

# *Fordham International Law Journal*

---

*Volume 12, Issue 3*

1988

*Article 8*

---

## Boureslan v. Aramco: Equal Employment Opportunity for U.S. Citizens Abroad

Lucien A. Moolenaar III\*

\*

Copyright ©1988 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Boureslan v. Aramco: Equal Employment Opportunity for U.S. Citizens Abroad

Lucien A. Moolenaar III

## **Abstract**

This Comment argues that prevailing principles of statutory construction compel the application of Title VII to the employment of U.S. citizens abroad by U.S. employers. Part I summarizes the factual background and legal analysis of the Boureslan [v. Aramco] decision. Part II examines the legal principles that govern the extraterritorial application of U.S. statutes. Part III argues that Congress intended Title VII to apply abroad and that international law permits such application. The Comment concludes that extraterritorial application of Title VII is necessary to secure all U.S. citizens the freedoms that Congress intended.

## COMMENT

### *BOURESLAN v. ARAMCO*: EQUAL EMPLOYMENT OPPORTUNITY FOR U.S. CITIZENS ABROAD\*

#### INTRODUCTION

Congress enacted title VII of the Civil Rights Act of 1964 ("Title VII")<sup>1</sup> to remedy racial, religious, sex, and ethnic discrimination in employment.<sup>2</sup> Although Title VII does not affirmatively state the geographical limits of its application, courts have construed it to protect all U.S. citizens from discrimination by U.S. companies regardless of the place of employment.<sup>3</sup> The Court of Appeals for the Fifth Circuit, how-

---

\* This Comment received the 1989 Foyen & Peri Award at the Fordham University School of Law.

1. Pub. L. No. 85-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. IV 1986)).

2. See H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 26, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2401 ("The purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin."). The essence of Title VII is § 704(a), which declares that it shall be an unlawful employment practice for an employer

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

42 U.S.C. § 2000e-2(a); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." (citation omitted)).

3. See, e.g., *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590, 592 (D. Md. 1986) (hearing U.S. employees' sex-discrimination suit against U.S. employer in West Germany); *Bryant v. International Schools Servs.*, 502 F. Supp. 472, 482-83 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (hearing U.S. teachers' sex discrimination suit against U.S. school in Iran); *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978) (barring Canadian porters' discrimination suit against railroad but stating that Title VII protects U.S. citizens employed abroad); see also *Kern v. Dynallectron*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (D.C. Cir. 1984) (applying Title VII to discrimination suit brought by U.S. citizen employed in Saudi Arabia without explicitly addressing threshold question of Title VII's extrater-

ever, recently held in *Boureslan v. Aramco*<sup>4</sup> that Title VII has no extraterritorial application. This unprecedented holding frustrates Congress's intent to afford equal employment opportunity to all U.S. citizens<sup>5</sup> and derogates from the growing international consensus against employment discrimination.<sup>6</sup>

This Comment argues that prevailing principles of statu-

ritorial jurisdiction). See generally C. SULLIVAN, EMPLOYMENT DISCRIMINATION § 1.10.4 (2d ed. 1988) (discussing history of Title VII's extraterritorial application).

4. 857 F.2d 1014, *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

5. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (Congress enacted Title VII to remove impediments to equal employment opportunity for all).

6. Several international agreements condemn employment discrimination. For example, the International Labor Organization Convention Concerning Discrimination in Respect of Employment and Occupation, *opened for signature* June 25, 1958, 362 U.N.T.S. 31 [hereinafter Convention Concerning Employment Discrimination], censures discrimination on the basis of "race, colour, sex, religion, political opinion, national extraction or social origin" and states that each member state shall "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." *Id.* at 32, 34 (emphasis added).

The International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Convention on Racial Discrimination] defines "racial discrimination" to include "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin . . ." *Id.* at 216 (emphasis added). States parties to this convention condemn racial discrimination and "undertake to prohibit and to eliminate racial discrimination in all its forms" and to guarantee to everyone equality before the law in the enjoyment of certain enumerated rights, including "[t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, [and] to just and favourable remuneration." *Id.* at 220, 222 (emphasis added).

States parties to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 [hereinafter Convention on Discrimination Against Women], condemn discrimination on the basis of sex and

shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.

*Id.* at 39 (emphasis added); see *infra* notes 143-46 and accompanying text (further discussion of these international agreements); I THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (P. Alston ed. 1982) (discussing the emergence of human rights as an international legal objective and discussing selected international human rights instruments); Dehner, *Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right*, 15 HARV. INT'L L.J. 71, 92 (1974) (nearly all nations condemn racial discrimination; most prohibit public and private discrimination by constitution or statute). But see E. RHODIE, DISCRIMINATION IN THE CON-

tory construction compel the application of Title VII to the employment of U.S. citizens abroad by U.S. employers. Part I summarizes the factual background and legal analysis of the *Boureslan* decision. Part II examines the legal principles that govern the extraterritorial application of U.S. statutes. Part III argues that Congress intended Title VII to apply abroad and that international law permits such application. This Comment concludes that extraterritorial application of Title VII is necessary to secure to all U.S. citizens the freedoms that Congress intended.

### I. BOURES LAN V. ARAMCO

In 1980, Ali Boureslan, a naturalized U.S. citizen, began work in Saudi Arabia with Arabian American Oil Company ("Aramco"), a U.S. corporation.<sup>7</sup> According to Mr. Boureslan, in 1982, his supervisor initiated a "campaign of harassment" against him that consisted of racial, religious, and ethnic slurs.<sup>8</sup> This campaign resulted in the termination of his employment in June 1984.<sup>9</sup> After his discharge, Mr. Boureslan initiated suit against Aramco pursuant to Title VII in the District Court for the Southern District of Texas.<sup>10</sup> In his suit, Mr. Boureslan alleged that Aramco violated Title VII by discharging him because of his race, religion, and national origin.<sup>11</sup>

As the alleged discrimination occurred outside the United

---

STITUTIONS OF THE WORLD (1984) (discussing anomalous cases of institutionalized discrimination in selected constitutions from around the world).

7. *Boureslan*, 857 F.2d at 1016. In 1979, Mr. Boureslan began work as an engineer for Aramco Services Company ("ASC"), a subsidiary of Arabian American Oil Company ("Aramco"). *Id.* ASC is a Delaware corporation with its principal place of business in Houston, Texas. *Id.* In 1980, Mr. Boureslan transferred from ASC in Houston to Aramco in Saudi Arabia. *Id.* Aramco is a Delaware corporation with its principal place of business in Dhahran, Saudi Arabia and is licensed to do business in Texas. *Id.*

8. Brief of Appellant at 4, *Boureslan v. Aramco*, 857 F.2d 1014 (No. 87-2206), *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988) [hereinafter Brief of Appellant]. In February 1982, Mr. Boureslan submitted a formal grievance against his supervisor, and an apology was issued. *Id.*

9. *Boureslan*, 857 F.2d at 1016. Mr. Boureslan alleged that following his submission of the formal grievance, Aramco and ASC "manipulated their policies and procedures to create a record that would justify [Mr. Boureslan's] termination." Brief of Appellant, *supra* note 8, at 4.

