Chief Justice Rehnquist explained that the Court must apply the presumption against extraterritoriality such that a congressional statute will apply only within United States boundaries unless a clear, affirmative statement of contrary intent exists.[98]

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sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.' " *Id.* (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

91 *Id.* at 19. The Court, therefore, declared that the National Labor Relations Board lacked the jurisdiction to conduct a union election for alien workers on a foreign ship. *Id.* at 22.

92 111 S. Ct. 1227 (1991).

93 42 U.S.C. § 2000e (1982). *See also supra* notes 4-5 and accompanying text.

94 *Aramco*, 111 S. Ct. at 1229. *See supra* note 27-29 and accompanying text.

95 *Id.* Chief Justice Rehnquist was joined by Justices White, O'Connor, Kennedy and Souter. *Id.* Justice Scalia concurred in part and in the judgment. *Id.* Justice Marshall, joined by Justices Blackmun and Stevens, dissented. *Id.*

96 *Id.* at 1230. The Court noted that Congress unquestionably has the power to execute its statutes outside the United States. *Id.* (citations omitted). Such a declaration mirrors that of several other cases involving the proposed transnational application of a statute. *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 17 (1963) (regulatory authority of Congress in the National Labor Relations Act reaches the crews of foreign-flagged ships in American waters); Steele v. Bulova Watch Co., 344 U.S. 280, 282-83 (1952) (Congress possesses the power to extend its laws beyond the United States in regulating the practices of American citizens); Blackmer v. United States, 284 U.S. 421, 437 (1932) (United States subpoena and contempt powers can compel a citizen living abroad to return to the United States).

97 *Id.*

98 *Id.* (citing Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)). The Court's articulation of the presumption against extraterritoriality focused on the *Foley Brothers* " 'canon of construction,' " from which the majority re-

Examining whether Title VII expressed such an intent, Chief Justice Rehnquist focused on the EEOC's three-pronged contention that a finding of extraterritorial intent was directed by Title VII's broad jurisdictional definitions, its alien exemption provision and traditional notions of judicial deference to the EEOC's statutory construction.[99]

The majority first considered the EEOC's claim that Title VII's expansive definition of commerce as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof,"[100] clearly evidenced a congressional intent to extend the Title VII safeguards abroad.[101] Describing the statute's definitions as "boilerplate," Chief Justice Rehnquist observed that the alleged Title VII expression of extraterritorial intent mirrored the language of several other statutes which were all territorially construed.[102] Chief Justice Rehnquist disregarded the

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quired a "clearly expressed" intent on the part of Congress to apply a statute beyond the United States. *Id.* (citing Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957); Foley Bros., Inc., v. Filardo, 336 U.S. 281, 285 (1949)).

99 *Id.* at 1230-31.

100 42 U.S.C. § 2000e(g) (1982).

101 *Aramco*, 111 S. Ct. at 1231. Aramco countered with three alternate interpretations. *Id.* First, Congress did not intend the phrase "or between a State and any place outside thereof" to pertain to employment practices entirely within a foreign country. *Id.* (citing Brief for Respondents at 21 n.14). Second, Title VII's manifest lack of the term "foreign" as applied to commerce or industry belies any extraterritorial intent. *Id.* Third, the Senate removed the terms "foreign commerce" and "foreign nations" from the bill before passing the 1964 Civil Rights Act, a clear indication that Congress meant for Title VII to apply territorially. *Id.* (citing Brief for Respondents at 7).

102 *Id.* at 1231-32. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052 (a)(12) (1988) (providing that "[t]he term 'commerce' means trade, traffic, commerce, or transportation (A) between a place in a State any place outside thereof, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)"); Transportation Safety Act of 1974, 49 U.S.C. APP. § 1802 (2) (1988) (defining "commerce" as "trade, traffic, commerce, or transportation, within the jurisdiction of the United States (A) between a place in a State any place outside of such State, or (B) which affects trade, traffic, commerce, or transportation described in clause (A)"); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402 (a) (1988) (stating that " '[c]ommerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof"); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 (b) (1988) (providing that "[t]he term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body"); Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 (1) (1990) (explaining that "commerce means travel, trade, traffic, commerce, transportation, or communication (A) among the several States; (B) between any foreign country or any territory or possession and any

assertion that Title VII's broad jurisdictional language disclosed transnational intent and concluded that the statute's boilerplate definitions failed to overcome the presumption against extraterritoriality.[103] The Court also based its decision on prior case law.[104] Chief Justice Rehnquist noted that the Supreme Court's multifarious rulings on the presumption required a statute to include an unequivocal revelation of an extraterritorial intent and maintained that Title VII's "commerce" definition evinced no such intent.[105]

Moreover, the majority distinguished Title VII from the Lanham Act, which the *Steele* Court construed as extraterritorially intended.[106] Chief Justice Rehnquist illustrated that Title VII lacked the Lanham Act's jurisdictional grant of "all commerce which may lawfully be regulated by Congress."[107] Chief Justice Rehnquist accentuated the language's expansiveness by emphasizing that the Constitution expressly granted congressional power to regulate commerce within foreign countries.[108] The majority reiterated that Title VII's nonspecific language did not constitute a clear expression of congressional intent to provide the statute with extraterritorial effect.[109] Consequently, the Court concluded that Title VII's assertedly broad jurisdictional language did not defeat the presumption against extraterritoriality.[110]

State; or (C) between points in the same State but through another State or foreign country").

103 *Aramco*, 111 S. Ct. at 1231.

104 *Id.* 1232.

105 *Id.* at 1233. As support for its territorial construction of Title VII, the majority pointed to several statutes that contained jurisdictional language as expansive as that of Title VII but which were held to apply only territorially. *Id.* at 1231-32. *See supra* note 102.

106 *Aramco*, 111 S. Ct. at 1232-33 (citing Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 285, 287 (1952)). For a discussion of the *Steele* case, *see supra* notes 67-74 and accompanying text. Chief Justice Rehnquist dismissed as "unpersuasive" the Commission's argument that there is a link between Title VII and the Lanham Act. *Id.* at 1232.

107 *Id.* at 1232-33. The Court observed that Title VII, in contrast to the Lanham Act, expressly derived its definition of "commerce" from the territorially construed LMRA. *Id.* at 1233 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 373 U.S. 10, 15 (1963)).

