# **ARTICLE: Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation after ARAMCO and the Civil Rights Act of 1991**

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**Reporter**

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**Author:** By Linda Maher \*

\* The author is an attorney, who also publishes on the domestic and international environmental and patent aspects of biotechnology and other subjects. This paper is dedicated to the memory of John Maher, Founder and President of Delancey Street Foundation, a brilliant social leader, a unique intellect and humanitarian, who was much loved by those who knew him. Thanks to Joseph Crea for his support, Leung Yee and Karen Brown. Special thanks to Paul Suhler.

**Text**

**[\*1]** INTRODUCTION

Today transnational markets and employment are reaching new heights, and international lawyers are faced with unprecedented challenges in international conflicts of laws. [[1]](#footnote-2)1 The domestic growth of foreign investment has heightened concerns about the applicability of domestic employment laws to United States employees of foreign corporations doing business in the United States, as well as for United States employees of domestic corporations operating overseas. [[2]](#footnote-3)2

**[\*2]** The United States Equal Employment Opportunity Commission (EEOC) [[3]](#footnote-4)3 enforces civil rights laws prohibiting discrimination in employment based on race, color, religion, sex, national origin, age, and physical and mental disabilities. [[4]](#footnote-5)4 The EEOC had been applying Title VII of the 1964 Civil Rights Act [[5]](#footnote-6)5 to protect United States citizens employed abroad in domestic corporations. [[6]](#footnote-7)6 On March 26, 1991, however, in *EEOC v. Arabian American* ***Oil*** *Co. (Aramco)*, [[7]](#footnote-8)7 the United States Supreme Court came to a startling decision profoundly affecting application of Title VII protection. [[8]](#footnote-9)8

The *Aramco* decision implicitly reaffirmed that Title VII requires domestic companies to investigate and correct instances of discrimination. Under an earlier holding in *Sumitomo Shoji America, Inc. v. Avagliano*, [[9]](#footnote-10)9 the term "domestic companies" was found to include foreign corporations incorporated in the United States. [[10]](#footnote-11)10 The plurality in **[\*3]** *Aramco*, however, determined that Title VII did not apply overseas to protect U.S. nationals in cases of discrimination abroad perpetrated by U.S. corporations.

*Aramco* rendered Title VII and its complementary civil rights legislation, the Age Discrimination in Employment Act (ADEA), [[11]](#footnote-12)11 non co-extensive in their overseas application. This result was particularly surprising in light of the fact that the ADEA was amended in 1984, to permit its extraterritorial application to be consistent with Title VII's. [[12]](#footnote-13)12

Although nationality is a traditional basis for asserting international jurisdiction over defendants and courts, [[13]](#footnote-14)13 under *Aramco*, a national would lose Title VII protection if promoted, rotated, or transferred to a position abroad in a domestic multi-national corporation, a foreign branch office or even in a controlled foreign subsidiary. [[14]](#footnote-15)14 Title VII's Section 702 (the alien exemption provision) states that the Act does "not apply to an employer . . . of aliens outside of any state." [[15]](#footnote-16)15 The plurality interpreted this provision to mean that aliens "inside" the United States were covered by the Act. [[16]](#footnote-17)16 They thereby, rejected any "negative inference" that would apply Section 702 to citizens "outside of any state." [[17]](#footnote-18)17

Recent legislation enacted under the Civil Rights Act of 1991, [[18]](#footnote-19)18 responds to *Aramco*, and underscores the Supreme Court's judicial tug-of-war with Congress, reaching back at least as far as the ADEA extraterritorial **[\*4]** amendment in 1984. This Article examines the statutes and case law bearing upon *Aramco*, and the impact of the new legislation which overrules it. Part I presents an historical setting for Title VII and the ADEA, and presents a brief case history of *Aramco*. [[19]](#footnote-20)19 It analyzes the decision in terms of statutory construction, legislative history, policy, the EEOC, and the international ramifications of the decision. Part II discusses some of the origins of the Civil Rights Act of 1991, relating to extraterritoriality such as, the proposed American Employees Equity Act of 1991, [[20]](#footnote-21)20 and the proposed Extraterritorial Employment Protection Amendment of 1991. [[21]](#footnote-22)21 Part III describes various sections of the Civil Rights Act, as they apply to extraterritoriality, and illustrates the direction from which new challenges have already come. The later portion of this section briefly discusses some of the other important matters this legislation addresses. Part IV concludes that extraterritorial application, both of Title VII and the ADEA, are far from secure. In light of recent cases since the Civil Rights Act of 1991, it is clear that the courts continue to seriously undermine access to benefits under the Civil Rights Act.

I. LEGISLATIVE AND LITIGATION BACKGROUND

A. *Legislative History*

Title VII of the Civil Rights Act of 1964 states as its purpose:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin. [[22]](#footnote-23)22

Title VII applies to nationals and aliens alike and specifically uses the broad term "any individual" to describe those to whom it extends **[\*5]** its legislative protection. Title VII contains an alien exemption provision which provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside of any state." [[23]](#footnote-24)23 This limited exclusion, affecting only aliens working for an employer abroad, traditionally had been interpreted as negatively inferring that citizens working outside of any state were covered. [[24]](#footnote-25)24 The specific use of the word "aliens" in the exemption provision, as opposed to "individual" arguably clarified Congress's intent. Until recently, based on this provision, the legislative history, [[25]](#footnote-26)25 the positions of the EEOC, [[26]](#footnote-27)26 and the Department of Justice, [[27]](#footnote-28)27 courts generally assumed extraterritorial application of Title VII. [[28]](#footnote-29)28 Judicial support developed in two separate lines of decisions involving both Title VII and the Age Discrimination in Employment Act (ADEA). [[29]](#footnote-30)29

In addition, in 1972 Congress amended Title VII to extend protection to federal workers and again included the language found in the **[\*6]** alien exemption. [[30]](#footnote-31)30 "Employees . . . (*except . . . aliens employed outside the limits of the United States*) in military departments . . . in executive agencies . . . units of legislative and judicial branches of the Federal Government having positions in the competitive service . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." [[31]](#footnote-32)31

Title VII defines "employer" as one "engaged in any industry affecting commerce;" [[32]](#footnote-33)32 "commerce" as "trade . . . between a state and any place outside thereof . . . or between points in the same state but through a point outside thereof;" [[33]](#footnote-34)33 and "industry affecting commerce" as including activity within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). [[34]](#footnote-35)34

Like Title VII, the ADEA is civil rights legislation. It fills a void in Title VII by prohibiting discrimination in employment based on age. However, because the ADEA did not have an alien exemption provision, the courts traditionally held against its extraterritorial application. [[35]](#footnote-36)35 The courts reasoned that section 7 of the ADEA provided for enforcement under the Fair Labor Standards Act (FLSA) which did not apply abroad. [[36]](#footnote-37)36 In light of these holdings, Congress amended the ADEA in 1984 to grant it complementary co-extension with Title VII's **[\*7]** extraterritorial application. [[37]](#footnote-38)37

B. *Facts and Procedural History of Aramco*

1. Facts

In 1979, Ali Boureslan began his employment as an engineer with Aramco Services corporation in Texas. [[38]](#footnote-39)38 Boureslan was an American citizen, born in Lebanon and residing in El Paso, Texas. [[39]](#footnote-40)39 In November 1980, he was transferred to work in Saudi Arabia. [[40]](#footnote-41)40 In 1982, Boureslan's supervisor allegedly began harassing him about his race, origin and religion. [[41]](#footnote-42)41 Boureslan's work conditions deteriorated and Aramco terminated him on June 16, 1984. [[42]](#footnote-43)42 He sued under Title VII and pendant state causes of action. [[43]](#footnote-44)43 The defendants were Arabian American ***Oil*** Company and Aramco Services Corporation, both Delaware corporations, whose principal places of business were Saudi Arabia and Texas respectively. [[44]](#footnote-45)44 The defendants claimed that Title VII did not apply to overseas employment and moved to dismiss for lack of subject matter jurisdiction. [[45]](#footnote-46)45

2. District Court Opinion

The district court did not rely on precedents such as *Love v. Pullman Co.* [[46]](#footnote-47)46 and *Bryant v. International School Services*, [[47]](#footnote-48)47 which support **[\*8]** extraterritorial application of Title VII. [[48]](#footnote-49)48 Rather, it used *Cleary v. United States Lines* [[49]](#footnote-50)49 and other ADEA case law. [[50]](#footnote-51)50 These cases noted a silence in the ADEA and, therefore, refused to permit extraterritorial application. [[51]](#footnote-52)51 The district court in *Aramco* then repudiated *Bryant* and its line of precedent cases, because the court considered Title VII's alien exemption clause suspect. [[52]](#footnote-53)52 As support, it cited *Espinoza v. Farah Manufacturing*, [[53]](#footnote-54)53 in which the Supreme Court had inferred from the alien exemption clause that Congress intended that the Civil Rights Act include aliens inside the United States. [[54]](#footnote-55)54

The court did not consider that the definitional "commerce clause" language in the Civil Rights Act might be an interpretation of a "nexus" requirement, one for instance, that provided a basis for Congress's power to grant extraterritoriality to Title VII. [[55]](#footnote-56)55 Instead the court opined that the Supreme Court already had determined that the LMRA had no extraterritorial application. [[56]](#footnote-57)56 LMRA language being borrowed for the LMRDA and Title VII, any interpretation of the commerce clause language which applies Title VII abroad would, therefore, be in juxtaposition to the LMRA and LMRDA.

**[\*9]** 3. The United States Court of Appeals Panel Decision

In affirming the district court's decision, the court of appeals referred to *Foley Bros., Inc. v. Filardo*, [[57]](#footnote-58)57 for statutory construction which presumes legislation applies domestically unless a contrary intent appears. [[58]](#footnote-59)58 Citing *Espinoza*, [[59]](#footnote-60)59 a case decided prior to the 1984 extraterritorial amendment of the ADEA, the appellate court noted that because the EEOC had no particular expertise in matters involving discrimination overseas, it should give the EEOC less deference than usual. [[60]](#footnote-61)60 The court's lack of faith in the EEOC contrasted clearly with the confidence in the EEOC which Congress had demonstrated when it had entrusted the EEOC to enforce the ADEA abroad, as well as the the overseas expertise which the EEOC had necessarily developed in the course of that enforcement.