10. *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd*, 857 F.2d 1014, *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

11. Brief of Appellant, *supra* note 8, at 4-5. Mr. Boureslan alleged that his "dis-

States, the district court confronted the threshold question of whether Title VII applied to U.S. citizens employed abroad.<sup>12</sup> Finding that Title VII has no extraterritorial application,<sup>13</sup> the

---

charge was pretextual in nature and that [he] was discharged because of his race, religion, and national origin." *Id.* at 5.

12. *Boureslan*, 653 F. Supp. at 629. Federal subject matter jurisdiction was predicated on Title VII. *Id.* Therefore, the district court was forced to decide the threshold question of whether Title VII applied to the employment of U.S. citizens abroad before reaching the merits of Mr. Boureslan's claim. See *MTM, Inc. v. Baxley*, 420 U.S. 799, 803 (1975); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 540 (1972).

13. *Boureslan*, 653 F. Supp. at 629. The court first examined Title VII's language. As the statute does not affirmatively state the scope of its jurisdiction, the court focused on the so-called "alien exemption provision," which provides that "[Title VII] shall not apply to an employer with respect to the employment of aliens outside any State." 42 U.S.C. § 2000e-1 (1982). The court considered a series of district court cases that interpreted the provision to extend coverage to U.S. citizens employed abroad. See, e.g., *Bryant v. International Schools Servs.*, 502 F. Supp. 472, 482 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (alien exemption provision reveals that Congress intended Title VII to protect U.S. citizens employed abroad); *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978) (alien exemption provision means that Title VII applies to U.S. citizens employed outside the United States); see also *infra* notes 101-108 and accompanying text. The *Boureslan* court did not mention *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590, 592 (D. Md. 1986) (alien exemption provision brings within Title VII U.S. citizens employed abroad by U.S. companies), the most recent case that accords with *Bryant* and *Love*. See *infra* notes 109-12 and accompanying text. The court also considered a Supreme Court case that construed the provision to cover aliens employed within the United States without expressing any opinion as to the coverage of U.S. citizens employed outside the United States. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973); *infra* notes 93-99 and accompanying text. Without explanation, the *Boureslan* court rejected the former construction as "suspect." See *Boureslan*, 653 F. Supp. at 630.

The court further found that Title VII's legislative history revealed no indication that Congress was concerned with discrimination abroad. *Id.*

The district court compared Title VII to the Age Discrimination in Employment Act (the "ADEA"), which, as originally enacted, did not expressly provide for extraterritorial application. Pub. L. No. 90-202, § 11, 81 Stat. 602, 605-07 (1967) (current version at 29 U.S.C. §§ 621-34 (1982 & Supp. IV)); see *Boureslan*, 653 F. Supp. at 631. In 1984, Congress strengthened the ADEA, adding explicit language covering U.S. citizens employed abroad. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (amending 29 U.S.C. § 630(f) (1982)). The legislative history of the ADEA amendment reveals that the drafters' purpose was to close the loophole created by courts that construed the ADEA not to cover older U.S. citizens employed abroad. See *Age Discrimination and Overseas Americans, 1983: Hearing on S. 558 Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 1-2 (1983)* (opening statement of Senator Charles E. Grassley, subcommittee chairman). The district court concluded from the development of the ADEA and from the absence of similarly explicit language in Title VII that Congress intended Title VII to apply only within the United States. *Boureslan*, 653 F. Supp. at 631; see *infra* notes 49-51 and accompanying text.

Finally, the court suggested that a "potential conflict" between Title VII and

district court dismissed Mr. Boureslan's claim for lack of subject matter jurisdiction.<sup>14</sup>

In his appeal to the Court of Appeals for the Fifth Circuit,<sup>15</sup> Mr. Boureslan maintained that the existing authority mandates the extraterritorial application of Title VII.<sup>16</sup> The Equal Employment Opportunity Commission (the "EEOC" or the "Commission"), the executive agency charged with administering and enforcing Title VII,<sup>17</sup> submitted an *amicus curiae* brief on Mr. Boureslan's behalf.<sup>18</sup> In its brief, the EEOC argued that Title VII protects all U.S. citizens from employment discrimination by a U.S. company regardless of the place of employment.<sup>19</sup> Aramco contended that Title VII's language and legislative history did not support extraterritorial application.<sup>20</sup>

The Fifth Circuit in *Boureslan* began its analysis of Title VII by invoking the presumption against extraterritoriality.<sup>21</sup> Under this standard, courts presume that U.S. legislation is meant to apply only within the territorial jurisdiction of the United States unless a contrary congressional intent appears.<sup>22</sup>

Saudi Arabia's Labor and Workman Law of 1959 is one of the "significant policy reasons for not applying Title VII abroad." *Boureslan*, 653 F. Supp. at 631. The court did not, however, specify any actual conflict. See *infra* notes 138-42 and accompanying text.

14. *Boureslan*, 653 F. Supp. at 631.

15. *Boureslan v. Aramco*, 857 F.2d 1014, *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

16. Brief of Appellant, *supra* note 8, at 6.

17. See 42 U.S.C. § 2000e-5(a) (1982). The Civil Rights Act of 1964 created the EEOC and delegated to the agency the primary responsibility to administer and enforce Title VII. *Id.*; see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 61-62 (1984).

18. Brief of the Equal Employment Opportunity Commission *Amicus Curiae*, *Boureslan v. Aramco*, 857 F.2d 1014 (No. 87-2206), *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988) [hereinafter EEOC Brief].

19. *Id.* at 6. The EEOC argued that Title VII's language and legislative history revealed congressional intent to cover U.S. citizens employed abroad. *Id.* at 6-14. The agency further argued that its consistent interpretation of Title VII is entitled to judicial deference. *Id.* at 15-16. Finally, the EEOC argued that the application of Title VII to the employment abroad of U.S. citizens does not conflict with principles of international law or infringe on Saudi Arabian sovereignty. *Id.* at 16-20.

20. Brief of Appellee Arabian American Oil Company ("Aramco"), *Boureslan v. Aramco*, 857 F.2d 1014 (No. 87-2206), *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

21. *Boureslan v. Aramco*, 857 F.2d 1014, 1016-17, *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

22. See, e.g., *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) ("This Court has often stated that the legislation of Congress will not extend beyond the bounda-

In order to overcome the presumption against extraterritoriality, the court sought in Title VII a "clear congressional expression of intent" to apply the statute abroad.<sup>23</sup>

To ascertain congressional intent, the Court of Appeals first examined Title VII's language. As Title VII does not explicitly state that it applies abroad, the court focused on the alien exemption provision, which states that Title VII shall not apply to the employment of aliens abroad.<sup>24</sup> The court noted that the provision had been construed in two ways: to mean that Title VII covers U.S. citizens employed abroad,<sup>25</sup> and to mean that Title VII covers aliens employed within the United States.<sup>26</sup> The court concluded that because the same language had supported two different constructions,<sup>27</sup> the alien exemption provision alone did not warrant a construction that overcomes the presumption against extraterritoriality.<sup>28</sup>

Second, the Court of Appeals considered Title VII's legislative history.<sup>29</sup> The court examined the House Reports ac-

---

ries of the United States unless a contrary legislative intent appears."); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained." (citation omitted)).

23. *Boureslan*, 857 F.2d at 1017.

24. *See id.* at 1018. The alien exemption provision provides that "[Title VII] shall not apply to an employer with respect to the employment of aliens outside any State . . ." 42 U.S.C. § 2000e-1.

25. *Boureslan*, 857 F.2d at 1018 (citing *Bryant v. International Schools Servs.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982)).