108 *Id.* at 1232. *See supra* note 71.

109 *Aramco*, 111 S. Ct. at 1233.

110 *Id.* The majority explained:

> Many acts of Congress are based on the authority of that body to regulate commerce among the several States, and the parts of these acts setting forth the basis for legislative jurisdiction will obviously refer to such commerce in one way or another. If we were to permit possible,

Chief Justice Rehnquist next addressed the EEOC's second claim that extraterritoriality was implied in the alien exemption provision which provided that Title VII's restrictions "shall not apply to an employer with respect to the employment of aliens outside any State."[111] The EEOC contended that Congress would not have created such a statutory exception unless it intended to grant extraterritorial protection to at least one category of employees, presumably American citizens.[112] The Court, however, declined to endorse the view that the alien exemption provision illustrated congressional intent to protect American citizens employed abroad by United States corporations.[113] Rather, insisting that a strict reading of Title VII would make the statute applicable to foreign employees in foreign countries, Chief Justice Rehnquist refused to support a statutory construction implicating problematic matters of international relations.[114]

As further evidence of Title VII's strict territorial nature,

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> or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.

Id.

111 *Id.* (citing 42 U.S.C. § 2000e-1 (1982)). The alien exemption provision provides in full:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1 (1982).

112 *Aramco*, 111 S. Ct. at 1233. Aramco responded with two alternate explanations. *Id.* First, the alien exemption clause relates only to aliens working for U.S. employers in U.S. "possessions" which are not "states" under the definitions of Title VII. *Id.* at 1233. Second, the provision serves as a confirmation of Title VII coverage for alien workers in the United States. *Id.* at 1234 (citing Brief for Respondents at 26).

113 *Id.*

114 *Id.* The Court remarked that Title VII contains no facial distinction between American employers and foreign employers, nor is there any evidence that the EEOC proffered a viable rationale for the distinction. *Id.* Title VII's express definition of "employer" lacked any reference to "American" or "foreign." *See* 42 U.S.C. § 2000e (b) (1982). The statute provides:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, [or] a corporation wholly owned by the Government of the United States, . . ., or (2) a bona fide private membership club (other than a labor organization) . . . .

Id.

Chief Justice Rehnquist recognized both the statute's affirmative provisions and omissions.[115] Chief Justice Rehnquist declared that Congress' exclusively domestic intent manifested itself in several statutory clauses.[116] For example, the Court noted that one section[117] precluded Title VII application from interfering with state or local laws unless such laws effected a result prohibited by Title VII.[118] Additionally, Chief Justice Rehnquist observed another section[119] which provided that Title VII should not hinder the execution of state law consistent with Title VII.[120] Chief Justice Rehnquist further discerned that Congress failed to include certain statutory elements in Title VII, such as the term "foreign" as applied to countries or proceedings.[121] Moreover, the majority emphasized that Congress did not place any tools for Title VII transnational enforcement at the EEOC's disposal.[122] The majority argued that the venue provision[123] did not

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115 *Aramco*, 111 S. Ct. at 1234.

116 *Id.*

117 42 U.S.C. § 2000e-7 (1982). The statute provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (1982).

118 *Aramco*, 111 S. Ct. at 1234.

119 42 U.S.C. § 2000h-4 (1982). The statute provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Id.

120 *Aramco*, 111 S. Ct. at 1234. The Court also listed 42 U.S.C. section 2000e-5 as indicative of territorial intent. *Id.* Under this provision, when examining an allegation of employment discrimination, the EEOC must impart "substantial weight" to the pronouncements of state or local officials made in proceedings initiated under state or local law. *Id.*

121 *Id.*

122 *Id.*

123 42 U.S.C. § 2000e-5(f)(3). The venue provision provides in pertinent part:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful

display an intent to apply Title VII abroad because it limited venue to the judicial district where certain specified events pertaining to the cause of action occurred.[124] The Court also recognized that the EEOC's subpoena power was confined to the United States and its territories.[125] As a final example of congressional silence, Chief Justice Rehnquist acknowledged that Title VII did not provide statutory guidelines for dealing with conflicts between Title VII and foreign law.[126] The Court concluded that these examples inherently contradicted an extraterritorial intent.[127]

Moving from its lengthy language examination, the Court next considered the appropriate standard of deference to the EEOC's statutory construction.[128] Chief Justice Rehnquist contended that the level of judicial deference depended largely on the consistency of earlier interpretations.[129] Consequently, the

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> employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

Id.

[124] *Aramco*, 111 S. Ct. at 1234. Title VII allows for venue in the judicial district where the alleged discrimination took place, where the employment records related to the allegedly discriminatory conduct are kept, where the employee would have worked except for such conduct or where the employer's principal office is located. *See* 42 U.S.C. § 2000e-5(f)(3) (1982).

[125] *See* 42 U.S.C. § 2000e-9. Pursuant to a cross-reference within Title VII, the subpoena power of the Commission is identical to that of the National Labor Relations Board (NLRB) under the NLRA. *Id.* Title VII provides in relevant part that "[f]or the purposes of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply." *Id.* Accordingly, the NLRA states:

> Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive witnesses. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

29 U.S.C. § 161 (1) (1988).

[126] *Aramco*, 111 S. Ct. at 1234. The Court contrasted Title VII with the amended Age Discrimination in Employment Act of 1967 (ADEA) which expressly provides for foreign law to displace the ADEA when the two are in conflict. *Id.* (citing ADEA, Pub. L. 90-202, 81 Stat. 602, § 41(f)(1) (1967) (currently codified at 29 U.S.C. 623(f)(1) (1988)).

[127] *Id.* at 1234.

[128] *Id.* at 1235.