Further, the appellate court found the language of the Civil Rights Act and the legislative history lacked any indication of extraterritorial intent. [[61]](#footnote-62)61 The court reasoned that because the customs in many countries differed, American businesses overseas would be forced to refuse to employ Americans or to discontinue business. [[62]](#footnote-63)62

In a strongly worded dissent, however, Judge King indicated that Congress intended Title VII to be applied extraterritorially. [[63]](#footnote-64)63 She pointed to the fact that every district court considering the question prior to *Aramco* had held that Title VII did apply abroad. [[64]](#footnote-65)64 Judge **[\*10]** King agreed with the majority that nationality is a basis for jurisdiction, and that states may regulate the activities of their nationals abroad. [[65]](#footnote-66)65 She further concurred that there was a presumption against extraterritorial application unless a contrary intent appeared, but argued that such intent did appear. [[66]](#footnote-67)66

Her dissent explained that statutory construction did not require a literally expressed intent. [[67]](#footnote-68)67 It argued that since no violation of international law would result from a finding for Title VII extraterritorial application under the Restatement of Foreign Relations Law, a literal statement standard was inapplicable. [[68]](#footnote-69)68 The dissent noted that it did not urge application of the Civil Rights Act overseas to foreign corporations. [[69]](#footnote-70)69 From *Steele v. Bulova Watch Co.*, [[70]](#footnote-71)70 the dissent quoted: "'the rights of other nations or their nationals are not infringed' by extraterritorial application of Title VII, and therefore 'the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries.'" [[71]](#footnote-72)71

**[\*11]** 4. The Court of Appeals Rehearing En Banc Decision

Because the court of appeals failed to consider the extraterritorial amendment to the ADEA in its panel opinion, it reheard the case en banc. [[72]](#footnote-73)72 In the rehearing, however, the court held up this *remedial* amendment as an example of the type of evidence which could over-come the *Foley* presumption against extraterritorial application. [[73]](#footnote-74)73 Of course, since prior to the present case, courts had always applied Title VII abroad, [[74]](#footnote-75)74 no such evidence existed. So the court of appeals again found insufficient evidence of congressional intent to apply Title VII abroad and, therefore, reaffirmed the district court's holding and its own earlier opinion. [[75]](#footnote-76)75

The en banc dissent, in which Judges Reavley, Politz, Johnson and Williams joined Judge King, was again thorough and detailed. [[76]](#footnote-77)76 The dissent found sufficient evidence that Congress intended Title VII to have a broad goal of eradicating discriminatory practices against United States citizens, even when that discrimination is carried out on foreign soil. [[77]](#footnote-78)77 Citing *Foley*, [[78]](#footnote-79)78 Judge King again reasoned that courts could not construe the standard for "clear" congressional intent to require a literal statement. [[79]](#footnote-80)79

5. The United States Supreme Court Decision

a. *The Plurality*

The EEOC joined Ali Boureslan as petitioner before the Supreme Court; however, the plurality opinion affirmed the en banc appellate decision. [[80]](#footnote-81)80 The plurality found that the language in Title VII's definitions was merely "boilerplate" and not indicative of a broad jurisdictional grant in the Civil Rights Act. [[81]](#footnote-82)81 The Court emphasized that possible conflicts of laws would cause venue problems. [[82]](#footnote-83)82

Turning to statutory construction, the Justices agreed with the **[\*12]** principle found in *Foley*, as cited in the lower decisions. [[83]](#footnote-84)83 So, in construing Title VII, they searched for "any indication of a congressional purpose to extend its coverage [abroad]." [[84]](#footnote-85)84 The plurality's presumption against extraterritoriality, however, necessitated an "affirmative intention of the Congress clearly expressed." [[85]](#footnote-86)85

Because Title VII borrowed language from the LMRDA, [[86]](#footnote-87)86 the plurality held that Title VII's words, "a state and any place outside thereof," [[87]](#footnote-88)87 could not refer to international locations. [[88]](#footnote-89)88 The petitioners had illustratively pointed to the Lanham Act, [[89]](#footnote-90)89 which helps regulate intellectual property interests, and which the Court had applied extraterritorially in *Steele.* [[90]](#footnote-91)90 *Steele* concluded that since the infringing product had some "effects" within the United States, [[91]](#footnote-92)91 and the Lanham Act had a "broad judicial grant" with a "sweeping reach into all commerce," the Lanham Act did apply abroad. [[92]](#footnote-93)92 The plurality, however, refused to draw support from Title VII's similarly broad definitional language. [[93]](#footnote-94)93 Rather, the plurality found *McCulloch v. Sociedad Nacional de Marineros de Honduras* [[94]](#footnote-95)94 persuasive. [[95]](#footnote-96)95 In *McCulloch*, the **[\*13]** Court had refused to rely on broad language in the National Labor Relations Act (NLRA) [[96]](#footnote-97)96 similar to the language in Title VII because there was not "any specific language" to reflect extraterritorial intent. [[97]](#footnote-98)97 The petitioners argued that the formulation of the alien exemption provision was in direct response to the Court's interpretation of the FLSA's [[98]](#footnote-99)98 term "possessions," as interpreted in *Vermilya-Brown Co. v. Connell*. [[99]](#footnote-100)99 In *Vermilya-Brown*, the Court held that the FLSA covered all employees of an American contractor on a military base situated abroad, because the FLSA did not distinguish between "citizens" and "aliens," but referred to all of the company's employees. [[100]](#footnote-101)100

The Court noted that Title VII defined "employee" as "an individual employed by an employer." [[101]](#footnote-102)101 Although Title VII's use of "employee" confirmed the inclusion of alien employees, whom the term "individual" clearly encompassed, the plurality insisted that the *Espinoza* interpretation of the alien exemption clause was the only one implied. [[102]](#footnote-103)102 Congress, the plurality added, knows how to make a clear statement of its intent when it wants to. [[103]](#footnote-104)103

The plurality noted that the EEOC's enforcement powers were limited to domestically gathered evidence, [[104]](#footnote-105)104 and therefore, as a general matter, the EEOC was not entitled to the deference normally accorded administrative agencies under *General Electric Co. v. Gilbert*. [[105]](#footnote-106)105 **[\*14]** Justice Scalia objected to this portion of the opinion, however, and stated that *General Electric* held not that the EEOC was singled-out from other agencies, "but that the EEOC's *guidelines*, like the guidelines of all other agencies without explicit rulemaking power, could not be considered legislative rules and therefore could not be accorded deference." [[106]](#footnote-107)106 Justice Scalia directed the plurality to a more recent case, *EEOC v. Commercial Office Products Co.*, [[107]](#footnote-108)107 decided in 1988, where the Court stated that the EEOC's interpretations of ambiguous language need only be reasonable to be entitled to deference. [[108]](#footnote-109)108 In *Commercial Office Products*, the Court had held: "It is axiomatic 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." [[109]](#footnote-110)109

b. *The Dissent*

Justice Marshall, joined by Justices Blackmun and Stevens, gave a detailed dissent. [[110]](#footnote-111)110 He agreed that *Foley* guided the inquiry into congressional intent, but he found no requirement of a literal statement of intent by Congress, and believed that the Court's duty was to give effect to "all available indicia of legislative will." [[111]](#footnote-112)111

According to the dissent, Congress inserted the alien exemption into Title VII to prevent a court from denying extraterritorial application as it had to the Eight Hour Law in *Foley*. [[112]](#footnote-113)112 The dissent further disagreed with the plurality's analysis of the decision's impact on international law. For example, the plurality cited *Benz v. Compania* ***[\*15]*** *Vaviera Hidalgo, S.A.*, [[113]](#footnote-114)113 which involved damages resulting from the picketing of a foreign ship operated entirely by foreign seamen, under foreign sovereignty, while the vessel was temporarily in a United States port; [[114]](#footnote-115)114 the dissent thought the case irrelevant because no United States citizens were involved. [[115]](#footnote-116)115 Outcomes like *Benz*, the dissent argued, "are reserved for settings in which the extraterritorial application of an Act would 'implicate sensitive issues of the authority of the Executive over relations with foreign nations.'" [[116]](#footnote-117)116 The standard used in *Benz*, therefore, was not the standard associated with a statute which regulates the actions of United States citizens abroad. [[117]](#footnote-118)117

The dissent invited comparison to the outcome in *Pennsylvania v. Union Gas Co.* [[118]](#footnote-119)118 In *Union Gas*, the Court had considered whether Congress had adequately stated its intention to abrogate the Eleventh Amendment immunity of the states under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. [[119]](#footnote-120)119 The Court concluded that Congress had based its intention on "a background understanding" that the general terms of the statute had made the states amenable to suit, with an exemption provision similar to that of Title VII's. [[120]](#footnote-121)120 This logic, the dissent argued, was considered sufficient to obliterate the "clear" statement rule, and subject the states to suit. [[121]](#footnote-122)121 The same logic should be sufficient to overcome the presumption against extraterritoriality when applied to the alien exemption clause in Title VII. [[122]](#footnote-123)122

6. Analysis

The plurality's decision in *Aramco* was seriously flawed in many respects. For instance, the plurality's analysis of the language of Title **[\*16]** VII, their insistence that the exemption clause only covers aliens inside the United States, is unsupported even by the case they cite, *Espinoza.* [[123]](#footnote-124)123 *Espinoza* related to the employment of aliens inside the United States, [[124]](#footnote-125)124 whereas *Aramco* dealt with citizens abroad. Further, the presumption against extraterritoriality formulated in *Foley* does not require a literal statement from Congress, because extraterritoriality does not violate principles of international law. [[125]](#footnote-126)125 The Restatement even names *Bryant*, [[126]](#footnote-127)126 the leading case supporting extraterritoriality in Title VII, as the example of an instance when co-jurisdiction with foreign nations is reasonable. [[127]](#footnote-128)127 The plurality's conjured definition of "clear" to mean a literal statement foreclosed inquiry into statutory interpretation. [[128]](#footnote-129)128

A nation's right to regulate its nationals wherever they may be is an accepted tenet of international law. [[129]](#footnote-130)129 The United States clearly employs this view in criminal, [[130]](#footnote-131)130 trademark, [[131]](#footnote-132)131 and tax [[132]](#footnote-133)132 matters. In those few cases where the laws of a foreign nation require employment discrimination based on race, color, religion, sex or national origin, the Court is free to apply the principle of comity, or the bonafide occupational **[\*17]** qualification (BFOQ) exception. [[133]](#footnote-134)133

The plurality performed a historical flip-flop. First, in *Cleary*, the Court stated that the ADEA was not extraterritorial but Title VII was, then in *Aramco*, they stated that Title VII was not extraterritorial, but, the ADEA (as amended) was. The Court manipulated its outcome to arrive at the improper and startling result that although a domestic employer may not discriminate against a national working abroad in a branch or subsidiary of an American corporation on the basis of his or her age, they may do so unfettered if the discrimination is based on that same individual's race, color, religion, sex, or national origin.

Given that all the district court cases decided near the creation of Title VII held for extraterritoriality, [[134]](#footnote-135)134 it is strange that the plurality did not apply the contemporaneous rule to its own reasoning. [[135]](#footnote-136)135 The plurality's decision was an unveiled attempt to usurp Congress's power to legislate.

a. *Statutory Construction*

A court should base its judicial interpretation of Congressional intent supporting extraterritorial application on the broad jurisdictional language of Title VII, the canons of construction, and the legislative history. [[136]](#footnote-137)136 Title VII has no geographic restriction on its application; moreover, Congress defined Title VII's terms. [[137]](#footnote-138)137 Nowhere does Title VII indicate that employers whose businesses affect commerce "between a State and any other place outside thereof" are exempted when the discrimination takes place outside domestic borders. [[138]](#footnote-139)138

Further, no venue problems are raised by extraterritorial application. Title VII specifically states that if an "employer" is not found by the first three provisions stated in the Act, then venue is proper "within the judicial district in which the respondent has his principal office." [[139]](#footnote-140)139 **[\*18]** This same venue language is used in the Jones Act, which has been held to apply extraterritorially in tort actions. [[140]](#footnote-141)140 Further, foreign and United States enterprises alike often maintain records of foreign operations in the United States, as well as abroad. Since an American multinational enterprise will usually have a principal office in the United States, companies may request production of witnesses and documents from their foreign locations through internal domestic channels. [[141]](#footnote-142)141