26. *Id.* (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973)). Compare *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590, 592 (D. Md. 1986) (holding that Title VII protects U.S. employees in West Germany from employer's sex discrimination) with *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (finding that Title VII permitted resident alien to bring discrimination suit against employer). *See infra* notes 93-100, 109-12 and accompanying text.

27. *Boureslan*, 857 F.2d at 1018. The court stated, "[w]e do not face a choice between attaching [the extraterritorial interpretation] to the alien exemption provision or stripping the provision of all purpose. If we decline to give the alien exemption provision the interpretation [favoring extraterritoriality], the provision still is a meaningful and useful part of [Title VII]." *Id.*

28. *Id.*

29. *Id.* at 1019-20. The court considered four statements in the legislative history. First, a House Report that accompanied Title VII to the Senate in which Title VII's passage was declared necessary "[t]o remove obstructions to the free flow of interstate and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution." H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 26 (1963), *reprinted in*



companying Title VII and concluded that they did not contain the clear expression of congressional intent required to overcome the presumption against extraterritoriality.<sup>30</sup>

Although the U.S. Supreme Court has held that the EEOC's interpretation of Title VII is generally entitled to deference,<sup>31</sup> the *Boureslan* court asserted that this case warranted less deference than usual.<sup>32</sup> In a footnote, the court noted that because the issue was a jurisdictional one in which the EEOC had developed no particular expertise, it would not defer to the Commission's view that Title VII applies abroad.<sup>33</sup>

---

1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2402. Second, the court considered the statement by Representative William McCulloch, ranking minority member of the Judiciary Committee, that "[a] key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and of the several States." *Id.* at pt. 2, at 1, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2488. Third, the court considered another statement in the same report—that "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them." *Id.* at 29, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2516. Fourth, the court considered a committee hearing on the bill that was later enacted as Title VII. *Civil Rights: Hearings on H.R. 7152, as amended by Subcomm. No. 5 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1963)* [hereinafter *Hearings on H.R. 7152*]. A house report submitted at this hearing explained that "[t]he intent of the [alien] exemption [provision] is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. REP. NO. 570, 88th Cong., 1st Sess. 4, *reprinted in Hearings on H.R. 7152, supra*, at 2303; *see infra* notes 116-28 and accompanying text.

30. *Boureslan*, 857 F.2d at 1020.

31. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973) (finding that the EEOC's interpretation of Title VII is "entitled to great deference"); *see infra* notes 93-100 and accompanying text (discussing the *Espinoza* case). In *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984), the United States Supreme Court established an analytical regime that requires a court to defer to an administrative agency's "permissible" construction of ambiguous language in a statute for which it is responsible. *Chevron*, 467 U.S. at 842-44; *see infra* notes 67-76 and accompanying text (setting forth the *Chevron* analysis); *infra* notes 124-37 and accompanying text (applying the *Chevron* analysis to the EEOC's interpretation of Title VII's extra-territorial jurisdiction).

32. *Boureslan*, 857 F.2d at 1019 n.2.

33. *Id.* In footnote 2, the court stated:

In *Espinoza* . . . the Court noted that the EEOC's interpretation of Title VII is generally entitled to deference. However, such interpretations are not controlling on the courts. Because this is a jurisdictional issue with little or no statutory language or legislative history, and one in which the EEOC has developed no particular expertise, we give the EEOC's interpretation less deference than usual. This is particularly appropriate given the traditional presumption against extraterritoriality.

*Id.*; *see infra* notes 67-76 and accompanying text; *infra* notes 124-37 and accompanying text.

The Court of Appeals concluded that neither Title VII's language nor its legislative history manifested congressional intent sufficient to overcome the presumption against extraterritoriality.<sup>34</sup> Accordingly, the court affirmed the district court's dismissal of the action.<sup>35</sup>

## II. PRINCIPLES OF EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES

A sovereign nation has jurisdiction to prescribe law regulating the conduct of its nationals both within and without its territory.<sup>36</sup> Congress, therefore, has the power to extend the reach of U.S. statutes to U.S. citizens outside the United States.<sup>37</sup> Whether Congress has exercised this power with respect to any particular statute is primarily a matter of statutory

---

34. *Boureslan*, 857 F.2d at 1021; see *infra* notes 113-23 and accompanying text.

35. *Id.*

36. See, e.g., *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Blackmer v. United States*, 284 U.S. 421, 436 (1932); *Cook v. Tait*, 265 U.S. 47, 54-56 (1924). Jurisdiction to prescribe law refers to a state's authority to make its law applicable to persons or activities. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987) [hereinafter RESTATEMENT THIRD]. Territoriality and nationality are the principal independent bases of jurisdiction to prescribe law. *Id.* § 402 comment a. The territoriality principle confers upon a state jurisdiction over conduct that occurs within its borders. *Id.* § 402(1)(a)-(b) & comment c. The territoriality principle includes the "effects" doctrine, which confers jurisdiction over conduct that occurs outside a state but that has or is intended to have substantial effect within it. *Id.* § 402(1)(c), comment d. The nationality principle confers upon a state jurisdiction over the conduct of its nationals outside as well as within its territory. *Id.* § 402(2). The nationality principle applies to both natural and juridical persons—the nationality of a juridical person being that of the state under whose laws it was organized. *Id.* § 402 comment e. The nationality principle, therefore, supports U.S. jurisdiction to prescribe its laws extraterritorially to U.S. citizens. See, e.g., *Steele*, 344 U.S. at 282 (applying the Lanham Trade-Mark Act, 15 U.S.C. §§ 1051-1127 (1982 & Supp. IV 1986), to conduct of U.S. citizen in Mexico).

37. See, e.g., *Steele*, 344 U.S. at 282 ("Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."); *Foley*, 336 U.S. at 284 (Congress has power to extend Eight Hour Laws, Act of Aug. 1, 1892, ch. 352, 27 Stat. 340 (current version at 40 U.S.C. §§ 928-933 (1982)), to work performed by U.S. citizens for U.S. contractor in Iraq and Iran); *Blackmer*, 284 U.S. at 436 (U.S. citizen residing abroad remains bound by U.S. laws applicable to his situation and therefore is subject to subpoena); *Cook*, 265 U.S. at 54-56 (Congress has power to tax income received by a U.S. citizen residing abroad from property situated abroad). See generally Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1311-18 (1985) (reviewing approaches to extraterritorial jurisdiction in the areas of antitrust, securities regulation, and foreign trade controls).

construction.<sup>38</sup> In addition to construing a statute's language and legislative history,<sup>39</sup> a court may consider the interpretation, if any, given a statute by the executive agency that is responsible for its administration<sup>40</sup> as well as relevant principles of international law.<sup>41</sup>

#### A. *The Presumption Against Extraterritoriality*

Under prevailing principles of statutory construction, federal legislation is presumed to apply only within the territorial limits of the United States unless a contrary congressional intent appears.<sup>42</sup> Congressional intent to apply a statute extraterritorially may be ascertained primarily from the statutory language.<sup>43</sup>

The "plain meaning rule" of construction, rooted in English jurisprudence, embodied the primacy of statutory language.<sup>44</sup> Under this rule, courts rejected extrinsic interpretive

38. *Steele*, 344 U.S. at 282-83 (whether Lanham Act applies to acts by a U.S. citizen in Mexico "depends on construction of exercised congressional power, not the limitations upon that power itself"); *Foley*, 336 U.S. at 284-85 ("The question . . . is not the power of Congress to extend the Eight Hour Law to work performed in foreign countries [for] such power exists. The question is rather whether Congress intended to make the law applicable to such work." (citations omitted)).