[129] *Id.* The majority relied on the elements of the deference test enunciated in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The *General Electric* Court announced that the level of deference due a federal agency's interpretation of a statute turns on " 'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

Court expressed concern over the EEOC's antithetical pronouncements regarding Title VII's extraterritorial application.[130] Chief Justice Rehnquist juxtaposed a 1971 EEOC statement—that Title VII anti-discrimination protections cover "all individuals, both citizens and noncitizens, domiciled or residing in the United States"[131]—with the Commission's later declarations that the statute applied abroad.[132]

Based on the inconsistency, Chief Justice Rehnquist refused to embrace the EEOC's transnational interpretation and deemed it unpersuasive because it did not rebut the presumption against extraterritoriality.[133] Chief Justice Rehnquist admitted that the EEOC's recent extraterritorial proclamations deserved some attention; nevertheless, the Chief Justice dismissed the assertion that they constituted a clearly expressed congressional intent to apply Title VII abroad.[134] Mindful of Congress's previous expressions of extraterritorial intent,[135] Chief Justice Rehnquist

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General Electric, 429 U.S. at 142 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Noting that the guidelines of the EEOC are entitled to some consideration in ascertaining congressional intent, the *General Electric* Court nevertheless asserted that "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, *see* Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942), or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *Id.* at 141 (citation omitted).

130 *Aramco*, 111 S. Ct. at 1235.

131 29 C.F.R. § 1606.1(c) (1971).

132 *See Aramco*, 111 S. Ct. at 1235. The EEOC argued that its extraterritorial interpretation of Title VII appeared consistently in several contexts: a 1975 letter of the General Counsel of the EEOC, the EEOC Chairman's testimony in 1983, a decision rendered by the agency in 1985 and a 1989 Policy Statement, all of which called for Title VII to regulate abroad. *Id.*

133 *Id.* The majority declared that "[t]he EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law." *Id.* Although acknowledging that the interpretive weight of the Commission's various extraterritorial proclamations should not be dismissed entirely, the Court emphasized that their "persuasive value is limited when judged by the standards set forth in *Skidmore*." *Id.* (citations omitted).

134 *Id.*

135 *Id.* at 1235 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989)). The Chief Justice discussed several statutes which Congress specifically imparted with transnational effect, such as the Export Administration Act and the amended ADEA. *Id.* at 1235-36. *See* Export Administration Act, 50 U.S.C. APP. § 2415(2) (1982) (covering every "United States person," defined as "any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern . . . ."); Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (1988)

noted no such exercise in Title VII and concluded that the relevant evidence represented thoroughly unconvincing support for Title VII application abroad.[136]

In a concurring opinion, Justice Scalia sought to clarify the third prong of the majority's analysis which addressed the deference granted to the EEOC's statutory interpretation.[137] Justice Scalia argued that an agency's interpretation should be granted deference wherever reasonable, taking into consideration the traditional judicial canons of construction.[138] Remarking that "deference is not abdication,"[139] Justice Scalia maintained that the EEOC generally deserved greater deference than that conferred by the majority.[140] Justice Scalia concluded, however, that such deference would be unreasonable in this case because the presumption could not be rebutted without a clear expression of congressional intent.[141]

(providing that "[t]he term 'employee' means an individual employed by any employer . . . includ[ing] any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country").

136 *Aramco*, 111 S. Ct. at 1236.

137 *Id.* (Scalia, J., concurring in part and concurring in judgment). Justice Scalia disapproved of the majority's focus on the mere persuasive power, or lack thereof, in the EEOC's interpretation of Title VII. *Id.* Charging that the majority misapplied *General Electric*, Justice Scalia maintained that the guidelines of a non-rulemaking agency are not tantamount to legislative regulations. *Id.* (citing General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976)).

138 *Id.* at 1236-37 (Scalia, J., concurring in part and concurring in judgment) (quoting EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988)). The *Commercial Office Products* Court stated that "the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988). Noting the majority's failure to address the deference standard advanced by *Commercial Office Products*, Justice Scalia commented that because "*Commercial Office Products* has not been overruled (or even mentioned) in today's opinion, . . . the state of the law regarding deference to the EEOC is left unsettled." *Aramco*, 111 S. Ct. at 1236 (Scalia, J., concurring in part and concurring in judgment). *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The *Chevron* Court stated that where Congress expressly authorizes a federal agency to promulgate regulations under a statute, a court may disregard the regulations only if they are arbitrary, capricious, or clearly opposed by the statute. *Id.* at 843-44. The *Chevron* Court explained, however, that where Congress implicitly imparts to an agency the power to interpret a statute through regulations, such regulations must be afforded deference if reasonably constructed. *Id.* at 844.

139 *Aramco*, 111 S. Ct. at 1237 (Scalia, J., concurring in part and concurring in judgment).

140 *See id.* Justice Scalia maintained that "I would resolve these cases by assuming, without deciding, that the EEOC was entitled to deference on the particular point in question." *Id.*

141 *Id.* Justice Scalia stated that the presumption's requirement of a clear expres-

In a vigorous dissent, Justice Marshall denounced the majority's "reformulation" of the presumption and asserted that the Court incorrectly required a clear statement of extraterritorial intent where the circumstances did not call for such a strict approach.[142] Agreeing that congressional intent was the dispositive issue, Justice Marshall declared that the presumption against extraterritoriality took effect only after all indications of legislative intent were exhausted.[143] Justice Marshall explained that consideration of extraterritorial intent must initially focus on any available extrinsic guides, such as the circumstances surrounding the statute's enactment, the legislative history or administrative interpretations.[144] Applying these guides to Title VII, Justice Marshall concluded that Congress clearly intended the statute to operate extraterritorially.[145]

Justice Marshall initially examined the presumption's history.[146] Recognizing two distinct versions of the presumption, the dissent identified the relevant inquiry as whether the statute's extraterritorial application would interfere with or displace a foreign country's domestic law.[147] Justice Marshall posited that if the statute's operation would not interfere, a court should imple-

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sion of transnational intent rendered it unreasonable for the Court "to give effect to mere implications from the statutory language as the EEOC has done." *Id.*

142 *Id.* (Marshall, J., dissenting). Justice Marshall was joined by Justices Blackmun and Stevens. *Id.*

143 *Id.*

144 *Id.* at 1238 (Marshall, J., dissenting). The dissent criticized the Court's treatment of *Foley Brothers*, claiming that the *Foley Brothers* Court's consideration of an entire panoply of intent-indicative factors, before drawing upon the presumption against extraterritoriality, was inconsistent with a construction of the presumption as a clear statement rule. *Id.* at 1237-38 (Marshall, J., dissenting). A clear statement rule, Justice Marshall observed, prevents a court from searching external elements for congressional intent. *Id.* Justice Marshall further posited that the *Foley Brothers* Court's analysis of the Eight Hour Law's overall scheme, legislative history and nondistinction between citizens and aliens, as well as its thorough examination of administrative interpretations, all contradicted the application of the presumption against extraterritoriality as a clear statement rule. *Id.* (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

145 *Id.* at 1237 (Marshall, J., dissenting).