In *Espinoza*, a Mexican citizen residing in the United States invoked domestic protection under Title VII. [[142]](#footnote-143)142 The Court concluded that in exempting an employer with respect to employment of "aliens outside of any State," Congress had demonstrated its intention to include employers of aliens "inside" the United States. [[143]](#footnote-144)143 The Court should have viewed this interpretation in conjunction with the exemption clause's use of the term "individual," which most assuredly includes aliens. The judgment in *Espinoza* did not negate a finding for extraterritorial application of Title VII based on the same clause. In support of this observation, William Carey, EEOC General Counsel, had sent an opinion letter to Senator Frank Church (D-Idaho), Mar. 14, 1975, stating that if the alien exemption "is to have any meaning at all . . . 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." [[144]](#footnote-145)144

A court must give effect to every word used by Congress. [[145]](#footnote-146)145 According to a unanimous decision by Judges MacKinnon, Bork, and **[\*19]** Scalia, a court can derive congressional intent from every part of the language of the Act, including subheadings of the various sections. [[146]](#footnote-147)146 The narrow reading the plurality gave the exemption clause violated the canons of construction and rendered Congress's words purposeless. Indeed, the only purpose of an exemption provision is to express an exception to the usual rule.

b. *The Legislative History of Title VII and Related Acts*

Testimony at civil rights hearings on House of Representatives bill (H.R) 405 in 1963, supported Title VII's extraterritorial application by references to the alien exemption provision. [[147]](#footnote-148)147 The legislative history shows a collaboration between H.R. 405, originally from the Committee on Education and Labor, and H.R. 7152, into which it was later incorporated and which became Title VII. [[148]](#footnote-149)148 The explanation of H.R. 405, based on the conclusions of its original committee, has the equivalent weight of a committee report, [[149]](#footnote-150)149 and courts accept such discussions of statutory meaning as the most "persuasive indicia of congressional intent." [[150]](#footnote-151)150

Given the realm U.S. multinational enterprises (MNEs) now command, as partially evidenced by the breadth of U.S. trade laws, Congress is enormously involved in foreign matters. [[151]](#footnote-152)151 To fully participate **[\*20]** in the global village, as evidenced by the international efforts in the recent Gulf War and its environmental cleanup, as well as US. efforts in other parts of the world, Americans working overseas need Title VII protection. A background understanding of U.S. foreign policy in civil rights underscores the logic in applying the Act abroad.

In hearings before the House on Title VII, Representative James Roosevelt (D-Cal.) testified that "the intent of the [alien] exemption clause 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 employer." [[152]](#footnote-153)152 Further, the legislative history shows that one of the purposes of Title VII was to improve the public policy image of the United States in the international community. [[153]](#footnote-154)153 Congress created Title VII at a time when the United States' failure to address discrimination had become a source of international criticism and domestic embarrassment. [[154]](#footnote-155)154 "Continued employment discrimination in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity." [[155]](#footnote-156)155 "Legislative inaction on civil rights would result in 'weakening **[\*21]** the respect with which the rest of the world regards us.'" [[156]](#footnote-157)156

The EEOC's documented support of the extraterritorial application of Title VII also provides insight into the legislative history. For example, the EEOC's opinion letter, [[157]](#footnote-158)157 its reference to a house report that accompanied Title VII to Congress urging passage of Title VII "to remove obstructions to the free flow of interstate and foreign commerce," [[158]](#footnote-159)158 its cited comment by Representative William McCulloch, the ranking minority member of the House Judiciary Committee, stating, "a key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several states." [[159]](#footnote-160)159 The EEOC fairly demonstrated that "the rights of citizenship mean little if an individual is unable to gain the economic where-withal to enjoy or properly utilize them." [[160]](#footnote-161)160

Similarly, the Department of Justice supported extraterritoriality of Title VII in debates over a proposed prohibition on participation in foreign boycotts which required religious-based employment discrimination. [[161]](#footnote-162)161 Further, supportive legislative history comes from a speech delivered by President Kennedy, who in calling for passage of the bill that became the Civil Rights Act of 1964, proclaimed the intent of the bill, "in this year of the emancipation centennial, justice requires us to insure the blessings of liberty for all Americans and their posterity-not merely for reasons of economic efficiency, world diplomacy, and domestic tranquillity--but, above all, because it is right." [[162]](#footnote-163)162

c. *Policy and the EEOC*

The decision in *Aramco* is inconsistent with established United States policy on human rights. The plurality distorted the presumption **[\*22]** against extraterritorial application into a mechanism for evaluating unripe, potential conflicts of jurisdiction with unidentified international sovereigns.

There are notable contradictions between the Court's holding in *Aramco* and its decisions in other cases, for example, *United States v. Verdugo-Urquidez*, [[163]](#footnote-164)163 particularly in regards to possible conflicts with foreign nations. Chief Justice Rehnquist wrote the *Verdugo-Urquidez* opinion based on the plain meaning of the Constitution, the intent of the framers, and militaristic justifications, and held that the Fourth Amendment did not prevent the United States from searching and seizing the property of foreign nationals in their own countries. [[164]](#footnote-165)164 Under that decision, aliens arrested and imprisoned in the United States have no grounds to invoke U.S. Constitutional protection. [[165]](#footnote-166)165 Under the Rehnquist Court's reasoning in *Verdugo-Urquidez*, applying Title VII's protection to nationals abroad should have presented no overwhelming concern for international conflicts.

Further, the plurality's lack of deference to the EEOC sent the wrong policy signal and may serve to increase the frequency with which courts dismiss domestic Title VII discrimination cases with international aspects. This message weakened the domestic police power of the EEOC because in some recent decisions the district courts have refused to hear such cases. [[166]](#footnote-167)166

*Aramco* questioned the EEOC's jurisdiction over cases involving U.S. civilian employees working in U.S. government defense posts, missions, consulates, and embassies abroad. [[167]](#footnote-168)167 Commentators have raised **[\*23]** concern as to whether courts should limit Title VII Section 717, which protects federal workers. [[168]](#footnote-169)168 Before *Aramco*, EEOC administrative judges frequently traveled to American posts to conduct hearings on discrimination. [[169]](#footnote-170)169 Following the Court's decision, some reopenings of these cases were requested. [[170]](#footnote-171)170 In addition, the decision questioned whether the Americans with Disabilities Act would operate overseas. [[171]](#footnote-172)171

d. *International*

Congress has specifically targeted discrimination in employment to be an offense under the Civil Rights Act of 1964, as well as under United States public policy, and numerous treaties to which the United States is a party. [[172]](#footnote-173)172 The United States has ratified five treaties, The Convention on the Political Rights of Women, [[173]](#footnote-174)173 The Inter-American Convention on the Granting of Political Rights to Women, [[174]](#footnote-175)174 the United Nations Charter, [[175]](#footnote-176)175 the International Agreement for the Suppression of the White Slave Traffic, [[176]](#footnote-177)176 and the Inter-American Convention on the Nationality of Women, [[177]](#footnote-178)177 pursuant to all of which gender based discrimination is illegal. [[178]](#footnote-179)178 Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination, [[179]](#footnote-180)179 the **[\*24]** United Nations Charter, [[180]](#footnote-181)180 the International Covenant on Civil and Political Rights, [[181]](#footnote-182)181 the International Covenant on Economic, Social and Cultural Rights, [[182]](#footnote-183)182 and The American Convention on Human Rights [[183]](#footnote-184)183 present an international standard for equitable rights among different peoples.

Further, the International Labour Organization (ILO) has promulgated several conventions with respect to work conditions for women. For example, the United Nations General Assembly has adopted The International Convention on the Elimination of All Forms of Discrimination Against Women, [[184]](#footnote-185)184 which was signed by President Carter July 17, 1980, shortly after its opening. [[185]](#footnote-186)185 The treaty requires signers to conform existing national laws, regulations, customs and practices that discriminate against women in almost all areas. [[186]](#footnote-187)186

*Aramco*, left unturned, would have had a significant negative impact on the thousands of Americans who work overseas. Inequities in local foreign laws may have the effect of denying Title VII rights to some overseas nationals working in United States corporations, or their subsidiaries; but, the Bonafide Occupational Qualification (BFOQ) exception [[187]](#footnote-188)187 and the principles of comity shield such employers. [[188]](#footnote-189)188 Moreover, women working abroad in American MNE's and on military bases are appropriate models for the promotion of both the United **[\*25]** Nations and United States human rights policies.

Furthermore, the Court's decision questioned the importance and viability of the international "effects doctrine" [[189]](#footnote-190)189 in Title VII cases. This doctrine permits a country to exercise international jurisdiction beyond its territorial borders on the basis of effects felt within that country. Not applying Title VII abroad would perpetuate hostile, foreign work environments, predictably resulting in employee departures. [[190]](#footnote-191)190 Intentionally discriminatory work transfers are also foreseeable. [[191]](#footnote-192)191 These consequences would have a substantial "effect" in the United States as women and minorities would continue to be denied power and money, and the U.S. treasury would be denied the tax revenue on their lost income.

The Court should have respected the expectations of the thousands of nationals who staff U.S. companies overseas that they retain Title VII protection. [[192]](#footnote-193)192 These expectations are based in both law and facts. **[\*26]** For although the plurality cited *Pfeiffer v. Wm. Wrigley Jr. Co.*, [[193]](#footnote-194)193 it ignored *Pfeiffer's* enlightened discussion regarding the Restatement of Foreign Relations Law: *Pfeiffer* reasoned that "suggestions that United States laws against employment discrimination be made applicable to foreign branches or subsidiaries of United States corporations would be consistent with the provisions of this section when applied to employees who are United States nationals." [[194]](#footnote-195)194 Americans working abroad pay income and social security taxes, serve in the armed forces, and vote in domestic elections. They have a legitimate expectation of adequate and equal protection from employment discrimination.

With respect to enforceability, the EEOC can investigate foreign subsidiaries of United States corporations via the parent corporation. [[195]](#footnote-196)195 The term "effective control," refers to a distinction between the de jure affiliate, and the de facto company. Overlays of jurisdiction enter the world of United States business and the American worker on a daily, commonplace basis, by way of trade, national debt, war, investments and the daily rigors of life and mobility. Fear of possible conflicts cannot control the Supreme Court. The Court may not excuse American industry from their reciprocal duties to American workers.

II. THE CASES BETWEEN ARAMCO AND THE CIVIL RIGHTS ACT OF 1991

Since *Aramco's* first hearing in 1987, courts have decided additional cases supporting *Bryant* and the extraterritorial application of Title VII. In *Akgun v. Boeing*, [[196]](#footnote-197)196 Boeing denied participation of U.S. plaintiffs, who worked for a subsidiary of Boeing Corporation in Turkey and were married to Turkish nationals, in the privileged "civilian **[\*27]** component" of the defendant's operations because of the status of their mates. [[197]](#footnote-198)197 The court held that extraterritorial application of the alien exemption clause of Title VII did not violate international law and based their decision on the alien exemption provision. [[198]](#footnote-199)198

Similarly, in *EEOC v. Bermuda Star*, [[199]](#footnote-200)199 the defendant denied the plaintiff's application for an entry position on a cruise ship because she was female. The court held that the defendant's actions were not merely internal and that they could apply Title VII even though the defendant's ship was of foreign registry. The cruise line had sufficient contacts in the United States to satisfy the court. The court also cited several other cases that demonstrated that parallel jurisdiction with other sovereigns should not dissuade U.S. courts from exercising sovereign jurisdiction in employment discrimination cases. [[200]](#footnote-201)200

In *Theus v. Pioneer Hi-Bred International*, [[201]](#footnote-202)201 and *Independent Union of Flight Attendants v. Pan American World Airways*, [[202]](#footnote-203)202 however, the courts had difficulty finding jurisdiction because they feared parallel jurisdiction with other sovereigns. In *EEOC v. Kloster Cruise Ltd.*, [[203]](#footnote-204)203 the defendant terminated the plaintiffs because of pregnancy and race. The court determined it could not find jurisdiction because of a possible conflict with another sovereign, and because the employment activity occurred neither exclusively abroad, nor in the United States. [[204]](#footnote-205)204

The sheer number of employees whose jobs involve some employment activity abroad and, therefore, might be affected by such holdings is undoubtedly high. Since the Supreme Court's decision in *Aramco*, cases have arisen which, prior to the enactment of the Civil Rights Act of 1991, denied extraterritorial application to plaintiffs. [[205]](#footnote-206)205

**[\*28]** After the Court's decision in *Aramco*, Representative Jefferson (D-LA) introduced H.R. 1694, American Employees Equity Act of 1991, Representative Mfume (D-MD) introduced H.R. 1741, Extraterritorial Employment Protection Amendments of 1991, and Senator Danforth (R-MO) introduced S. 1407, Protection of Extraterritorial Employment, in connection with Senator Kennedy (D-MA) and his bills for the Civil Rights Act.