39. *See, e.g.*, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-84 (1984) (construing the language and legislative history of § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1982)); *see infra* notes 43-66 and accompanying text.

40. *See, e.g.*, *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984) (deferring to the EPA's interpretation of terms used in the Clean Air Act Amendments of 1977, 42 U.S.C. § 7502(b)(6) (1982)); *see infra* notes 67-76 and accompanying text.

41. *See, e.g.*, *Steele*, 344 U.S. at 280 (considering principles of international law before applying U.S. trademark law to acts occurring in Mexico); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 945-56 (D.C. Cir. 1984) (considering principles of concurrent jurisdiction and international comity before applying U.S. antitrust law abroad); *see infra* notes 77-87 and accompanying text.

42. *Steele*, 344 U.S. at 285; *Foley*, 336 U.S. at 284-85.

43. *See, e.g.*, *Park 'N Fly v. Dollar Park and Fly*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("[O]ur starting point must be the language employed by Congress, and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" (citation omitted)); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . .").

44. *See* R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 229-33 (1975); J. HURST, *DEALING WITH STATUTES* 54-55 (1982); Wald, *Some Observations on*

aids such as legislative history in favor of the plain meaning of a statute's language.<sup>45</sup> Increasingly, however, statutory language has been interpreted with reference to legislative history.<sup>46</sup> Under current doctrine, statutory interpretation begins with "the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."<sup>47</sup> The burden therefore rests on a statute's legislative history to clarify any ambiguity that may exist in the statutory language.<sup>48</sup>

Courts have used both explicit and general jurisdictional language to apply statutes extraterritorially. For example, in 1984, Congress strengthened the Age Discrimination in Employment Act (the "ADEA")<sup>49</sup> by adding explicit language covering U.S. citizens employed abroad.<sup>50</sup> As amended, the ADEA states that "any employee who is a citizen of the United States employed by an employer in a workplace in a foreign country" is entitled to its protection.<sup>51</sup>

---

*the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195-97 (1982).

45. See, e.g., *Caminetti*, 242 U.S. at 485 ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); *Hamilton v. Rathbone*, 175 U.S. 414, 419 (1899) ("[W]here [an] act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.").

46. See Wald, *supra* note 44, at 197 ("In the 'orgy of statute making' ushered in by the New Deal and continued relentlessly through the next fifty years, resort to legislative history became pervasive.") (quoting G. GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977)).

47. *Consumer Prod. Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Supreme Court has applied the *Consumer Product* formulation in numerous subsequent cases involving statutory construction. See, e.g., *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); *American Bank and Trust v. Dallas County*, 463 U.S. 855, 862 (1983); *Bread Political Action Comm. v. Federal Election Comm.*, 455 U.S. 577, 580 (1982); *Albernaz v. United States*, 450 U.S. 333, 336 (1981).

48. See *Bread*, 455 U.S. at 580; Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: Of Carey, Crest Street and Congressional Intent*, 60 TEMPLE L.Q. 599, 617-19 (1987); Wald, *supra* note 44, at 198-99 ("[T]he [Supreme] Court now shifts onto legislative history the burden of proving that the words do not mean what they appear to say.").

49. 29 U.S.C. § 621-34 (1982 & Supp. IV 1986).

50. Congress amended the ADEA as a part of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1792 (codified as amended at 29 U.S.C. § 630(f) (1982 & Supp. IV 1986)).

51. 29 U.S.C. § 630(f).

Explicit jurisdictional language, however, is not always required for a statute to apply extraterritorially. Courts have found general coverage provisions sufficient to support extraterritorial application of statutes that regulate U.S. foreign commerce.<sup>52</sup> In such cases, the U.S. Constitution's grant to Congress of jurisdiction over U.S. foreign commerce<sup>53</sup> is sufficient to overcome the presumption against extraterritoriality.<sup>54</sup> For example, the Sherman Anti-Trust Act (the "Sherman Act")<sup>55</sup> proscribes "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . with foreign nations,"<sup>56</sup> and penalizes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . with foreign nations."<sup>57</sup> Although the first case on point rejected extraterritorial application of the Sherman Act,<sup>58</sup> the current interpretation of this general jurisdictional language is that anti-competitive acts of U.S. citizens abroad that have a substantial effect upon U.S. foreign commerce are subject to the Sherman Act.<sup>59</sup>

Under the Lanham Trade-Mark Act (the "Lanham Act"),<sup>60</sup> a trademark registrant has a cause of action against any person who, "in commerce," uses or reproduces that trademark.<sup>61</sup>

52. *See infra* notes 55-66 and accompanying text.

53. U.S. Const. art. I, § 8, cl. 3.

54. *See infra* notes 55-66 and accompanying text.

55. 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986).

56. 15 U.S.C. § 1.

57. *Id.* § 2.

58. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

59. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). For a discussion of the evolution of the "effects" doctrine, see 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 6.01-21 (2d ed. 1981 & Cum. Supp. 1987); W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* §§ 2.1-15 (3d ed. 1982 & Supp. 1988). *See generally*, Kintner & Griffin, *Jurisdiction over Foreign Commerce Under the Sherman Anti-Trust Act*, 18 B.C. INDUS. & COM. L. REV. 199, 199-227 (1977) (discussing the expanding jurisdictional reach of the Sherman Act); Ongman, "Be No Longer Chaos: Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope," 71 Nw. U.L. REV. 733, 735-40 (1977) (discussing limitations that have been imposed on the Sherman Act's jurisdictional reach).

60. 15 U.S.C. §§ 1051-1127 (1982 & Supp. IV).

61. 15 U.S.C. § 1114(1). Section 1114(1) provides in relevant part:

“Commerce” means “all commerce which may lawfully be regulated by Congress” and therefore includes U.S. foreign commerce.<sup>62</sup> In *Steele v. Bulova Watch Co.*,<sup>63</sup> the Bulova Watch Company sued a U.S. citizen who held the trademark “Bulova” in Mexico and assembled and sold watches under that name exclusively in Mexico.<sup>64</sup> The Supreme Court found that because Congress’s commerce power includes the power to regulate U.S. foreign commerce, the Lanham Act’s general jurisdictional language supported jurisdiction over the acts of trademark infringement in Mexico.<sup>65</sup> Since *Bulova*, several courts have construed the Lanham Act to sustain jurisdiction over extraterritorial conduct.<sup>66</sup>

---

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive [sic].

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

*Id.* (emphasis added).

62: 15 U.S.C. § 1127; see U.S. CONST. art. I, § 8, cl. 2.

63. 344 U.S. 280 (1952).

64. *Id.* at 281-82.

65. *Id.* at 286.

66. See, e.g., *American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n*, 701 F.2d 408, 412-13 (5th Cir. 1983) (sales of products bearing infringing marks consummated in Saudi Arabia and none of those products found their way into the United States); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594, 600-01 (S.D. Cal. 1956) (infringing marks affixed to products in Mexico and products sold in Mexico). But see *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985) (finding that interests of and links to U.S. foreign commerce of extraterritorial activity in question were insufficient to bring the activity under the Lanham Act); *American White Cross Labs, Inc. v. H.M. Cote, Inc.*, 556 F. Supp. 753, 757 (S.D.N.Y. 1983) (“Congress did not intend that . . . the [Lanham] Act should reach ‘acts committed by a foreign national in his home country under a presumably valid trademark registration in that country.’” (quoting *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956))).