146 *Id.* at 1237-40 (Marshall, J., dissenting). Justice Marshall initially explained that the majority's reworking of the presumption enabled the Court to impart a lack of extraterritorial intent to certain omissions within Title VII, such as the term "foreign" as appended to "nations" or "proceedings." *Id.* at 1237 (Marshall, J., dissenting).

147 *See id.* at 1240 (Marshall, J., dissenting). *See also* Note, *supra* note 36, at 1476-77 ("a court must proceed on an ad hoc basis to resolve whether congressional intent for extraterritorial jurisdiction exists under the particular facts and circumstances at issue," employing the clear expression test only where a statute would engender international contention if applied in foreign countries).

ment the *Foley Brothers* "weak presumption" and thereby scrutinize all available indications of extraterritorial intent before raising the presumptive barrier.[148] Justice Marshall explained that the *Foley Brothers* decision did not rest on the existence of a clear statement of intent but rather on the totality of the circumstances, including the statute's legislative history, overall composition and relevant administrative interpretations.[149]

Further, the dissent set forth the appropriate interpretive framework for courts confronted with a statute's extraterritorial application that would impede the operation of foreign law.[150] Justice Marshall stated that where such application would frustrate international comity notions, a court should use the clear statement standard to ascertain the legislative intent rather than the less exacting *Foley Brothers* approach.[151] Acknowledging the coexistent, but entirely independent, nature of the two construc-

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148 *Aramco*, 111 S. Ct. at 1240 (Marshall J., dissenting). Justice Marshall stressed that the Court in *Foley Brothers* considered the presumption against extraterritoriality to be a valid approach " 'whereby *unexpressed* congressional intent may be ascertained.' " *Id.* at 1238 (Marshall, J., dissenting) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

149 *Id.* The dissent elucidated the difference between a clear statement rule and the *Foley Brothers* approach by contrasting several examples of the former with the latter. *See id. See also* Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (legislative history of the Education of the Handicapped Act is inapposite in ascertaining congressional intent to abolish Eleventh Amendment sovereign immunity because the requisite intent "must be both unequivocal and textual"); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); Webster v. Doe, 486 U.S. 592, 603 (1988) ("heightened showing" of clear intent is required where Congress seeks to constrain review of constitutional claims by the courts); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242, 243 (1985) (congressional duty in statutory override of an Eleventh Amendment right is to render such "intention unmistakably clear in the language of the statute," that is, to "unequivocally express" its intent); Kent v. Dulles, 357 U.S. 116, 130 (1958) (Congress must state its intent to abridge a citizen's associational freedoms "in explicit terms").

150 *Aramco*, 111 S. Ct. at 1239 (Marshall, J., dissenting) (quoting NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979)).

151 *Id.* In *Benz*, the Court refused to construe the Labor Management Relations Act as intended to control labor disputes on foreign vessels between foreign seamen and their foreign employers due to the strong probability of resultant international turmoil. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 146-47 (1957). The *Benz* Court promulgated a demanding rule of statutory construction, available when extraterritorial application would implicate difficult issues of international comity. *Id.* at 147. The Court proclaimed that "[f]or us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147. Similarly, the *McCulloch* Court required a "clear expression" of congressional intent to extend the National Labor Relations Act to alien sailors working on foreign ships due to the

tions, Justice Marshall determined that the majority incorrectly imposed the higher standard.[152] The Justice stressed that the *Benz-McCulloch* approach was inappropriate because Title VII's transnational application would not displace the domestic law of any foreign countries.[153] Justice Marshall charged that the construction utilized by the majority enabled the Court to circumvent the requisite initial analysis regarding international comity, a determination that would have bound the Court to either the *Benz-McCulloch* or *Foley Brothers* approach.[154]

Asserting that Title VII extraterritorial application would not interfere with foreign law because of the statute's focus on United States nationals,[155] Justice Marshall proceeded to examine the relevant indications of congressional intent evident in the statute's language, legislative history and EEOC interpretations.[156] Justice Marshall contended that the express inclusion of commerce "between a State and any place outside thereof," within the range of Title VII-protected conduct, revealed Con-

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extant "highly charged international circumstances." McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 12, 21-22 (1963).

152 *Aramco*, 111 S. Ct. at 1238-39 (Marshall, J., dissenting). Justice Marshall criticized the majority for resorting to "selective quotation" to enunciate its clear statement version of the presumption against extraterritoriality. *Id.* at 1238 (Marshall, J., dissenting). Pointing to its failure to consider the full language and effect of prior decisions, Justice Marshall emphasized that whereas the majority claimed that the Court in both *Chisholm* and *McCulloch* inspected only the language of the relevant statutes for transnational intent, the Court in those cases actually dealt with, respectively, "the circumstances" involved in the statute's enactment, and the statute's "extensive legislative history," as indicators of congressional intent. *Id.* at 1238-39 (Marshall, J., dissenting) (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 (1962); New York Cent. R.R. Co. v. Chisholm, 268 U.S. 29, 31 (1924)). Conversely, the *Foley Brothers* Court sought to determine the unexpressed extraterritorial intent of Congress by analyzing statutory language, legislative history and administrative interpretations. Foley Bros., Inc v. Filardo, 336 U.S. 281, 285-90 (1949).

153 *Aramco*, 111 S. Ct. at 1239 (Marshall, J., dissenting). The dissent argued that the extraterritorial operation of Title VII would not disrupt international comity because the statute only pertains to American nationals abroad. *Id.*

154 *Id.* *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500, 501 (1979) (confronted with a statutory challenge of prominent national interests, the Court must rely on its "prudential policy" of requiring a clear expression of congressional intent to grant jurisdiction over a dispute arising under the statute).

155 *Aramco*, 111 S. Ct. at 1239. *See* Skiriotes v. Florida, 313 U.S. 69, 73 (1941) (Congress may regulate the conduct of American citizens abroad unless such regulation interferes with the rights of foreign countries or foreign citizens).