Great resistance in the courts and federal agencies remains a barrier to effective implementation of the Act. The cases already decided and the cases pending at the time of enactment may see no relief under the Civil Rights Act, as no provision was specifically included to permit retroactive application. [[206]](#footnote-207)206 Further, Evan Kemp, EEOC Chairman in 1991, helped formulate EEOC policy that courts must observe the implementation date of the statute. [[207]](#footnote-208)207 Therefore, these plaintiffs and any others who filed before the date of enactment will not have the assistance of the EEOC, and may see no benefit under the Act if a court does not choose to apply it.

III. THE CIVIL RIGHTS ACT OF 1991

After years of negotiation, the Civil Rights Act of 1991 (CRA) became law on November 21, 1991. [[208]](#footnote-209)208 The Act's findings in subsection 2(1) state a need "to deter unlawful harassment." [[209]](#footnote-210)209 The primary purpose of the Act, stated in section 3, is to: "provide adequate protection to victims of discrimination." [[210]](#footnote-211)210 Subsection 3(4) indicates that the Act is partially meant to respond to recent Supreme Court decisions by expanding the scope of relevant civil rights statutes. [[211]](#footnote-212)211

Title I contains the heading on Protection of Extraterritorial Employment. [[212]](#footnote-213)212 Subsection (c)(1) states that if an employer controls a corporation incorporated in a foreign country, "any practice prohibited . . . shall be presumed to be engaged in by such employer." [[213]](#footnote-214)213 This heading **[\*29]** clearly overrules *Aramco*.

Subsection (c)(3) states the basis for determination of effective control of a corporation: (A) interrelation of operations; (B) common management; (C) centralized control of labor relations; and, (D) common ownership or financial control of the employer and the corporation. [[214]](#footnote-215)214 Further, the new sections also apply to the Americans with Disabilities Act of 1990. [[215]](#footnote-216)215 Subsection 109(a) redefines the term, "employee," as including an individual who is a citizen of the United States. [[216]](#footnote-217)216 This clarifying language was borrowed largely from the amended ADEA which applies extraterritorially. [[217]](#footnote-218)217

A foreign compulsion exception, which the Act incorporated in subsection 109(b), will continue to shelter employers from the conflict of laws dilemma resulting from foreign employment practices. [[218]](#footnote-219)218 Under subsection 109(b)(1), a discriminatory activity "shall not be unlawful . . . if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located." [[219]](#footnote-220)219

Section 105 clarifies the burden of proof necessary in disparate impact cases, and amends section 2000e-2, by adding new subsections (k)(1)(A), (k)(1)(B), and (k)(1)(C). Additionally, section 107 clarifies the "Prohibition Against Impermissible Consideration[s]" (mixed motive) with a new subsection (m). This subsection allows a plaintiff to demonstrate that race, color, religion, sex, or national origin are motivating factors for employment practices, even though other factors may also have been present. [[220]](#footnote-221)220

According to the Act's legislative history, "virtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." [[221]](#footnote-222)221 Congress clarifies its view by stating that, "America is a better country because we as a people have moved forward toward the goal of eradicating discrimination. Nowhere is that **[\*30]** more important than in the workplace." [[222]](#footnote-223)222

A. *Concerns With The Civil Rights Act of 1991*

1. Extraterritoriality of The Civil Rights Act of 1991

Although section 109 has been broadly reported by EEOC documents and the courts to apply Title VII abroad, large segments of the American employment population will not benefit under the present Act. [[223]](#footnote-224)223 This is because of the many exceptions and limitations to Title VII and the ADEA, and conflicts in judicial application of these and related laws.

The Civil Rights Act of 1991 is generally applicable to all corporations doing business in the United States. Immunities, however, such as those granted by the Foreign Sovereign Immunities Act (FSIA), [[224]](#footnote-225)224 the International Organization and Immunities Act (IOIA), [[225]](#footnote-226)225 diplomatic treaties (FCNs), [[226]](#footnote-227)226 or Executive Orders, [[227]](#footnote-228)227 provide exceptions to this rule. Fortunately, immunity granted to foreign governmental entities under the FSIA may not extend to such entities that engage in purely commercial activity. [[228]](#footnote-229)228 For example, governmental ownership of an airline did not immunize it from the ADEA in *Gazder v. Air India*. [[229]](#footnote-230)229 Yet, an ERISA [[230]](#footnote-231)230 claim was dismissed for lack of jurisdiction over the Canadian subsidiary of an American corporation in *Lawford v. New York Life Insurance*. [[231]](#footnote-232)231

Unlike Title VII protection inside the United States, the Civil Rights Act of 1991 extends protection abroad only to American citizens, and only to those working in American corporations or their controlled **[\*31]** subsidiaries. This limitation will automatically exclude permanent resident aliens as well as other aliens, both of whom receive domestic coverage. Further, a recent judicial decision, *Fortino v. Quasar Co.*, [[232]](#footnote-233)232 has cast great doubt as to what constitutes an American corporation, thereby further limiting access to benefits provided under both domestic and extraterritorial application of the Act. [[233]](#footnote-234)233

Similarly, commentators have raised some doubt as to the breadth of the 1984 amendment to the ADEA that granted it extraterritoriality. [[234]](#footnote-235)234 For example, the ADEA explicitly protects Americans employed abroad by American employers from age discrimination. [[235]](#footnote-236)235 If courts, however, drastically change the definition of what constitutes an American company, that change will limit the application of the ADEA both domestically and abroad. [[236]](#footnote-237)236

Further, a literal reading of section 623(h)(2) of the ADEA suggests that foreign businesses in the United States are not subject to the ADEA at all. [[237]](#footnote-238)237 Section 623(h)(2) of the ADEA states: "The prohibition of this section shall not apply where the employer is a foreign persons not controlled by an American employer." [[238]](#footnote-239)238 The passage contains no words of limitation limiting this exemption to the foreign operations of a foreign employer. [[239]](#footnote-240)239 Therefore, foreign businesses in the United States who employ Americans here, or overseas, may escape U.S. anti-discrimination statutes altogether. For these companies the place of employment may make no difference to their hiring practices.

EEOC's own policy guidelines, in contrast, state that the ADEA does apply to foreign employers doing business in the United States because there was no indication by Congress, either in the 1984 amendment or before, that Congress intended otherwise. As discussed above, however, the trend of the present Supreme Court, as underscored by *Aramco*, is towards requiring an affirmative statement of legislative intent. The fact that Congress has acted to overrule the Court does not change per se the Court's attitude, or its power to render decisions out **[\*32]** of sync with the intent of Congress. Therefore, an attack on the ADEA is possible.

Section 109 of the Civil Rights Act [[240]](#footnote-241)240 legislatively overturns *Aramco*. It applies Title VII to American employers employing Americans overseas. However, at the very time that Congress was acting to restore this protection to the American employee, the courts were formulating new holdings cutting to the bone the beneficial impact of the Act, by restrictively reinterpreting the definition of an American corporation such as *Fortino*. [[241]](#footnote-242)241 In light of *Fortino*, and the Act's resolution of the interpretation of the exemption clause, the struggle for the protection of American workers' rights, both at home and abroad will shift. The new emphasis will focus upon the managerial structure of a corporation, its subsidiaries, and secondary subsidiaries, in relationship to the FCNs, foreign parentage, admiralty, federal employer status, BFOQs, and foreign compulsion criteria.

2. Friendship, Commerce & Navigation Treaties

According to the United Nations Centre on Transnational Corporations, certain foreign countries have restricted the employment of aligned nationals, those of the same nationality as the corporation, by foreign corporations. [[242]](#footnote-243)242 Further, all nations restrict nationals employed in foreign corporations by such mechanisms as granting work permits and visas. As a counterbalance, various trading countries have agreed to Friendship, Commerce and Navigation (FCN) treaties. FCNs are commercial treaties which govern the rights of the parties concerning transactions within the United States. [[243]](#footnote-244)243 The United States has FCNs with most European Community countries, China, El Salvador, Hungary, Israel, Japan, Liberia, Nicaragua, Norway, Poland, South Korea, and Sweden.

FCNs stand in contrast to the established principle of international law that the law of the place prevails in employment relations. FCNs, for the most part, preceded the enactment of U.S. civil rights legislation of the 1960s. FCNs provide a defense to foreign corporations who hire their own nationals to fill high executive or confidential **[\*33]** positions abroad. This freedom of choice treaty provision was intended to allow foreign employers to favor their own nationals in executive positions. [[244]](#footnote-245)244 Among the U.S. circuits, however, there is great conflict as to what extent these provisions apply to immunize a foreign employer from the civil rights laws. [[245]](#footnote-246)245

The EEOC Policy Statement Application of Title VII to American Companies Overseas and to Foreign Companies, [[246]](#footnote-247)246 which applied prior to *Aramco*, offered only limited coverage and guidance for interpreting the Civil Rights Act of 1991 in light of the impact of FCNs. The policy states that the following employers operating outside the United States were subject to Title VII with respect to U.S. citizen employees: (1) United States corporations doing business abroad; (2) foreign corporations incorporated in the United States and doing business here, if there was some connection between the discrimination and that United States business; and (3) foreign subsidiaries or firms controlled by an American employer. The question of how the FCNs interplay with the Act is not discussed.