### B. *Deference to Administrative Agency Interpretation*

The U.S. Supreme Court long has recognized that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."<sup>67</sup> In *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>68</sup> the Supreme Court enunciated an analytical regime for reviewing the appropriate administrative agency's construction of a statute.<sup>69</sup> Under the Chevron regime, if a court finds that Congress has expressed its intent unambiguously, both the court and the agency must effectuate that intent.<sup>70</sup> Alternatively, if the court determines that Congress has not directly addressed a precise issue, it may not simply impose its own construction on the statute, as in the absence of an administrative interpretation.<sup>71</sup> Rather, the court must defer to the agency's interpretation if it is based upon a "permissible" construction of the statute.<sup>72</sup>

Whether an agency's construction is permissible will depend on the nature of the agency's delegated authority.<sup>73</sup>

---

67. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *see also* *Aluminum Co. of America v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-90 (1984) (upholding the interpretation of Pacific Northwest Electric Power Planning and Conservation Act by federal agency responsible for marketing federal hydroelectric power in the Pacific Northwest); *Train v. NRDC*, 421 U.S. 60, 75 (1975) (deferring to the EPA's interpretation of the Clean Air Amendments of 1970); *Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408 (1961) (deferring to Atomic Energy Commission's interpretation of its duties under the Atomic Energy Act of 1954); *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944) (deferring to the NLRB's interpretation of the National Labor Relations Act); *United States v. Moore*, 95 U.S. 760, 763 (1877) ("[T]he construction given to a statute by those charged with the duty of executing it . . . ought not to be overruled without cogent reasons.").

68. 467 U.S. 837 (1984).

69. *Id.* at 842-43. The *Chevron* Court considered whether to defer to the Environmental Protection Agency's (the "EPA") definition of "stationary source" as used in the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. *Chevron*, 467 U.S. at 840. After examining the relevant statutory language and legislative history, the Court held that the EPA's definition was entitled to deference. *Id.* at 842-45.

70. *Id.*

71. *Id.* at 843.

72. *Id.* "The court need not conclude that the agency construction was the *only* one it permissibly could have adopted to uphold the construction, or even the reading *the court* would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11 (citations omitted) (emphasis added).

73. *Id.* at 843-44.

Congressional empowerment of an executive agency to administer a statute necessarily includes the explicit or implicit delegation of authority to formulate policy.<sup>74</sup> An interpretation pursuant to explicit delegation is permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute."<sup>75</sup> However, a reasonable interpretation pursuant to an implicit delegation is permissible unless the statute or its legislative history indicate that Congress would not have sanctioned it.<sup>76</sup>

### C. *International Law*

Two or more states may share jurisdiction to regulate the same activity or conduct. The conduct or activity of one state's national in the territory of another may confer concurrent jurisdiction to prescribe law—prescriptive jurisdiction—based on principles of nationality and territoriality, respectively.<sup>77</sup> As these principles are not mutually exclusive, concurrent jurisdictional bases do not necessarily bar any state from exercising its jurisdiction to prescribe.<sup>78</sup> The Restatement (Third) of Foreign Relations Law of the United States ("Restatement Third")<sup>79</sup> has promulgated a test of reasonableness to evaluate a state's exercise of its jurisdiction to prescribe.<sup>80</sup> Section 403 provides that a state may not prescribe laws having extraterritorial effect if, after "evaluating all relevant factors," it would

74. *Id.* at 843 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

75. *Id.* at 844. An explicit delegation occurs when Congress has explicitly left a gap in a statutory provision and authorized the agency to promulgate regulations to fill that gap. *Id.* at 843-44. For example, § 245A(g)(1) of the Immigration and Nationality Act explicitly authorizes the Attorney General to "prescribe . . . (A) regulations establishing a definition of the term 'resided continuously', as used in this section . . ." 8 U.S.C. § 1255a(g)(1) (Supp. IV 1986).

76. *Chevon*, 467 U.S. at 844-45. An implicit delegation occurs when Congress has implicitly left a gap in a statutory provision and thereby authorized the agency to elucidate the provision. *Id.*

77. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286-87 (1952); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984). See generally RESTATEMENT THIRD, *supra* note 36, § 402 comment b ("The exercise of jurisdiction both by the state of nationality and by the territorial state may result in overlap or conflict, actual or potential, and may call for evaluation of the competing interests by a standard of reasonableness . . .").

78. See *Laker*, 731 F.2d at 951-52; Piccioto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11, 14, 25 (1983); *supra* note 36 and accompanying text.

79. See *supra* note 36 and accompanying text.

80. See RESTATEMENT THIRD, *supra* note 36, §§ 402-03.



be "unreasonable" to do so.<sup>81</sup> This provision enumerates eight such factors, encompassing considerations of territoriality, nationality, the importance of the activity to the regulating states and to the international legal system, and the likelihood of conflict between the states' regulations.<sup>82</sup> The official comment to section 403 states that U.S. statutes are to be construed consistently with that section unless such construction is not fairly possible.<sup>83</sup>

Applying the Restatement Third reasonableness test, U.S. courts generally have found that U.S. interests support the extraterritorial application of U.S. statutes to U.S. citizens abroad.<sup>84</sup> For example, in *Laker Airways v. Sabena, Belgian World Airlines*,<sup>85</sup> a U.K. airline alleged that a group of airlines con-

81. *Id.* § 403.

82. *Id.* The eight enumerated factors are:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

*Id.*; see Meessen, *Conflicts of Jurisdiction Under the New Restatement*, L. & CONTEMP. PROBS. Summer 1987, at 47 (discussing the balancing of state interests under the Restatement Third with respect to true and false conflicts of jurisdiction); Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487 (1985) (discussing the origins of and judicial responses to the reasonableness test).

83. Restatement Third, *supra* note 36, § 403 comment g.

84. See, e.g., *United States v. Wright-Barker*, 784 F.2d 161, 168 (3d Cir. 1986) (threshold issue of Congress's intent to apply U.S. narcotics statutes extraterritorially is "reasonable"); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 956 (D.C. Cir. 1984) (court's extraterritorial application of U.S. antitrust laws to case before it is "within the bounds of reason imposed by international law").

85. 731 F.2d 909 (D.C. Cir. 1984).

spired to implement an anti-competitive pricing scheme on their United States-England routes.<sup>86</sup> The D.C. Circuit found that, although both the United States and England shared concurrent prescriptive jurisdiction over the alleged conduct, applying the Sherman Act was reasonable given the strong U.S. interest in maintaining free competition in its foreign commerce.<sup>87</sup>

### III. TITLE VII APPLIES TO THE EMPLOYMENT OF U.S. CITIZENS EMPLOYED ABROAD

#### A. *Overcoming the Presumption Against Extraterritoriality with Language and Legislative History*

Proper statutory construction of Title VII reveals congressional intent that overcomes the presumption against extraterritoriality. Title VII's language and its legislative history indicate that Congress intended Title VII to protect U.S. citizens from employers' unlawful employment practices regardless of the place of employment.