156 *Aramco*, 111 S. Ct. at 1240-46 (Marshall, J., dissenting). Within its consideration of the language of Title VII, the dissent analyzed the statute's definitions and the alien exemption provision. *Id.* at 1240 (Marshall, J., dissenting). Justice Marshall concluded that these elements exhibited the transnational intent of Congress. *Id.*

gress's extraterritorial intent.[157] Moreover, Justice Marshall proclaimed that the negative inference drawn from the alien exemption provision, suggesting that Congress intended to protect American workers abroad, clearly defeated the presumption.[158] Justice Marshall stressed that Congress would not have designed an exemption if it did not intend to bestow transnational protection upon a category of employees other than aliens.[159] Reviewing the clause's legislative history, the dissent argued that the provision's stated purpose to preclude conflicts of law arising from a United States corporation's employment of a foreign national abroad, further reflected congressional intent to apply Title VII extraterritorially.[160]

Justice Marshall then analyzed the legislature's alleged omissions.[161] The dissent rejected the majority's claim that Congress failed to provide conflicts of law guidelines and noted that the alien exemption provision's express objective was to prevent the discordant operation of Title VII and the laws of foreign countries.[162] The dissent additionally recognized that venue was

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157 *Id.* (quoting 42 U.S.C. § 2000e(g) (1982)). Justice Marshall also asserted that Congress did not condition Title VII protection of an "individual" on any particular location of employment. *Id. See supra* note 4.

158 *Aramco*, 111 S. Ct. at 1240-41 (Marshall, J., dissenting). *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 8 (1989) (statute's explicit inclusion of States within covered "persons" constitutes sufficient expression of congressional intent to abrogate the sovereign immunity of States).

159 *Id.* at 1240 (Marshall, J., dissenting).

160 *Id.* at 1241 (Marshall, J., dissenting) (quoting H.R. REP. No. 570, 88th Cong., 1st Sess. 4) (1963)). Justice Marshall also criticized the majority's flawed treatment of the alien exemption provision. *Id.* at 1242 (Marshall, J., dissenting). Justice Marshall dismissed the Court's insistence that the alien exemption provision functioned merely to confirm statutory protection for aliens working inside the United States as profoundly untenable, because Congress already covered such aliens by applying Title VII to "any individual." *Id.* The dissent also declined to advocate the view that Congress created a transnational exemption to express territorial coverage. *Id.* Similarly, Justice Marshall addressed the contention that Congress enacted the alien exemption provision to preclude the operation of Title VII in United States possessions, which the statute does not cover in its definition of "State." *Id.* The dissent noted that such a construction was allegedly mandated by the decision of the Court in Vermilya-Brown Co. v. Connell, 335 U.S. 377, 390 (1948) which held that the term "possession" in the Fair Labor Standards Act, 52 Stat. 1060 (1938), encompassed leased military bases in foreign countries. *Id.* Justice Marshall explained that the majority's *Vermilya-Brown* objection to extraterritorial application of Title VII served to reinforce the transnational intent of Congress because both possessions and foreign countries are subject to the same presumption against extraterritoriality. *Id.*

161 *Id.* at 1242-44 (Marshall, J. dissenting).

162 *Id.* at 1243 (Marshall, J., dissenting) (quoting H.R. REP. No. 570, 88th Cong., 1st Sess. 4 (1963)). Justice Marshall observed that the express purpose of the provision was " 'to remove conflicts of law which might otherwise exist between the

proper in the judicial district of the employer's principal office[163] and that the statute empowered the EEOC to conduct its Title VII duties at any location.[164] Justice Marshall reasoned that the majority incorrectly asserted that Congress intended a pure territorial scope for Title VII.[165] Justice Marshall also de-emphasized the territorial limitation of the EEOC's subpoena power[166] and contended that the agency's statutory subpoena power was unrelated to the statute's transnational reach.[167] The Justice illustrated that the Age Discrimination in Employment Act[168] was applied extraterritorially despite the statute's express language limiting the EEOC's subpoena power to the United States proper.[169]

Responding to the Court's concern over possible Title VII application to foreign employers, Justice Marshall explained that the coexisting *Foley Brothers* and *Benz-McCulloch* constructions determined a statute's extraterritoriality by first determining the statute's impact if applied transnationally.[170] Thus, the dissent maintained, where a statute purportedly regulates the conduct of foreign nationals abroad and displaces the foreign country's domestic law, the strict *Benz-McCulloch* approach controls.[171] The strict approach, according to the dissent, required a clear statement of transnational intent to overcome the presumption against extraterritoriality.[172] Justice Marshall declared, however, that when applying the same statute to the conduct of American nationals abroad, the less-restrictive *Foley Brothers* standard is used.[173] Justice Marshall asserted that because the alien exemp-

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United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.' " *Id.* (quoting H.R. REP. No. 570, 88th Cong., 1st Sess. 2303 (1963)).

163 *Id.* (quoting 42 U.S.C. § 2000e-5(f)(3) (1982)).

164 *Id.* (Marshall, J., dissenting). Specifically, the EEOC may administer Title VII at its main office in Washington, D.C., or "at any other place." *Id.* (quoting 42 U.S.C. § 2000e-4(f) (1982)).

165 *Id.*

166 *Id.* at 1243-44 (Marshall, J., dissenting). *See supra* note 125.

167 *Aramco*, 111 S. Ct. at 1244 (Marshall, J., dissenting).

168 29 U.S.C. §§ 621-634 (1988). *See supra* note 135.

169 *Aramco*, 111 S. Ct. at 1244 (Marshall, J., dissenting). *See* 15 U.S.C. § 78u(b) (1934). Justice Marshall also observed that although the Securities Exchange Act of 1934 does not grant transnational subpoena power to the Securities and Exchange Commission, the Act is generally construed as applying abroad. *Aramco*, 111 S. Ct. at 1244 (Marshall, J., dissenting).

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.* The dissent asserted that the extraterritorial application of congressional

tion provision applied both to the conduct of American enterprises[174] and United States employers,[175] Congress only intended to regulate the practices of American corporations.[176]

As a final justification, Justice Marshall addressed the EEOC's Title VII interpretations.[177] Justice Marshall stressed that the Commission's transnational Title VII interpretation exhibited a wholly consistent legislative history.[178] The dissent explained that the 1971 EEOC regulation stating that Title VII "protects all individuals, both citizens and noncitizens, domiciled or residing in the United States,"[179] eliminated noncitizenship and residency as unprotected distinctions under Title VII's national origin safeguards.[180] Thus, Justice Marshall concluded that

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statutes to American nationals implicates significantly fewer issues of international comity than such application to foreign nationals. *Id.*

174 *Id.* (quoting H.R. REP. No. 570, 88th Cong., 1st Sess. 4 (1963).