The Supreme Court's position in *Sumitomo Shoji America v. Avagliano*, [[247]](#footnote-248)247 and the Third Circuit's in *MacNamara v. Korean Airlines*, [[248]](#footnote-249)248 however, provide additional guidance. In *Sumitomo*, the Supreme Court avoided the issue of any arguable conflict between the Civil Rights Act and the FCN between the United States and Japan. The Court held that domestic incorporation rendered a foreign company domestic for the purposes of the Act

In *MacNamara*, a case before the Third Circuit involving discrimination in age and national origin, the EEOC argued that the purpose of the FCNs had been to protect foreign businesses against the discriminatory **[\*34]** effects of local laws, such as those requiring a fixed percentage of local employees, or which forbade the hiring of non-citizens. Title VII, the EEOC said, placed no competitive disadvantage on foreign corporations. FCNs then, were meant to neutralize "percentile" restrictions, and provide "national treatment" for foreign businesses, and were not meant to grant immunity from the CRA of 1964. [[249]](#footnote-250)249 The Third Circuit stated that the U.S.-Japan FCN was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically conflict with the right to select its own nationals for managers on the basis of citizenship. [[250]](#footnote-251)250

The EEOC noted that a broad reading of FCNs would not only remove them from their historical context but threaten the application of civil rights domestically. In the words of the Commission:

The consequences of accepting the view that the treaty grants an unfettered right of choice (to foreign businesses) would be far-reaching. Under such an interpretation, foreign companies would have the right to hire white Americans over black Americans solely on the basis of race, American males over females solely on the basis of sex, and Protestant Americans over Jewish Americans solely on the basis of their religion. [[251]](#footnote-252)251

3. Foreign Parent Corporations of U.S. Incorporated Subsidiaries

Neither the ADEA nor Title VII of the CRA of 1991 specifically address the situation which arises when discrimination is caused by a foreign parent of a U.S. subsidiary. The ADEA's 1984 amendment extended protection to United States citizens working abroad. As amended, the ADEA states that an American employer is responsible for any practices prohibited by the ADEA engaged in by controlled subsidiaries. This seems to suggest that foreign subsidiaries of an American corporation are affected, but not necessarily the American subsidiary of a foreign corporation. Specifically the ADEA, as amended, covers: (1) American firms (meaning employer as defined in 29 U.S.C. § 630(b)); (2) an employer who is a joint employer with a United States firm, e.g., a foreign branch of an American firm; and (3) employers incorporated in a foreign country but controlled by an **[\*35]** American firm. [[252]](#footnote-253)252 The ADEA provides an expressed exemption for foreign firms, not controlled by American employers. [[253]](#footnote-254)253

The test of corporate control which the ADEA applies is the same as that used by the National Labor Relations Board: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. [[254]](#footnote-255)254 Case law has also established that this criterion may be satisfied by a showing that an American corporation is sufficiently necessary to the employment process, even in the absence of total control or ultimate authority. [[255]](#footnote-256)255 Similarly, Title VII, as amended by the CRA of 1991, states that if an employer controls a corporation incorporated in a foreign country, any prohibited practice will be presumed to be engaged in by such employer. Additionally, the discrimination must begin with an American corporation, and be traced through its subsidiaries in order for liability to attach.

It would be overly optimistic to assume that what constituted an American corporation, with regard to a foreign parent, and the effect of FCNs was resolved in *Sumitomo*. In that controversy, the Second Circuit had construed the FCN between the United States and Japan. It had held that the freedom of choice provisions in the treaty did serve to immunize a foreign company from prosecution under claims of discrimination based on citizenship. The court added, however, that the favoritism may only serve as a BFOQ defense under Title VII of the CRA of 1964, in as far as it is "reasonably necessary to the successful operation of its business." [[256]](#footnote-257)256 The court set forth four factors to be considered in determining whether such favoritism was reasonably necessary: (1) linguistic and cultural skills; (2) knowledge of the products, markets, customs and business practices of the employer's country; (3) familiarity with the personnel and corporate structure of the principal or parent enterprise; and (4) acceptability to those persons with whom **[\*36]** the company or branch does business. [[257]](#footnote-258)257

The Supreme Court's decision in *Sumitomo*, while powerful, delicately sidestepped the issue of whether foreign parental control invoked the FCN treaty exemptions to the Civil Rights Act. The Court held that because the defendant, a Japanese subsidiary, had been incorporated in the United States, it was therefore no longer a foreign corporation, nor was it covered by the FCN treaty. [[258]](#footnote-259)258 The Court specifically declined to determine if a wholly owned domestic subsidiary of a foreign parent corporation could assert the substantive treaty rights of its parent corporation. [[259]](#footnote-260)259

*Sumitomo* has controlled for over ten years. However, recent decisions have challenged the holding, and threaten to seriously erode application of the CRA, domestically and consequently, abroad as well. For example, in *Fortino v. Quasar Co.*, [[260]](#footnote-261)260 a work force reduction program, which targeted non-Japanese management with more than 10 years of service, was held by the Seventh Circuit not to have violated Title VII and the ADEA, even though Quasar is a subsidiary of an American corporation. Quasar claimed that its discrimination in favoring Japanese citizens did not amount to national origin abuse. The company cited the FCN treaty, and argued, although it is a division of an incorporated American corporation, Matshushita Electric Corporation of America, its parent's parent, Matsushita Electric Industrial Co., a wholly-owned Japanese subsidiary, had rights under the treaty. Incredibly, the court agreed that the treaty applied, and that such discrimination on the basis of citizenship did not violate Title VII's prohibition of discrimination on the basis of "national origin." [[261]](#footnote-262)261

The court in *Fortino* essentially rejected *Sumitomo*, holding that liability under the Civil Rights Act flowed from a company's standing as an incorporated American entity, as opposed to that of a foreign unincorporated branch office. The court found that in showing preference to Japanese executives, Quasar was acting at the direction of its parent management, located in Japan, and therefore, the company was entitled to invoke the treaty. In light of the enormity of the number of foreign owned companies and subsidiaries established in America since **[\*37]** the 1960s, *Fortino* may leave millions of domestic American workers without Title VII or ADEA protection. Millions of overseas Americans will be placed outside the recently extended extraterritorial protection of the Civil Rights Act of 1991, because of a mere reclassification as to what constitutes an American corporation.

The integration of managerial control among foreign parents and domestic American subsidiaries seems to be an emerging avenue by which the conservative judiciary continues to restrict the application of civil rights to Americans employed in domestically incorporated business, both in America and abroad. Plaintiffs have used this concept as a tool to find a deep pocket or to show control over a subsidiary by an American corporation for the purpose of invoking Title VII, not eliminating it.

The logical extension of *Fortino* is that the same foreign parent may similarly avoid Civil Rights Act liability for discrimination affecting subsidiaries of its American company, which may also employ Americans abroad. The decision directly confounds the purpose and intent of the Congress in enacting the Civil Rights Act of 1991. Yet, the decision is not directly impacted by the Act, because the Act does not address FCNs and therefore, remains as a prime example of judicial legislation in favor of employers. As more cases develop utilizing this argument, the circuits will continue to split on the issue, and the Supreme Court will eventually have to address it. The timing of *Fortino*, shows it may be an effort to force the matter before the existing conservative Rehnquist Court before the Court can be rebalanced by President Clinton.

In contrast to *Fortino*, other cases have implied support for a finding that even a foreign parent could be subject to Title VII. For instance, in *Johnson v. Cloos International*, [[262]](#footnote-263)262 former employees of an American subsidiary of a foreign parent corporation sought to establish evidence of an "integrated enterprise" amongst the parent and the sister affiliates to permit it to invoke Title VII. [[263]](#footnote-264)263 In *Thomas v. Rohner-Gehrig & Co.*, [[264]](#footnote-265)264 the court held that a German parent company, which discriminated against U.S. employees, violated the national origin clause of Title VII. [[265]](#footnote-266)265

**[\*38]** The Fifth Circuit, in *Spiess v. C. Itoh & Co.*, [[266]](#footnote-267)266 however, clarified the inconsistent circuit court decisions on enforceable ADEA and Title VII rights. The Fifth Circuit rejected a BFOQ exception limitation as applied to companies protected under FCNs because it interpreted the treaty to be absolute. The defendant, C. Itoh, a wholly owned subsidiary incorporated in the United States, moved to dismiss claiming FCN Treaty rights under its parent, on the basis of integration of the corporation's work force. C. Itoh also asserted that the Japanese parent had hired the Japanese citizens, and thus the subsidiaries' hiring practices were affected by the parent's decisions. The district court had rejected this argument, unlike the court in *Fortino*, but refused to determine the issue, saying the motion to dismiss was not properly appealable. [[267]](#footnote-268)267

4. Admiralty Cases

The extraterritorial provisions in the Civil Rights Act of 1991 would arguably not affect cases such as *EEOC v. Kloster Cruise Ltd.*, [[268]](#footnote-269)268 which raise admiralty issues related to extraterritorial application of civil rights laws. In *Kloster*, the EEOC sought to enforce subpoenae duces tecum against a wholly owned Bahamian subsidiary providing catering services on the cruise line. EEOC's action was in regard to Americans working aboard a Bahamian-registered cruise ship. The ship docked once a week in Miami where Kloster had its executive offices. Kloster had thirty-one district managers throughout the United States, and generated 95% of its business from North American ticket sales. The EEOC's premise was that Kloster and the Bahamian subsidiary were an integrated entity for Title VII purposes.

Kloster refused to comply with the subpoenae, claiming the EEOC lacked subject matter jurisdiction. The court, holding for the defendant, said "the well established rule of international law [is] that the law of the flag state ordinarily governs the internal affairs of a ship." [[269]](#footnote-270)269 However, in light of Kloster's enormous benefit from the North American market, obtaining almost all of its sales there, application of the "effects doctrine", also an established tenet of international law, would **[\*39]** have been equally proper.

5. EEOC and Federal Employees under the CRA of 1991

Shortly after the Supreme Court's decision in *Aramco*, the EEOC received a request to review a claim by a federal employee, regarding overseas discrimination. [[270]](#footnote-271)270 The EEOC's Office of Federal Operations advised the commissioners that the EEOC could continue to assert jurisdiction over federal employees' claims of discrimination overseas, because the source of the legislation and the history of enactment differed in origin from that of Title VII.

Some EEOC commissioners, however, still express doubt as to whether this is jurisdictionally valid. [[271]](#footnote-272)271 The concern centers around Congress's utilization of identical exemption language for both federal and non-federal employees. [[272]](#footnote-273)272 In light of the enactment of section 109 of the Civil Rights Act of 1991, according to EEOC Commissioner Joy Cherian, it remains unclear if Congress intended the CRA to cover federal employees. [[273]](#footnote-274)273

6. The Bona Fide Occupational Qualification (BFOQ)

The BFOQ defense is based on the premise that American employers must, at times, yield to the laws of a host country. For example, ***Kern*** *v. Dynalectron Corp.* [[274]](#footnote-275)274 addressed a requirement that all pilots flying into Mecca be Moslem. Because of the severe penalty, i.e., non-Moslems would be beheaded, conversion to Islam was considered a valid BFOQ, as it was necessary to perform safely and efficiently within the job description.

The 1984 extraterritorial amendment to the ADEA also amended section 4(f)(1) providing that a defense is found when compliance with the ADEA causes an employer to violate the laws of a foreign host. The ADEA, therefore, statutorily provided for a BFOQ defense.

Although the violation of laws of another country are adequate to **[\*40]** invoke the BFOQ defense under the ADEA, courts have found that the customs of a host country are insufficient grounds to support a BFOQ defense under Title VII. In *Abrams v. Baylor College of Medicine*, [[275]](#footnote-276)275 a district court found that a medical school's exclusion of Jewish physicians from a rotational program in Saudi Arabia was not justified. The Saudi government had never specifically told the defendant that American Jews could not participate in the program. [[276]](#footnote-277)276 Thus, mere discriminatory policies were not considered sufficient to invoke the defense.

Similarly, in *Fernandez v. Wynn* ***Oil*** *Co.*, [[277]](#footnote-278)277 the defendant denied an American female a promotion on the basis of her sex. Although the district court had denied liability because the plaintiff had failed to prove a prima facie case based on her qualifications, the Ninth Circuit court rejected the district court's analysis of the BFOQ defense. The appellate court stated that "stereotypic impressions of male and female roles do not qualify gender as a BFOQ . . . nor does stereotyped customer preference justify a sexually discriminatory practice." [[278]](#footnote-279)278

Unfortunately, the Civil Rights Act of 1991 is silent on the definition of a BFOQ. In the future, courts will probably address when a foreign custom may constitute a BFOQ under Title VII and the ADEA.