#### 1. Statutory Language

Title VII's basic coverage provision outlaws discrimination against "any individual with respect to his . . . terms . . . of employment, because of such individual's race, color, religion, sex, or national origin."<sup>88</sup> The statute does not affirmatively state the territorial boundaries of its application. The only geographic limitation on the coverage of "any individual" is found in the alien exemption provision, which states that Title VII "shall not apply to an employer with respect to the employment of aliens *outside any State*."<sup>89</sup> Because Title VII is a remedial statute, it must be liberally construed.<sup>90</sup> The lan-

---

86. *Id.* at 916-17, 955-56.

87. *Id.* at 956.

88. 42 U.S.C. § 2000e-2(a)(1) (1982) (emphasis added); *see supra* note 2.

89. 42 U.S.C. § 2000e-1 (1982) (emphasis added); *see supra* note 24.

90. *See Coles v. Penny*, 531 F.2d 609, 615 (D.C. Cir. 1976) ("[T]itle VII is remedial in character and should be liberally construed to achieve its purposes."); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975) ("[R]emedial legislation such as Title VII of the Civil Rights Act of 1964 is entitled to the benefit of liberal construction."); *Henderson v. Eastern Freight Ways*, 460 F.2d 258, 260 (4th Cir.), *cert. denied*, 410 U.S. 912 (1972) ("[Title VII] is remedial in character and should be generously construed to achieve its purposes."). A remedial statute is one that provides or improves a remedy to enforce rights or redress injuries. N. SINGER,

guage of civil rights statutes generally must be given "broad and inclusive effect," and their coverage extended as far as a fair reading of the statute permits.<sup>91</sup> Furthermore, the exemptions from remedial statutes generally are to be narrowly construed against those seeking to assert them.<sup>92</sup>

Federal courts vary in their interpretations of Title VII's general coverage and alien exemption provisions. In *Espinoza v. Farah Mfg. Co.*,<sup>93</sup> the U.S. Supreme Court confronted the issue of whether Title VII applies domestically to the employment of aliens.<sup>94</sup> In *Espinoza*, a Mexican citizen residing in the United States alleged that an employer discriminated on the basis of national origin in violation of Title VII by refusing to hire aliens.<sup>95</sup> The Court found that the exemption of aliens

---

SUTHERLAND STATUTORY CONSTRUCTION § 60.02, at 60 (4th ed. 1984 & Supp. 1988) [hereinafter SUTHERLAND]. Modern civil rights legislation is generally considered remedial. *Id.* at 61. "[The] legitimate purpose [of remedial statutes] is to advance human rights and relationships." E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 252, at 494 (1940). Remedial statutes "should be given a liberal construction . . . and all matters fairly within the scope of such a statute should be included, even though outside the letter, if within its spirit or reason." *Id.* at 492-93 (citations omitted).

91. See *Hartman v. Wick*, 678 F. Supp. 312, 325 (D.D.C. 1988). The *Hartman* court found that Title VII applies to non-resident aliens who apply for employment within the United States because "courts must give the language of civil rights statutes 'broad and inclusive effect,' and must extend their coverage to the outer limits permitted from a fair reading of the statute." *Id.* (citing SUTHERLAND, *supra* note 90, § 74.05).

92. See *Phillips Co. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from . . . remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process . . ."); *Piedmont & N.R. Co. v. ICC*, 286 U.S. 299, 311-12 (1932) ("Exemptions from [the] sweep [of remedial legislation] should be narrowed and limited to effect the remedy intended."); *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 706 (D.C. Cir. 1971) ("Remedial legislation is traditionally construed 'broadly to effectuate its purposes,' with exceptions 'narrowly construed.'" (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960))); *Port of New York Authority v. Baker, Watts & Co.*, 392 F.2d 497, 504 (D.C. Cir. 1968) ("Exceptions in a remedial statute must be narrowly construed."); see also *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 618 (1980) (Marshall, J., dissenting) ("A statute designed to remedy the national disgrace of discrimination in employment should be interpreted generously to comport with its primary purpose; exemptions should be construed narrowly so as not to undermine the effect of the general prohibition.").

93. 414 U.S. 86 (1973).

94. *Id.*

95. *Id.* at 87. Ms. Espinoza was a citizen of Mexico who resided in Texas. In July 1969, Ms. Espinoza applied for employment as a seamstress at the San Antonio divi-

employed outside of any state implies that Title VII covers aliens employed within the United States.<sup>96</sup> The Court expressed no opinion, however, on the statute's extraterritorial application for the benefit of U.S. citizens.<sup>97</sup>

The *Espinoza* holding supports Title VII's application to the employment of U.S. citizens abroad. By its own terms, the *Espinoza* construction of the alien exemption provision is not exclusive of other constructions.<sup>98</sup> The Court did not address extraterritorial application, simply because the case did not raise that issue.<sup>99</sup> Since *Espinoza*, several district court cases have addressed this precise issue and have construed the alien exemption provision to mean that Title VII's coverage of "any individual" includes U.S. citizens employed abroad.<sup>100</sup>

*Love v. Pullman Co.*,<sup>101</sup> the first district court case to address Title VII's application to U.S. citizens employed abroad, concerned the issue of whether the statute covered Canadian railroad porters who worked both in Canada and the United States.<sup>102</sup> The court held that the alien exemption provision meant that the alien porters were covered only to the extent that they operated within the United States.<sup>103</sup> Consistent with this holding, the court explained in dictum that the exemption

---

sion of Farah Manufacturing Company. Her application was rejected on the basis of the company's policy not to hire aliens. Ms. Espinoza alleged that the policy violated Title VII by discriminating against aliens on the basis of national origin. *Id.*

96. *Id.* at 95. Although the court found that Title VII protected aliens legally within the United States, it held that the employer's refusal to hire aliens based on lack of citizenship did not amount to discrimination on the basis of national origin. *Id.* at 95-96.

97. *See id.* at 87-96. The Supreme Court never has expressed an opinion regarding the extraterritorial application of Title VII.

98. *See id.* at 95.

99. Both employer and applicant for employment were within the United States. *See supra* notes 93-97 and accompanying text.

100. *See Seville v. Martin Marietta Corp.*, 638 F. Supp. 590, 592 (D. Md. 1986) (alien exemption provision means that U.S. citizens employed abroad by U.S. companies are within the reach of Title VII); *Bryant v. International Schools Servs.*, 502 F. Supp. 472, 482-83 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (alien exemption provision indicates that Congress intended Title VII to protect U.S. citizens employed abroad); *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978) (alien exemption provision means that Title VII applies equally to U.S. citizens abroad and at home); *see infra* notes 101-15 and accompanying text.

101. 13 Fair Empl. Prac. Cas. (BNA) at 423.

102. *Id.* at 426.

103. *Id.*

also means that Title VII covers U.S. citizens employed abroad.<sup>104</sup>

The employment of U.S. citizens abroad was the principal issue in *Bryant v. International Schools Services*.<sup>105</sup> In *Bryant*, U.S. citizens employed in Iran by a U.S. corporation alleged that their employer's benefits policy was discriminatory on the basis of sex in violation of Title VII.<sup>106</sup> The district court construed the alien exemption provision to mean that Title VII applies to the employment of U.S. citizens abroad.<sup>107</sup> Accordingly, the court held that Title VII does apply extraterritorially.<sup>108</sup>

In *Seville v. Martin Marietta Corp.*,<sup>109</sup> U.S. citizens employed by Martin Marietta, a U.S. corporation in West Germany, brought a sex discrimination suit against their employer under Title VII.<sup>110</sup> Addressing the extraterritorial application of Title VII, the court found that the *Espinoza* and *Bryant* constructions of the alien exemption provision are "parallel," not in-

104. *Id.* n.4. The court stated that

American citizens who were employed . . . in Canada are entitled to *full relief without any subtraction*. This conclusion rests on the negative inference of [the alien exemption provision]. Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered under the Act.