175 *Id.* (quoting S. REP. No. 867, 88th Cong., 2nd Sess. 11 (1964)).

176 *Id.* Justice Marshall opined that "although the issue is not before us in this case, we would not be at a loss for interpretive resources for narrowing Title VII's extraterritorial reach to United States employers should such a construction be necessary to avoid conflicts with foreign law." *Id.*

177 *Id.* at 1244-46 (Marshall, J., dissenting). Justice Marshall also scrutinized the Title VII construction promulgated by the Department of Justice, which, in its capacity as the subordinate Title VII-enforcement agency, advanced the principle that the statute applied beyond the boundaries of the United States. *Id.* at 1245 (Marshall, J., dissenting) (citation omitted).

178 *Id.* at 1245-46 (Marshall, J., dissenting). Justice Marshall observed that the first enunciation of such an extraterritorial construction of the statute occurred in a 1975 letter of the agency's General Counsel. *Id.* at 1245 (Marshall, J., dissenting). The letter stated:

> If [the alien exemption provision] is to have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.

Id. (quoting Letter from W. Carey, EEOC General Counsel, to Senator Frank Church (Mar. 14, 1975)).

Justice Marshall further noted that the EEOC corroborated this initial interpretation in subsequent decisions and policy statements. *Id. See* EEOC Dec. No. 85-16 (Sept. 16, 1985); 38 FEP Cases 1889, 1891, 1892 (examination of Title VII's language reveals that "not only is there no specific exclusion in the Act that would bar its extraterritorial application, a fair interpretation of the language of [the alien exemption provision] leads to the conclusion that Congress intended to protect U.S. citizens working abroad." Consequently, the Commission ruled that Title VII "does apply to covered employers with respect to their employment of U.S. citizens outside the United States").

179 *Id.* (quoting 29 C.F.R. § 1606.1(c) (1971)).

180 *Id.* at 1246 (Marshall, J., dissenting). The majority asserted that this same language evidenced a territorial intent. *See supra* note 131 and accompanying text. Justice Marshall explained that "the EEOC could not have stated that Title VII

Chief Justice Rehnquist failed to defer appropriately to the EEOC's construction of Title VII.[181]

The critical difference between the polar views of Chief Justice Rehnquist and Justice Marshall revolved around the Justices' disparate treatment of the presumption against extraterritoriality.[182] As even a perfunctory comparison between *Foley Brothers* and the *Benz-McCulloch* tandem demonstrates, a judge's reading of the presumption constitutes an essential initial determination that fixes his or her perspective on the statutory elements.[183] Such a judicial dynamic was at work in *Aramco*.[184]

It was in rendering this underlying assessment that the majority misapplied the presumption. The *Aramco* Court failed to appreciate the crucial differentiating inquiry relating to the creation of international discord by a statute's transnational application.[185] An extraterritorial Title VII construction would not disturb international comity because the statute expressly avoids

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protects 'both citizens *and* noncitizens' from national-origin discrimination *outside* the United States because such an interpretation would have been inconsistent with the alien exemption provision." *Aramco*, 111 S. Ct. at 1245 (Marshall, J., dissenting).

[181] *Id.* Justice Marshall described the majority's failure to give effect to the indications of extraterritorial intent in the language and legislative history of Title VII as forging a presumption against extraterritoriality that is "a barrier to any genuine inquiry into the sources that reveal Congress' actual intentions." *Id.*

[182] Justice Marshall incorporated many of the principles relating to the assessment of legislative intent and the presumption against extraterritoriality set forth by Judge King in the panel and en banc dissents in *Boureslan*. Justice Marshall's *Aramco* dissent mirrored the approach of Judge King that "congressional intent to exercise extraterritorial jurisdiction must be explicit only when such an exercise of jurisdiction would violate international law. Where there is no conflict with international law, no *explicit* congressional authorization is needed." Gallozzi, *supra* note 17, at 378.

[183] *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (Congress must clearly and affirmatively express its extraterritorial intent where the transnational operation of a statute would interfere with the sovereignty of a foreign nation); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (clear expression of transnational intent required to rebut the presumption against extraterritoriality if application of statute abroad would disturb international relations); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285-90 (1949) (unexpressed extraterritorial intent of Congress may be discerned through an examination of the statutory language, legislative history and administrative interpretations).

[184] *See* EEOC v. Aramco, 111 S. Ct. 1227 (1991) (presumption against extraterritoriality requires a clear, affirmative expression of transnational intent to overcome the presumption).

[185] Indeed, the majority's approach to the presumption against extraterritoriality typified the judicial tendency, when confronted with a statute silent on its transnational application, "to gravitate toward a narrow interpretation of the statute itself and thereby circumvent thorny, unresolved questions of international law." Turley, *supra* note 5, at 600-01.

conflicts of law issues through the alien exemption provision and the bona fide occupational qualification,[186] which relieves an employer's Title VII obligations where sex, religion or other characteristic comprises a fundamental employment requirement.[187] Consequently, Congress's extraterritorial intent appears in the alien exemption provision and the powerful negative inference derived therefrom. Therefore, Congress only needed to exempt Title VII protection for aliens abroad if the statute applied to American citizens working in foreign countries for United States employers.[188]

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186 42 U.S.C. § 2000-e2(e) (1982). The BFOQ provides:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id. *See* Comment, *supra* note 15, at 139 (1985) (corporation's claim that its employment discrimination is exempted by the BFOQ must meet three criteria: "(1) all or substantially all members of a group must lack a desired characteristic; (2) the link between the desired characteristic and the included group must not be based on stereotypical assumptions; and (3) the desired characteristic must pertain to some action which is essential to the given business").