7. Foreign Compulsion Defense

American employers who are subject to liability under Title VII for action required by foreign host governments may further assert the defense of "foreign compulsion," even in the absence of a BFOQ defense. The foreign compulsion defense was raised in *Bryant*, [[279]](#footnote-280)279 discussed earlier. In *Bryant*, an employer claimed the Iranian government compelled it to omit benefits to wives whose husbands were employed in Iran, as the Iranian government insisted that employers could not duplicate benefits.

The defendant in *Pfeiffer v. Wm. Wrigley Jr. Co.*, [[280]](#footnote-281)280 also used this defense, noting that if German law required retirement at age sixty-five, the ADEA must yield. The foreign compulsion doctrine gives primacy **[\*41]** to lex loci when there is a conflict between domestic and foreign legal requirements. However, the Civil Rights Act of 1991 again gives no guidance as to what definitional standard to apply in Title VII or ADEA cases regarding what constitutes foreign compulsion.

B. *Other Features of the New Civil Rights Act of 1991*

1. Retroactive Effect

No retroactive effect was given in the ADEA amendment of 1984, [[281]](#footnote-282)281 however, conflicts with the language of the Civil Rights Act of 1991 suggest it does apply retroactively. The Act states that, "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." [[282]](#footnote-283)282 As in *Aramco*, this narrow language of exclusion raises a negative inference. Do cases outside the limitation become subject to the Civil Rights Act of 1991?

Subsection 402(a) of the Act adds additional support suggesting the Act applies retroactively. The subsection provides that the Act shall take effect upon enactment. This literally means that courts should apply the law after November 21, 1991.

Further controversy regarding retroactivity is generated by conflicting Supreme Court decisions. In *Bradley v. School Board of Richmond*, [[283]](#footnote-284)283 the Court concluded that, "the law in effect at the time the Court renders its decision [should apply], unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." [[284]](#footnote-285)284 In *Bowen v. Georgetown University Hospital*, [[285]](#footnote-286)285 however, the Court stated that, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." [[286]](#footnote-287)286 Further, the Court declined the opportunity to reconcile these cases in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*. [[287]](#footnote-288)287 In his concurring opinion, Justice Scalia remarked that the two cases are "in irreconcilable contradiction" [[288]](#footnote-289)288 and **[\*42]** discounted any possible distinctions between the cases based on substantive or procedural rights. [[289]](#footnote-290)289

The Rehnquist Court's inability to conform its own opinions with existing Supreme Court decisions has unfortunately trickled down to the district courts. [[290]](#footnote-291)290 In *Mojica v. Gannett Co.*, [[291]](#footnote-292)291 and *Graham v. Bodine Electric Co.*, [[292]](#footnote-293)292 an Illinois district court held that the Civil Rights Act does apply retroactively, based upon section 402(b), [[293]](#footnote-294)293 while courts in *Mozee v. American Commercial Marine Service Co.* [[294]](#footnote-295)294 and *James v. American International Recovery*, [[295]](#footnote-296)295 held the reverse. [[296]](#footnote-297)296 Clearly this is another area ripe for further contest.

Unfortunately, the very agency created by Congress to protect the rights of discrimination victims, the EEOC, has suggested that even under *Bradley*, the Civil Rights Act of 1991 does not apply retroactively. [[297]](#footnote-298)297 Leadership at EEOC and at the Department of Justice impacts heavily on claimants, because these agencies interpret legislation, instruct staff, modify rules and assist the court by supplying legal support for positions they urge. [[298]](#footnote-299)298 Throughout the eight year tenure of Chairman Clarence Thomas, Women's Legal Defense Fund attorneys repeatedly showed a drastic reduction in enforcement activities, along with policy changes that severely eroded Title VII rights. [[299]](#footnote-300)299 However, in light of the recent history of the EEOC under conservative administrations, and the disclosure of Clarence Thomas's methods of administering the agency, perhaps this is to be expected.

Since Evan Kemp took the chair in March 1990, the decline has accelerated. In April 1992, a review by Women Employed, the National Women's Law Center, Equal Rights Advocates, and the Women's Legal Defense Fund found that the EEOC's handling of **[\*43]** complaints was dismal, settlements were declining, no cause findings had increased, investigations were inadequate, and the staff was incompetent and hostile to complainants. [[300]](#footnote-301)300

Further confusion arises from section 109, on extraterritorial application. Subsection 109(c) provides that "the amendments made by this section shall not apply with respect to conduct occurring before the date of enactment of the Act." [[301]](#footnote-302)301 Is this limited exclusion for extraterritorial cases an indication of the retroactive application of the Act generally? It is certainly arguable that the cited restrictions are not merely superfluous. [[302]](#footnote-303)302

2. Caps

Complaining parties who allege intentional discrimination under the Civil Rights Act of 1991, domestically or internationally, may seek partial compensatory and punitive awards subject to caps. These awards apply to claims for future pecuniary loss, emotional pain and suffering, and mental anguish. Punitive and compensatory damages, however, only apply in instances of disparate treatment, and not disparate impact. [[303]](#footnote-304)303 The plaintiff must show intentional discrimination with malice or reckless indifference to the claimant's federally protected rights. The Act, however, does not set forth a formula for establishing this criterion. In addition, the Act establishes a cap system based on the employer's number of employees, in each of 20 or more calendar weeks. The caps are as follows: $ 50,000 for employers of 15 to 100 employees; $ 100,000 for 101 to 200; $ 200,000 for 201 to 500; and $ 300,000 for companies with more than 500 employees. Title VII does not apply to employers with fewer than fifteen employees. [[304]](#footnote-305)304 The EEOC has determined that temporary employees must also be counted for the purpose of caps. [[305]](#footnote-306)305 Arguably, worldwide employee numbers are **[\*44]** also applicable. The caps apply to future pecuniary losses, such as consequential damages, pain and suffering, and mental anguish. Further, the caps exclude and are in addition to any relief available under Section 706(g) of Title VII, such as back pay, front pay, shift differentials, fringe benefits, overtime, medical expenses, reinstatement, hiring, promotions, attorney fees and costs, and interest. [[306]](#footnote-307)306 Immunity continues to shield the federal and public sector employers from damages under the Civil Rights Act of 1991 because they are exempted under the Act, although this immunity may not hold true for purely commercial aspects of such employment. [[307]](#footnote-308)307

Why caps? Unlike racial discrimination, caps are imposed on gender discrimination claimants. Clearly people can suffer greatly from gender discrimination. In *Johnson v. Railway Express Agency*, [[308]](#footnote-309)308 the Supreme Court has already held that the federal employment discrimination ban applies to race discrimination in private employment. [[309]](#footnote-310)309 The caps may be read to legislatively overrule this Supreme Court decision.

Further, because the caps relate awards to the size of the employer, not the harm done, they will not fairly compensate victims. The arbitrary cap step distinctions are already the subject of proposed legislation. The Equal Remedies Act, now pending as S. 2062, and H.R. 3975, seeks to entirely remove the caps.

3. Juries

The Civil Rights Act of 1991 guarantees the right to a trial by jury, [[310]](#footnote-311)310 where a party seeks either compensatory or punitive damages. [[311]](#footnote-312)311 This could be a truly significant revision because it curtails the individual bias a judge may impose in civil rights cases. A jury that perceives a cover-up is likely to punish businesses for their automatic support of managers charged with discriminatory practices. Further, with the threat of jury trials and their higher awards, the practice by well-heeled defendants of dragging out litigation and wearing down plaintiffs will become less attractive and settlement will take on a new **[\*45]** urgency. The Civil Rights Act, however, provides that judges may not inform juries about the cap limitation, thereby creating more of an appearance of jury outcome than the actual result.

4. Alternative Dispute Resolution Procedures

In *Alexander v. Gardner-Denver Co.*, [[312]](#footnote-313)312 the Supreme Court held that adherence to restrictive arbitration clauses was optional in Title VII claims. [[313]](#footnote-314)313 In a more recent decision, *Gilmer v. Interstate/Johnson Lane Corp.*, [[314]](#footnote-315)314 however, the Court held that ADEA claims can be subject to compulsory arbitration pursuant to an employment agreement. [[315]](#footnote-316)315 Additionally, *Willis v. Dean Witter Reynolds, Inc.*, [[316]](#footnote-317)316 and *Alford v. Dean Witter Reynolds, Inc.*, [[317]](#footnote-318)317 both held that Title VII claims can be subject to mandatory arbitration. [[318]](#footnote-319)318 These cases may reflect the new changes in the Civil Rights Act of 1991 in this area.

The Civil Rights Act of 1991 provides that where appropriate, and to the extent authorized, the courts should encourage the use of alternative dispute resolution. Although the language of the Act seems to be conclusive that mandatory arbitration is not required under the Act, this area may also be subject to future litigation.

5. Disparate Impact

Back in 1971, the Supreme Court held in *Griggs v. Duke Power Co.*, [[319]](#footnote-320)319 that even neutral employment practices could violate Title VII if they harmed a protected class, and if a defendant could not prove they were a business necessity. The Court noted that Title VII proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employer cannot show that an employment practice which operates to exclude relates to job performance, Title VII prohibits the practice. [[320]](#footnote-321)320 *EEOC v. Rath Packing Co.*, [[321]](#footnote-322)321 is an example of how courts **[\*46]** have applied the business necessity rule. "The proper standard is not whether [the alleged discriminatory practice] is justified by routine business considerations but whether there is a compelling need for that practice." [[322]](#footnote-323)322

In 1989, however, in *Wards Cove Packing Co. v. Atonio*, [[323]](#footnote-324)323 the Rehnquist Court shifted the burden to plaintiffs to separate various degrees of disparate impact attributable to each practice in multiple discriminatory practice suits. Further, it shifted the burden of persuasion of proving job-relatedness from the defendant to the plaintiff, who often was without records, or knowledge to meet the burden. *Wards Cove Packing* also adopted a weaker standard of justification for discriminatory practices which disproportionately excluded women and minorities, by defining a business necessity as a practice which significantly serves a legitimate business objective. [[324]](#footnote-325)324

The Civil Rights Act of 1991 addresses these problems in section 105, which in turn creates a new section 703(k) in Title VII to specifically address disparate impact. Under section 703(k)(1)(B)(i), a plaintiff is exempted from proving disparate impact of each employment practice, if the plaintiff can demonstrate that such elements of the defendant's business decisions are not capable of separation for analysis. In such cases, the respondent's decision making process can be viewed as one employment practice and bottom line statistics can be used in cumbersome cases to establish a claim. [[325]](#footnote-326)325

Section 104 of the Act shifts the burden of persuasion on the issue of job relatedness back, to the defendant, and section 105 states that the employer using the exclusionary practice must show job relatedness and business necessity of the practice. Section 106 also eliminates employer adjusted test scores used for preferential selection on the basis of race, color, sex, or national origin. [[326]](#footnote-327)326

**[\*47]** 6. Mixed Motive Cases

In *Price Waterhouse v. Hopkins*, [[327]](#footnote-328)327 the Supreme Court held that employers who acted on the basis of both proper and unlawful motive, would not be liable if they could prove that the same result or decision would have been reached in the absence of discrimination. The amended section 107 allows plaintiffs to recover for proven intentional discrimination. The Act amends section 703 of the Civil Rights Act of 1964, by stating that unlawful employment practice is established when a complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor. Once a party shows discriminatory taint, the entire process becomes unlawful. If the employer can show it would have taken the same action absent discriminatory intent, then the employee is not entitled to damages, reinstatement or hiring, but only declaratory and injunctive relief, and attorney fees and costs. [[328]](#footnote-329)328

7. Challenges to Consent Decrees

In *Martin v. Wilks*, [[329]](#footnote-330)329 the Supreme Court held that nonparties to a Title VII suit could bring collateral lawsuits attacking orders and decrees entered in the initial suit. In *Martin*, white firefighters challenged a consent agreement between their employer and the NAACP that provided for the promotion of black employees on the basis of race. The employer agreed that this was reverse discrimination but argued that the decree was court approved. On appeal, the Supreme Court held that the employees were not bound by a consent decree in which they had no part. [[330]](#footnote-331)330

Section 68 of the Civil Rights Act of 1991 strengthens the finality of the consent decree by requiring that certain circumstances control challenges. For instance, parties who had notice of the pending decree, and reasonable opportunity to object are barred from later challenging it. Further, challenges will not be permitted if such views were reasonably represented by others, even without notice. [[331]](#footnote-332)331 Thus, the Act essentially bars all after-decree challenges by adversely affected parties with notice or substitute representation.