*Id.* (emphasis added).

105. 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

106. *Id.* at 479. In particular, the plaintiffs alleged that their employer's benefits policy "resulted in disparate treatment and/or had a disparate impact on them." *Id.* For a general discussion of "disparate impact" theory under Title VII, see Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

107. *Bryant*, 502 F. Supp. at 482. The court stated that

The short answer to all of [the employers'] arguments against giving extraterritorial effect to Title VII is that Congress has spoken on the subject and that a fair interpretation of the statutory language leads to the conclusion that Title VII is to be given extraterritorial effect.

. . . By negative implication, since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to non-aliens, i.e., American citizens, outside of any state . . . .

*Id.*

108. *Id.* at 483.

109. 638 F. Supp. 590 (D. Md. 1986).

110. *Id.* at 591-92. Four female employees challenged on "disparate impact" grounds Martin Marietta's fringe benefit scheme pursuant to which 99% of the men but only 22% of the women employed at the facility received benefits. *Id.* at 591-94. For a general discussion of "disparate impact" theory under Title VII, see Rutherglen, *supra* note 106.

consistent constructions.<sup>111</sup> The court followed the *Bryant* and *Love* decisions and held that Title VII applies to the employment of U.S. citizens abroad.<sup>112</sup>

Taken together, Title VII's general coverage and alien exemption provisions compel the logical inference that Congress intended the statute to cover the employment of U.S. citizens abroad. First, the plain meaning of "any individual" in the general coverage provision is not restricted to individuals within the United States, for such a restriction would render the distinction between alien and citizen labor in the alien exemption provision superfluous.<sup>113</sup> Put another way, it would be unnecessary to exempt *aliens* employed abroad if *no one* were covered abroad.<sup>114</sup> Second, because Congress exempted only *aliens* employed abroad, "any individual" must include *non-aliens*—U.S. citizens—employed abroad.<sup>115</sup>

## 2. Legislative History

Title VII's legislative history is scant with respect to the statute's jurisdictional limits.<sup>116</sup> H.R. 7152, the 88th Congress's precursor to Title VII, stressed the adverse effects of employment discrimination on U.S. domestic and foreign commerce.<sup>117</sup> The bill's stated purposes were to remove obstruc-

---

111. *Seville*, 638 F. Supp. at 592.

112. *Id.*

113. See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 286 (1949). In *Foley*, the Supreme Court held that the Eight Hour Law does not extend to cover a U.S. citizen employed abroad by a U.S. company. *Id.* The Court specifically noted that "[n]o distinction is drawn [in the Eight Hour Law] between laborers who are aliens and those who are citizens of the United States." *Id.* The Court concluded from the absence of any such distinction 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 [and not to] foreign countries." *Id.*

114. See *Boureslan v. Aramco*, 857 F.2d 1014, 1032 (King, J., dissenting), *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

115. See *Seville*, 638 F. Supp. at 592; *Bryant v. International Schools Servs.*, 502 F. Supp. 472, 482-83 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982); *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978).

116. See, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2402; H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963); see Equal Employment Opportunity Commission, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968); see also *Bryant*, 502 F. Supp. at 483.

117. H.R. 7152, 88th Cong., 1st Sess. (1963).

tions to U.S. domestic and foreign commerce<sup>118</sup> and to secure to all persons the privileges and immunities guaranteed by the U.S. Constitution.<sup>119</sup> As enacted, Title VII does not use the term "foreign commerce," but the definition of "commerce" under the statute includes commerce "between a state and any place outside thereof."<sup>120</sup> Accordingly, the statute's jurisdiction reaches U.S. foreign commerce.

House Report 570 of the Committee on Education and Labor,<sup>121</sup> which was submitted in connection with H.R. 7152,<sup>122</sup> explained that "[t]he intent of the [alien] exemption [provision] is to *remove conflicts of law* which might otherwise exist between the United States and a foreign nation in the *employment of aliens outside the United States* by an American enterprise."<sup>123</sup> This explanation of the alien exemption provision indicates that when Congress enacted Title VII, it was concerned with the conflicts that might arise from its extraterritorial application to the employment of aliens—but not U.S. citizens—by U.S. employers. Title VII's legislative history therefore reinforces the plain meaning of the statutory language: that Congress intended the statute to apply to employers with respect to the employment of U.S. citizens outside the United States.

#### B. *The EEOC's Interpretation of Title VII Is Entitled to Deference*

The EEOC has consistently taken the position that Title VII protects U.S. citizens working abroad for U.S. employers.<sup>124</sup> It has advanced this position in an EEOC administrative decision,<sup>125</sup> in *amicus curiae* briefs in federal cases,<sup>126</sup> and in

---

118. *Id.* § 701(b)(1). Section (b)(1) stated that the legislation was necessary "[t]o remove obstructions to the free flow of commerce among the States and with foreign nations." *Id.* (emphasis added).

119. *Id.* § 701(b)(2). Section (b)(2) stated that the legislation was necessary "[t]o insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution of the United States." *Id.*

120. 42 U.S.C. § 2000e(g) (1982 & Supp. IV 1986) (emphasis added).

121. H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963).

122. See *Hearings on H.R. 7152*, *supra* note 29, at 2300. House Report 570 was originally submitted in connection with H.R. 405, an earlier precursor to Title VII in the 88th Congress, and resubmitted in connection with H.R. 7152.

123. H.R. REP. NO. 570, 88th Cong., 1st Sess. 4 (emphasis added).

124. See EEOC Brief, *supra* note 18, at 15.

125. See EEOC Decision 85-16, Empl. Prac. Dec. (CCH) ¶ 6856, at ¶ 7072 (Sept. 16, 1985).

testimony before Congress.<sup>127</sup> The Supreme Court has held that the EEOC's interpretation of Title VII is "entitled to great deference."<sup>128</sup>

The *Boureslan* court's failure to defer to the EEOC's interpretation of Title VII because the case involved the issue of jurisdiction violated the analytical procedure established by the U.S. Supreme Court in *Chevron*.<sup>129</sup> As the *Boureslan* court conceded, Title VII does not directly address extraterritorial application.<sup>130</sup> Therefore, subject matter jurisdiction over the employment of U.S. citizens abroad under Title VII requires proper construction of the statute's language and legislative history.<sup>131</sup> Given the EEOC's long-standing position on the issue, a proper application of the *Chevron* analysis<sup>132</sup> would have prohibited the *Boureslan* court from imposing its own interpretation on the statute.<sup>133</sup> Congress did not explicitly direct the EEOC to interpret Title VII's extraterritorial scope; therefore, it is necessary to defer to the Commission's interpretation of Title VII's jurisdictional scope absent any indication that Congress would not have sanctioned it.<sup>134</sup>

Title VII's language and legislative history reveal not only

126. See, e.g., EEOC Brief, *supra* note 18; Brief of Equal Employment Opportunity Commission *Amicus Curiae*, *Bryant v. International Schools Servs.*, 675 F.2d 562 (3d Cir. 1981) (Nos. 81-1558, 81-1559).