187 *See* Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984). In *Kern*, an American pilot signed an employment contract with a United States corporation which provided helicopters to oversee the pilgrimage of Moslems into the holy city of Mecca. *Kern*, 577 F. Supp. at 1197. Saudi Arabian law prohibits all non-Moslems from entering the holy city under penalty of death. *Id.* at 1198. Consequently, the corporation required all non-Moslem pilots to convert to Islam. *Id.* After refusing to convert, the plaintiff filed a complaint with the EEOC and brought suit in the United States alleging employment discrimination on the basis of religion. *Id.* The district court declared that since every non-Moslem pilot servicing Mecca faced a beheading upon entry into the holy city, conversion to Islam for a non-Moslem pilot comprised an essential prerequisite for such a pilot to complete his job safely. *Id.* at 1200. Thus, the court concluded that the corporation's discrimination against non-Moslems fell within the BFOQ exception of Title VII. *Id.* at 1201. *See also* Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1302, 1303 (1987) (neither stereotypical assumptions nor mere customer preference constitute a valid BFOQ).

188 *See* Note, *supra* note 36, at 1480. This commentator noted:

> A primary difference between Title VII and the employment-related statutes that have been denied extraterritorial application is Title VII's explicit exclusion of aliens employed abroad. The restricted statutes contain no such exclusion and thus present no formal bar to extending United States jurisdiction from the United States plaintiff in

The majority, however, incorrectly fashioned the presumption against extraterritoriality by misconstruing precedent and, as Justice Marshall charged, grossly distorting[189] the extraterritorial intent requirement to demand a clear expression of such intent.[190] Indeed, Chief Justice Rehnquist ignored the co-existing *Foley Brothers* and the *Benz-McCulloch* constructions. The *Foley Brothers* Court promulgated one standard, the so-called weak presumption, for discerning "unexpressed congressional intent"[191] and another standard, requiring "a clearly expressed purpose,"[192] where a statute's transnational application would result in the regulation of "labor conditions which are the primary concern of a foreign country."[193] The latter standard was subsequently adopted as the *Benz-McCulloch* test.[194] While the *Foley Brothers* Court stressed the Eight Hour Law's failure to distinguish between coverage of citizens and of aliens working abroad,[195] the *Aramco* Court dismissed the effect of the alien exemption provision, which explicitly denied Title VII protections to aliens working abroad while impliedly granting extraterritorial application of the statute to American citizens.[196] Thus, the ma-

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> the case before the court to foreseeable alien plaintiffs claiming United States statutory protections over their employment conditions abroad. In Title VII litigation, however, the statute's explicit exclusion of alien employees abroad prevents the threat of such interference with the sovereignty of another nation over the employment of its own nationals within its borders.

Id.

189 *Aramco*, 111 S. Ct. at 1237 (Marshall, J., dissenting).

190 *See* Prentice, *The Muddled State of Title VII's Application Abroad*, 41 LAB. L.J. 633, 640 (1990) ("the presumption against extraterritorial application of U.S. laws should not be an especially strong one in the modern era unless there is a real danger that such an application will infringe upon the sovereignty of foreign nations in some substantial way.").

191 Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

192 *Id.* at 286.

193 *Id.*

194 *See supra* notes 80, 90.

195 *Foley Bros., Inc.*, 336 U.S. at 286. The *Foley Brothers* Court expressed concern over the statute's potential application to foreign nationals, stating:

> Unless we were to read a [citizen/alien] distinction into the statute we should be forced to conclude . . . 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. . . . 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.

Id.

196 *See* Note, *supra* note 36, at 1473-74 (if merely applied to non-citizens in the

jority erroneously disregarded the statutory element present in Title VII, which the *Foley Brothers* Court found so glaringly absent in the Eight Hour Law, a statute construed as entailing a mere territorial scope.[197]

The sources constituting the pre-*Aramco* rendition of the presumption against extraterritoriality presented the Supreme Court with the opportunity to produce the desideratum of transnational statutory interpretation, a principled, comprehensive explication of the presumption and its dual applicability.[198] The *Aramco* Court clearly declined to foster this objective.[199] Attempting to exhume the presumption from the majority's prohibitively strict interpretation, however, Justice Marshall accurately delineated the two distinct rules of construction,[200] one of which a court may implement depending on whether the statute's extraterritorial application interferes with a foreign nation's domestic law.[201]

The *Aramco* Court's unwillingness to ascribe an extraterritorial intent to Congress's promulgation of Title VII signals a dire period for Americans working for United States corporations abroad.[202] As a result of the *Aramco* decision, American employees now forfeit Title VII protections when transferred or assigned abroad by their United States employers. Concomitantly, the court has created a disincentive for Americans to relocate and

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United States, and not to American employees abroad, the alien exemption provision would be superfluous and would deny the "more meaningful construction" of Title VII).

197 *See supra* note 195.

198 *See* Note, *supra* note 36, at 1476. *See also* Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U.L. REV. 339, 392 (1990) ("The central problem with the presumption against extraterritoriality is not conflict with other canons (though some exist), but the fragile theoretical basis upon which it rests in the contemporary world. While the presumption may have had some historical relevance at its inception, there is no current support for the presumption's underlying [territorialist] assumption about Congress's behavior or, more broadly, the behavior of the world markets").

199 *See* EEOC v. Aramco, 111 S. Ct. 1227, 1230 (1991) (notwithstanding an extraterritorially-applied statute's failure to interfere with foreign law, the statute must contain the clearly expressed transnational intent of Congress in order to rebut the presumption against extraterritoriality).

200 *Id.* at 1244 (Marshall, J., dissenting).

201 *See* Note, *supra* note 36, at 1477 ("The first step in [the extraterritoriality] analysis is to determine whether the assertion of U.S. jurisdiction over the defendant would interfere with accepted jurisdictional principles of international law").

202 *See* Barbash, *Same Boss, Different Rules: An Argument for Extraterritorial Extension of Title VII to Protect U.S. Citizens Employed Abroad by U.S. Multinational Corporations*, 30 VA. J. INT'L L. 479, 513 (1990) (all United States laws prohibiting employment discrimination should be applied transnationally in order to protect American nationals working abroad from any type of inequitable conduct by American employers).

work in a foreign country.[203] Further, the *Aramco* decision will place American employers at a distinct disadvantage in an increasingly global marketplace.[204] American employers may be unable to induce their employees, particularly minorities, to work abroad because of misgivings in surrendering Title VII's anti-discrimination shield.[205] As foreign assignment remains a necessary employment condition, the need for Title VII protections abroad

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[203] *See id.* at 483 ("It is irrational that a U.S. employee who wishes to work in the foreign office of a U.S. company is stripped of his or her right under Title VII to be free from discrimination in the workplace"); Note, *supra* note 187, at 1296 ("because foreign service may be a prerequisite to promotion within the hierarchy of American multinational enterprises, allowing companies to discriminate on the basis of race, religion, sex, or national origin in the assignment of employees abroad will often lead to discriminatory promotional practices at home").