**[\*48]** 8. Statute of Limitations

In 1989, in *Lorance v. AT&T Technologies*, [[332]](#footnote-333)332 the Supreme Court held that the statute of limitations for an EEOC filing on a facially neutral, but intentionally discriminatory change in AT&T's seniority system, began to run when AT&T adopted the change. The case retroactively required plaintiffs to file charges when there was no ripe cause of action, and when demotion or other impacts were merely speculative. Because subsequent employees hired more than 300 days after the changes were initiated would never be able to raise the issue, the Court deprived plaintiffs of any remedy. [[333]](#footnote-334)333

Section 112 of the Civil Rights Act of 1991 now allows such actions to be brought when the individual becomes subject to the discriminatory activity or upon the discriminatory application. The Act amends § 706 (e) of the Civil Rights Act of 1964 and allows complaints to be filed within 180 days of: (1) when the seniority system was adopted; (2) when the individual becomes subject to the system; or (3) when the aggrieved party is injured by the discriminatory system. [[334]](#footnote-335)334

ADEA suits previously have had a filing period of two to three years depending on the intentional character of the activity. The Civil Rights Act of 1991, however, now makes the ADEA complementary to Title VII's statute of limitations, thus actions must be brought within ninety days after receiving notice from the EEOC that it has dismissed the charge or terminated the process. [[335]](#footnote-336)335

9. Fees

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, [[336]](#footnote-337)336 the Court limited expert fees to thirty dollars a day, pursuant to Section 1821. [[337]](#footnote-338)337 Previously, under *West Virginia University Hospitals v. Casey*, [[338]](#footnote-339)338 the Rehnquist Court held that the Civil Rights Attorney Fees Awards Act of 1988 did not permit a prevailing plaintiff to recover expert fees, even when essential to the plaintiff's case. As a result, civil rights plaintiffs could not be made whole by the remedy the Court provided.

**[\*49]** Under the American rule, each party must pay their own attorney fees, regardless of outcome. Under *Independent Federation of Flight Attendants v. Zipes*, [[339]](#footnote-340)339 however, a court may award the recovery of attorney's fees. Further, the Civil Rights Act of 1991 now permits courts to include expert fees within the attorney's fees award. [[340]](#footnote-341)340

10. Contractual Agreements

*Patterson v. McLean Credit Union*, [[341]](#footnote-342)341 held that Section 1981 of the Civil Rights Act of 1866, as applied to the right to make and enforce contracts, could only be applied in formation disputes and not to discrimination arising on the job itself. In doing so, the Court essentially ended the practice of using the earlier Act to enhance remedies by permitting punitive damage awards and jury trials.

The Civil Rights Act of 1991 reverses *Patterson*, amends section 1981, and grants the right to "make and enforce contracts," and includes the making, performance, terms, and termination of contracts thus permitting "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." [[342]](#footnote-343)342 This is particularly important in view of the fact that the 1866 Civil Rights Act, in contrast to the 1964 Act, applies to all private sector employers, and contains no size restrictions.

CONCLUSION

The *Aramco* plurality's restriction on the applicability of Title VII abroad was seriously flawed for many reasons. The Court did not address precedent case law or follow dictates of statutory construction. Furthermore, the Court rendered Congress's alien exemption clause superfluous. Previously the Court had derived congressional intent from a notation as small as a heading, suggesting indications of congressional intent are sometimes far from voluminous. Therefore, a plain meaning interpretation of the exemption clause should have been sufficient to hold in favor of extraterritorial application, even before the Civil Rights Act of 1991.

Further, *Aramco* completely ignored the "Effects Doctrine," disregarding **[\*50]** unified market economies, world wide free trade, and expansion of the MNEs. As the massive European Community and other world trading blocks evolve, overseas American workers and advisors have experienced serious hardship, as well as a competitive disadvantage.

The plurality overturned two entire bodies of law affecting Title VII and the ADEA with "hindsight" reinterpretation of these decade old statutes and their case-law. Further, the plurality never weighed the possible violation of international law in not finding an extraterritorial application in Title VII, because international conventions and treaties are "supreme law" in the United States. [[343]](#footnote-344)343

*Aramco* was an example of the conservative forces on the courts denying meaningful access to civil rights as they have throughout the Reagan and Bush administrations. The EEOC's performance under chairmen Evan Kemp and Clarence Thomas has also hindered progress.

With the Civil Rights Act of 1991, however, Congress reaffirmed that Title VII is not our burden to bear, but rather, what is highest and most human about us. But while the Act is a step forward, it is still flawed with respect to its lack of adequate definition as to what constitutes an American corporation, and whether subsidiaries and secondary subsidiaries, can claim exemption to the Act under the FCNs, foreign parentage, admiralty, federal employer status, BFOQs, and foreign compulsion criteria. Further, the legislation has left gaps which will result in extensive litigation in areas involving, for example, retroactiveness, caps on remedies, access to juries, mandatory alternative dispute resolution, disparate impact, and mixed motive cases.

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1. 1 *See* Joy Cherian, Transnational Reach of U.S. Civil Rights Laws, What's Left After *Aramco*?, Address Before the A.B.A. Section on Labor and Employment Law in Rome, Italy, *in* 42 LAB. L.J. 596 (1991). Dr. Cherian is a Commissioner of the Equal Employment Opportunity Commission. *Id.* [↑](#footnote-ref-2)
2. 2 *Extraterritorial Application of United States Employment Discrimination Laws*, 1991 N.Y.ST.B.A. SEC. ON COMM. AND FED. LIT. I. [↑](#footnote-ref-3)
3. 3 42 U.S.C. § 2000e-4, e-5 (1978). [↑](#footnote-ref-4)
4. 4 42 U.S.C. § 2000e-2, e-4 (1978). *See* Executive Order No. 12,106 § 3 (1978), 44 F.R. 1053. [↑](#footnote-ref-5)
5. 5 42 U.S.C. § 2000a-h(6) (1988). [↑](#footnote-ref-6)
6. 6 *See supra* note 1. [↑](#footnote-ref-7)
7. 7 111 S. Ct. 1227 (1991). [↑](#footnote-ref-8)
8. 8 Id. at 1236. [↑](#footnote-ref-9)
9. 9 473 F. Supp. 506 (S.D.N.Y. 1979), 638 F.2d 552 (2d Cir. 1981) *rev'd in part*, 457 U.S. 176 (1982). The petitioner was a wholly owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese trading company doing business in the United States. They were sued by secretaries claiming the company's practice in hiring only male Japanese citizens to fill executive positions violated Title VII of the Civil Rights Act of 1964. Sumitomo moved to dismiss, stating its practices were protected under a treaty of friendship. *See* Treaty of Friendship, Commerce and Navigation (FCN), Apr. 2, 1953, U.S.-Japan, art. VIII, 4 U.S.T. 2063 (entered into force Oct. 30, 1953). Article VIII(1) of the treaty provided that the "companies of either party shall be permitted to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." 473 F. Supp. at 509. The Supreme Court held that Sumitomo was not a company of Japan and thus not covered by Art. VIII(1) of the Treaty, rather, the Court said, Sumitomo was a U.S. company, constituted under the laws of the State of New York, the place of their incorporation. 457 U.S at 182-83.