127. See *Age Discrimination and Overseas Americans, 1983: Hearing on S. 558 Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 4 (1983)* [hereinafter *ADEA Hearing*] (statement of Clarence Thomas, Chairman, Equal Employment Opportunity Commission); Letter from William A. Carey, EEOC General Counsel, to Sen. Frank Church (Mar. 17, 1975), reprinted in Note, *Civil Rights in Employment and the Multinational Corporations*, 10 CORNELL INT'L L.J. 87, 104 (1976). In his letter, the Chairman wrote: "Giving [the alien exemption provision] its normal meaning would indicate a Congressional intent to exclude from the coverage of the statute aliens employed by covered employers working in the employers' operations outside the United States." *Id.* The letter continued: "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 coverage . . . in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." *Id.* (emphasis added).

128. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

129. See *supra* notes 68-76 and accompanying text.

130. *Boureslan v. Aramco*, 857 F.2d 1014, 1018, *reh'g en banc granted*, 863 F.2d 8 (5th Cir. 1988).

131. See *supra* notes 13-14.

132. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984); see *supra* notes 68-76 and accompanying text.

133. See *supra* notes 71-72 and accompanying text.

134. See *supra* notes 74-76 and accompanying text.



that Congress would have sanctioned the EEOC's interpretation, but that Congress intended precisely that result.<sup>135</sup> Additionally, when Congress amended the ADEA to cover U.S. citizens employed abroad, one stated purpose was to conform the statute's coverage to that of Title VII, which at the time had been applied abroad.<sup>136</sup> At a Senate hearing on the ADEA amendment, then General Counsel of the EEOC testified that the ADEA should be amended to have the extraterritorial application that courts had derived from Title VII's alien exemption provision.<sup>137</sup> These statements during the ADEA hearing further suggest that at the time Congress was amending the ADEA to apply abroad, it was aware of—and apparently sanctioned—courts' extraterritorial application of Title VII. Accordingly, under *Chevron*, the *Boureslan* court should have sustained the EEOC's interpretation.

C. *Principles of International Law Permit the Extraterritorial Application of Title VII*

The United States and Saudi Arabia share concurrent prescriptive jurisdiction over the employment of U.S. citizens in Saudi Arabia, based on nationality and territoriality principles, respectively.<sup>138</sup> Because Congress can neither anticipate nor resolve all conflicts with foreign countries' prescriptive jurisdiction, it expects the full participation of the courts in resolv-

135. See *supra* notes 113-15 and accompanying text; *supra* notes 116-30 and accompanying text.

136. See *ADEA Hearing*, *supra* note 127, at 4. At the hearing, Senator Charles E. Grassley, the subcommittee chairman, noted that "[t]he substantive provisions of the ADEA track title VII, which has been held to apply overseas." Clarence Thomas, then Chairman of the EEOC, testified that "the ADEA should be amended to provide extraterritorial coverage to Americans working in foreign countries for American companies [because of] *Title VII's extraterritorial application* and the long-recognized fact that the purposes and goals of the two statutes are parallel: to eliminate discrimination in employment." *Id.* (emphasis added).

137. *Id.* At the hearing, Clarence Thomas, then Chairman of the EEOC, stated: Title VII of the Civil Rights Act of 1964, as amended, which EEOC also enforces, does apply extraterritorially because § 702 of Title VII provides, in pertinent part, "[T]his subchapter shall not apply to an employer with respect to the employment of *aliens outside* of any state . . ." (emphasis added). This provision indicates, by implication, that *Congress intended Title VII to protect American employees working for American employers outside the United States.*  
*Id.* (emphasis added).

138. See *supra* notes 77-78 and accompanying text.

ing such conflicts.<sup>139</sup> Accordingly, where U.S. prescriptive jurisdiction overlaps with that of another state, current doctrine requires courts to evaluate the reasonableness of asserting U.S. jurisdiction on any given occasion.<sup>140</sup>

Extraterritorial application of Title VII serves both U.S. and international interests. The United States's interest in preventing discrimination against U.S. employees abroad is considerable. Foreign assignment can be essential to career advancement in a U.S. multinational enterprise.<sup>141</sup> Accordingly, unless Title VII prohibits unlawful discriminatory practices abroad as well as domestically, the career opportunities of women and racial, ethnic, and religious minorities in U.S. multinational enterprises may be restricted.<sup>142</sup>

Extraterritorial application of Title VII also complies with the international consensus opposing discrimination in employment.<sup>143</sup> Most developed nations are signatories to international instruments that condemn discrimination, such as the International Labour Organization Convention Concerning Discrimination in Respect of Employment and Occupation,<sup>144</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>145</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>146</sup> The

---

139. See *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d at 952 (citing BUREAU OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF STATE, CURRENT POLICY NO. 481, EXTRATERRITORIALITY AND CONFLICTS OF JURISDICTION 4 (1983)).

140. See, e.g., *id.* (considering the reasonableness of asserting U.S. jurisdiction over extraterritorial anti-competitive activity); RESTATEMENT THIRD, *supra* note 36, § 403.

141. See, e.g., *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1192-93 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

142. See generally J. FERNANDEZ, RACISM AND SEXISM IN CORPORATE LIFE: CHANGING VALUES IN AMERICAN BUSINESS (1981) (discussing discrimination in the contemporary corporate setting).

143. See, e.g., Convention on Discrimination Against Women, *supra* note 6, at 39; Convention on Racial Discrimination, *supra* note 6, at 216, 220, 222; Convention Concerning Employment Discrimination, *supra* note 6, at 32, 34; see *supra* note 6 for a discussion of these conventions.

144. *Supra* note 6. Not fewer than 94 states have ratified this convention. See 2 WORLD TREATY INDEX 940-41 (2d ed. 1983).

145. *Supra* note 6. 131 states had ratified this convention as of December 31, 1987. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, STATUS AS AT 31 DECEMBER 1987, at 103-04, U.N. Doc. ST/LEG/SER.E/6, U.N. Sales No. E.88.V.3 (1988) [hereinafter MULTILATERAL TREATIES STATUS].

146. *Supra* note 6. 114 states had ratified this convention as of December 31, 1987. See MULTILATERAL TREATIES STATUS, *supra* note 145, 160-61.

United States has codified its opposition to employment discrimination in Title VII. The ADEA further reflects the United States's policy, prohibiting age discrimination against U.S. employees both domestically and abroad.<sup>147</sup> Therefore, application of Title VII to discrimination against U.S. employees outside the United States furthers both U.S. and international policy opposing discrimination. Accordingly, it would be reasonable to apply Title VII to the employment of U.S. citizens by U.S. employers abroad.

#### *CONCLUSION*

The growing presence of minorities and women in an increasingly multinational employment market demands vigilant enforcement of civil rights legislation. The *Boureslan* decision has left an ominous loophole that enables multinational employers to deny U.S. citizens in foreign countries the basic liberties that Title VII was enacted to secure. This loophole must be closed to enable minorities and women to participate in the employment market free from the specter of discrimination. Accordingly, Title VII must be construed to prohibit discriminatory employment practices against U.S. employees abroad.

*Lucien A. Moolenaar III\**

---

147. See *supra* notes 49-51 and accompanying text.

\* J.D. Candidate, 1990, Fordham University School of Law.