[204] While *Aramco* creates serious problems for American employers in one regard, the decision impermissibly shelters flagrant employment discrimination by United States corporations against their American employees, as long as the practice occurs on foreign soil. *See* Barbash, *supra* note 202, at 508. Professor Barbash specifically noted:

> Companies incorporated in America but based overseas should not be able to use their location to thwart the reach of Title VII. Such multinational corporations must not be allowed to abuse their employees while companies located in the United States, both domestic and foreign-owned, are required by law to treat their employees in a nondiscriminatory fashion.

See id. *See also* Note, *supra* note 36, at 1481 (extending Title VII abroad would effectuate the underlying remedial nature of the statute and would deter further discriminatory employment practices by United States corporations in foreign countries).

[205] Boureslan v. Aramco, 857 F.2d 1014, 1027 (5th Cir. 1988) (King, J., dissenting). In a panel dissent, Judge King objected to the majority's failure to extend Title VII extraterritorially by way of illustration and declared that two American employees of a U.S. corporation, one working in the United States, the other working in a foreign country, could suffer the same discriminatory acts, while only the former would have recourse under Title VII. *Id.* Judge King continued:

> [T]his situation creates a dilemma for minorities and women: foreign assignments will be less attractive, while refusal of such an assignment could limit an individual's opportunity for advancement. . . . Extraterritorial application of Title VII may therefore be necessary to ensure that members of protected groups have equal opportunity with respect to foreign assignments that would affect their employment opportunities in the United States.

Id. *See* Turley, *supra* note 198, at 389-90 ("Millions of United States citizens work outside the country and tens of millions are vulnerable to transfer overseas. The presumption places all employees in a perverse position. Companies desiring to discriminate will be able to use employee refusal to transfer abroad as a legitimate cause for termination. If, on the other hand, a minority employee accepts the reassignment, the company can then fire the employee for overtly discriminatory reasons if it so wishes"); Comment, *The Multinational Enterprise and Title VII: Equal Employment Opportunities for Americans at Home and Abroad*, 4 EMORY INT'L L. REV. 373, 410 (1990) ("The only reasonable interpretation of Title VII is to apply it extraterritorially").

has never been greater than on the eve of the European community consolidation and the extraordinary challenges and opportunities that such an event presents American business.[206] The *Aramco* Court's refusal to apply Title VII extraterritorially undermines a most vital statutory catalyst which had secured the American employment relationship from discrimination since 1964.[207]

Edwin F. Chociey Jr.

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206 The establishment of a unified Internal Market within Europe will not only benefit the European Community (EC of the Community) member states, but also foreign manufacturers who do business with EC nations due to the removal of legislative hindrances to intra-European trade. Comment, *The Single European Act: A Profitable Perspective Not Only for the European Community*, 20 SW. U.L. REV. 175, 184, 187 (1991). The Single European Act's (the Act) dismantling of economic, physical and technical barriers to free trade and movement will provide American firms with excellent opportunities for investment and exporting. Jones, *Putting "1992" in Perspective*, 9 NW. J. INT'L. L. & BUS. 463, 476 (1989). Concomitantly, the Act will increase the competitiveness of EC firms both worldwide and within the Community thereby creating risks for United States corporations seeking to reach into and beyond the Internal Market of 1992. *Id.* The major innovation of the Internal Market is the establishment of a largely uniform program of testing standards and trade regulations. Bangemann, *Fortress Europe: The Myth*, 9 NW. J. INT'L. L. & BUS. 480, 481 (1989). Such a program will facilitate the free movement of EC-manufactured goods as well as foreign products injected into the markets of EC nations. Van Voorst tot Voorst, *Europe 1992: Free Movement of Goods in the Wider Context of a Changing Europe*, 25 COMMON MKT. L. REV. 693, 704 (1988). Consequently, the Internal Market will eliminate regulatory distinctions between EC goods and foreign goods. *Id.* Further, the community banking policy of product and geographical deregulation will thrust EC financial centers into the center of international business. Zavvos, *Banking Integration and 1992: Legal Issues and Policy Implications*, 31 HARV. INT'L. L.J. 463, 464 (1990). Thus, the EC's support for the liberalization of world trade through the Single European Act, will greatly benefit foreign corporations by allowing them to manufacture a product in conformity with only one set of community-wide specifications. Moens, *The 1992 Challenge: The Right of Establishment and the Freedom of Movement of Goods in the European Community*, 16 U. QUEENSLAND L.J. 70, 74, 76 (1990). Indeed, such trade benefits for non-EC nations belie the Act's alleged creation of an independent super-state. Campbell, *The Single European Act and the Implications*, 35 INT'L & COMP. L.Q. 932, 938 (1986). There is some concern, however, that the Act will render Western Europe impermeable to foreign trade and investment. Jarvis, *American Business and the Single European Act: Sealing the Walls of "Fortress Europe"*, 20 CAL. W. INT'L L.J. 227, 251 (1990). To rally support among EC countries for the implementation of the Act, the planners of the Internal Market pledged that foreign firms would be constrained from entering the Market until every Community member realizes the advantages of the Act. *Id.* Thus, the Act will unavoidably create the so-called Fortress Europe. *Id.*

207 The application of Title VII to United States corporations operating in foreign countries would be consistent with the international consensus on eliminating discrimination in employment. Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1299-1300, 1301 (1987). Consequently, foreign opposition to an extraterritorial construction of the statute should be unpersuasive. *Id.* The protection of American workers form civil rights violations by United States employers would effectuate the worldwide interest in equal employment op-

portunity. Comment, *supra* note 205, at 384-85. Despite the emerging interdependency of national economies, American courts refuse to disavow their territorialist approach to labor disputes, which is a perspective better suited to the beginning half of the century. Turley, *supra* note 6, at 663-64.