   If Sumitomo - U.S.A. created a new subsidiary and hired Americans to work abroad in that company, such personnel would have been covered under Title VII had it been found to have extraterritorial application. The converse would have been true if a new branch office, as opposed to an incorporated subsidiary, were formed by Sumitomo - Japan. Interestingly, the case discusses the post war influx of the foreign corporation into the United States and clarifies that the Friendship Treaty was not meant to give foreign corporations greater rights than domestic companies enjoyed. *Sumitomo* confirms the move towards global standards. Perhaps the most striking advance of the postwar treaties is the widespread use of the corporate form. [↑](#footnote-ref-10)
10. 10 *See generally* Andrew J. Lauer, *Title VII, The Age Discrimination in Employment Act and The Friendship. Commerce and Navigation Treaty: An Ongoing Conflict; An Analysis of* MacNamara v. Korean Airlines, 17 BROOK, J. INT'L L. 423 (1991) (discussing the legality of firings based on race and FCN's). FCN treaties allow participating foreign corporations to employ persons of their choice for some executive positions. Some foreign companies interpreted this to mean that they were not subject to U.S. civil rights laws. *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982). [↑](#footnote-ref-11)
11. 11 29 U.S.C. §§ 621-634 (1988). *See* 29 U.S.C. § 623(f)(1) (1988) (for the 1984 extraterritorial amendments). "If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be the practice by such employer." 29 U.S.C. § 623(h)(1) (1988). [↑](#footnote-ref-12)
12. 12 *See Age Discrimination and Overseas Americans, 1983: Hearings Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 4 (1983) (statement of Clarence Thomas, then Chairman, EEOC, now U.S. Supreme Court Justice). "Neither the ADEA nor its legislative history give any indication that the statute should apply to acts outside this country's borders." *Id.* Further, he stated, "in contrast, Title VII of the Civil Acts Right of 1964, as amended, which EEOC also enforces, does apply extraterritorially because § 702 of Title VII provides, in pertinent part, 'this subchapter shall not apply to an employer with respect to the employment of aliens outside of any state. . . ." *Id.* Thomas was quoting Title VII's alien exemption provision. *See* 42 U.S.C. § 2000e-1 (1988). [↑](#footnote-ref-13)
13. 13 LOUIS HENKIN ET AL., INTERNATIONAL LAW 52, 832-54 (2d ed. 1987). [↑](#footnote-ref-14)
14. 14 *See* EEOC v. Arabian Am. ***Oil*** Co., 111 S. Ct. 1227 (1991). [↑](#footnote-ref-15)
15. 15 42 U.S.C. § 2000e-1 (1988). [↑](#footnote-ref-16)
16. 16 111 S. Ct. at 1233. [↑](#footnote-ref-17)
17. 17 Id. at 1234. [↑](#footnote-ref-18)
18. 18 Pub L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). [↑](#footnote-ref-19)
19. 19 *See generally* Jacqueline E. Bailey, *Title VII Protections Do Not Extend To American Working Overseas:* EEOC v. Arabian American ***Oil*** Co., 5 TRANSNAT'L LAW 417 (1992) (disagreeing with the Supreme Court decision) (citing Conly J. Schulte, *Americans Employed Abroad by United States Firms are Denied Protection Under Title VII:* EEOC v. Arabian American ***Oil*** Co., 25 CREIGHTON L. REV. 351 (1991) (criticizing the Supreme Court's statutory analysis and the decision)). [↑](#footnote-ref-20)
20. 20 H.R. 1694, 102d Cong., 1st Sess. (1991); *see* 137 CONG. REC. H2135 (1991) (proposing restoration of Title VII to apply extraterritorially). [↑](#footnote-ref-21)
21. 21 Extraterritorial Employment Protection Amendment of 1991, H.R. 1741, 102d Cong., 1st Sess. (1991). [↑](#footnote-ref-22)
22. 22 42 U.S.C. § 2000e-2(a)(1) (1988). [↑](#footnote-ref-23)
23. 23 42 U.S.C. § 2000e-1(f) (1988). [↑](#footnote-ref-24)
24. 24 Boureslan v. Aramco, 857 F.2d 1014, 1021 n.1 (5th Cir. 1988) (King, J., dissenting) (stating that every district court that has considered the question has held that Title VII applies extraterritorially). *Cf.* id. at 1018 (Davis, J.) (explaining but ultimately rejecting the negative implication of section 702 that Title VII does apply extraterritorially to cover United States citizens employed overseas in domestic corporations). [↑](#footnote-ref-25)
25. 25 *See* id. at 1018 n.1 (discussing intent in regards to the amendment to Title VII which extended the Act to federal workers, with the exception of aliens employed outside the limits of the United States); id. at 1020 (discussing the *Civil Rights: Hearing on H.R. 7152, as amended by Subcommittee No. 5 Before the House Committee on the Judiciary*. 88th Cong., 1st Sess. 2303 (1963)); id. at 1026 n.12 (on additional legislative history). [↑](#footnote-ref-26)
26. 26 EEOC Policy Statement: Application of Title VII to American Companies Overseas and to Foreign Companies, *reprinted in* FAIR EMPL. PRAC. MAN. (BNA) 405:6663 (1990); *see also* Boureslan v. Aramco, Arabian Am. ***Oil*** Co., 892 F.2d 1271, 1277 n.4 (5th Cir. 1990)(en banc). [↑](#footnote-ref-27)
27. 27 892 F.2d at 1277 n.4 (commenting on the position of the Justice Department, and citing *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94 Cong., 1st Sess. 88 (1975)(statement of Antonin Scalia, then, Assistant Attorney General, now Supreme Court Justice, testifying in 1975 that Title VII already applied to U.S. citizens by covering employers anywhere in the world)). [↑](#footnote-ref-28)
28. 28 EEOC v. Arabian Am. ***Oil*** Co., 111 S. Ct. 1227, 1244 n. 7 (1991) (Marshall, J., dissenting); 857 F.2d at 1021 n.1, 1031 n.22 (King, J., dissenting) (citing Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986); ***Kern*** v. Dynaelectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (supporting the extraterritoriality of Title VII but declining to apply the Act because of a BFOQ), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984); Bryant v. Int'l Sch. Servs., Inc., 502 F. Supp 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982); Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981); Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978)) (all supporting extraterritorial application). [↑](#footnote-ref-29)
29. 29 *See* 111 S. Ct. at 1244 n.7 (Marshall, J., dissenting) (citing Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988) [hereinafter ADEA]). [↑](#footnote-ref-30)
30. 30 857 F.2d at 1018 n.1. (citing 42 U.S.C. § 2000e-16(a)). [↑](#footnote-ref-31)
31. 31 *Id.* [↑](#footnote-ref-32)
32. 32 42 U.S.C. § 2000e(b) (1988). [↑](#footnote-ref-33)
33. 33 § 2000e(g). [↑](#footnote-ref-34)
34. 34 § 2000e(h) (1988) (citing Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401-561 (1988) [hereinafter LMRDA]). The breath of the LMRDA is coterminous with that of the Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-97 (1988) [hereinafter LMRA] and the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988). [↑](#footnote-ref-35)
35. 35 *E.g.*, DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1986) (non-applicability of pre-amendment ADEA to a firing of a national in Canada); Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985) (non-applicability of pre-amendment ADEA to a firing of a national working in a wholly owned German subsidiary); Cleary v. United States Lines 728 F.2d 607 (3d Cir. 1984) (non-applicability of pre-amendment ADEA to a national employed by a Multinational Enterprise (MNE), and addressing concerns over the discharge because of age of a U.S. citizen who had been employed for many years by an English company). [↑](#footnote-ref-36)
36. 36 Fair Labor Standards Act, 29 U.S.C. § 216 (1988) [hereinafter FLSA]. If the courts had read the FLSA correctly, the FLSA might have been found to demonstrate an implied authorization of extraterritorial application in the ADEA. Such a finding would be logical because Congress clearly was interested in making the ADEA and Title VII co-extensive. The FLSA specifically excludes certain sections of itself from applying to employees in a workplace, "within a foreign Country." These sections refer to maximum hours, minimum wage, child labor, and essential labor practices, but do not refer to civil rights like age discrimination. Monroe Leigh, *Age Discrimination in Employment Act--Extraterritorial Application--U.S. Citizen Employer Abroad*, 80 AM. J. INT'L L. 179, 180-81 (1986). [↑](#footnote-ref-37)
37. 37 Pub. L. No. 98-459, 98 Stat. 1767 (codified as amended at 29 U.S.C. § 630(f) (1988)). [↑](#footnote-ref-38)
38. 38 Boureslan v. Aramco, 653 F. Supp. 629 (S.D. Tex. 1987). [↑](#footnote-ref-39)
39. 39 *Id.* [↑](#footnote-ref-40)
40. 40 *Id.* [↑](#footnote-ref-41)
41. 41 *Id.* [↑](#footnote-ref-42)
42. 42 *Id.* [↑](#footnote-ref-43)
43. 43 *Id.* [↑](#footnote-ref-44)
44. 44 *Id.* [↑](#footnote-ref-45)
45. 45 *Id.* [↑](#footnote-ref-46)
46. 46 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). *Love* dealt with the extent to which Canadian porters (aliens) were protected by Title VII. It concluded that when porters worked in the United States they were entitled to relief. "American citizens who were employed by Pullman in Canada are entitled to full relief . . . . This conclusion rests on the negative inference of § 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1." 13 Fair Empl. Prac. Cas. at 426 n.4. [↑](#footnote-ref-47)
47. 47 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562, 577 n.23 (3d Cir. 1982). Like *Love*, 13 Fair Empl. Pac Cas. (BNA) 423, *Bryant* also negatively inferred, from the absence of a reference to U.S. nationals in the exemption clause, that Title VII must have applied to nationals abroad. Bryant v. International Sch. Servs., 502 F. Supp. 472, 482 (D.N.J. 1980) (quoting *Love*). In *Bryant*, an American corporation had discriminated on the basis of sex by awarding teachers two kinds of employment contracts providing substantially different benefits based on a woman's marital status. The court relied upon the alien exemption clause in Title VII to grant relief. Further, *Bryant* discussed two supporting cases and *Love* discussing cross border workers' rights. *See supra* note 46. *See also* Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981) (involving discriminatory employment practices applied to women seeking work in Latin America and in Southeast Asia, but, not discussing the basis of its jurisdiction). [↑](#footnote-ref-48)
48. 48 *See* 653 F. Supp. at 629-30. [↑](#footnote-ref-49)
49. 49 555 F. Supp. 1251 (D.N.J. 1983) *aff'd*, 728 F.2d 607 (3d Cir. 1984). *See supra* note 35. [↑](#footnote-ref-50)
50. 50 653 F. Supp. at 630-631 (citing Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985); Thomas v. Brown & Root, Inc., 745 F.2d 279 (4th Cir. 1981) (discussing an ADEA case in which the plaintiff was fired, made a complaint with the EEOC, was then rehired, and later fired again, the court held that the initial filing was not automatically activated by the refiring and followed *Cleary* in not applying the ADEA extraterritorially.). [↑](#footnote-ref-51)
51. 51 653 F. Supp. at 631. [↑](#footnote-ref-52)
52. 52 Id. at 630-31. [↑](#footnote-ref-53)
53. 53 414 U.S. 86 (1973). [↑](#footnote-ref-54)
54. 54 653 F. Supp. at 630 (citing Espinoza, 414 U.S. at 95). *Espinoza* refused to follow EEOC guidelines that employment discrimination on the basis of citizenship against a legal alien is prohibited discrimination on the basis of national origin. 414 U.S. at 92-95. "Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." Id. at 95. [↑](#footnote-ref-55)
55. 55 *See* 653 F. Supp at 630. [↑](#footnote-ref-56)
56. 56 *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (NLRB jurisdiction over foreign ships with foreign crews in U.S. waters); Benz v. Compania Navieia Hidalgo, 353 U.S. 138 (1957) (discussing the limits of the NLRB when U.S. workers joined picketing, holding that foreign nationals cannot apply the LMRA to their foreign employer when in the United States)). [↑](#footnote-ref-57)
57. 57 336 U.S. 281 (1949) (denying application of the Eight Hour Law to private contractors working overseas). [↑](#footnote-ref-58)
58. 58 Boureslan v. Aramco, 857 F.2d 1014, 1017 (5th Cir. 1988). The EEOC joined as amicus curiae. Id. at 1015. [↑](#footnote-ref-59)
59. 59 Espinoza v. Farah Mfg., 414 U.S. 86 (1973). [↑](#footnote-ref-60)
60. 60 857 F.2d at 1018, 1019 n.2 (citing 414 U.S. at 94). [↑](#footnote-ref-61)
61. 61 *Id.* at 1017-20. [↑](#footnote-ref-62)
62. 62 *Id.* at 1020. [↑](#footnote-ref-63)
63. 63 857 F.2d at 1021 (King, J. dissenting). [↑](#footnote-ref-64)
64. 64 Id. at 1021 n.1 (citing Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986); ***Kern*** v. Dynaelectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (supporting the extraterritoriality of Title VII but declining to apply the Act because of a BFOQ), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984); Bryant v. International Sch. Servs., 502 F. Supp. 472 (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 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978)). *See generally* Marialuisa S. Gallozzi, *Jurisdiction - Extraterritorial Application of U.S. Statute Proscribing Employment Discrimination - Congressional Intent*, 83 AM. J. INT'L L. 375 (1989) (writing on Aramco, regarding the first appellate hearing, the author stated, "given the potential impact of the decision, the incompleteness of the majority's opinion is surprising. The majority failed to consider the jurisdictional principles of international law, notwithstanding that . . . its decision, like the presumption against extraterritoriality, was motivated . . . by a desire not to impinge upon the sovereignty of other nations, and notwithstanding . . . that the issue was raised by the parties. The majority also failed to consider the reasoning of three additional district court decisions cited by the dissent that upheld the extraterritorial application of Title VII). Id. at 379. [↑](#footnote-ref-65)
65. 65 857 F.2d at 1021 (King, J. dissenting) (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Blackmer v. United States, 284 U.S. 421 (1932) (upholding imposition of fines on U.S. nationals residing in France for failure to respond to two subpoenas in a criminal case); United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, (D.C. Cir. 1984); I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1986)). *See also* Cook v. Tait, 265 U.S. 47, 56 (1924) (imposing Internal Revenue Code on American nationals residing abroad). [↑](#footnote-ref-66)
66. 66 857 F.2d at 1022. Judge King contended that the classic formulation of the presumption against exterritoriality did not require the majority's stringent standard, and further, that a "clear" intent did not mean "express." *Id.* [↑](#footnote-ref-67)
67. 67 *Id.* ("In rejecting these traditional methods of statutory construction as inadequate, the majority implies that nothing short of an explicit statement by Congress will overcome the presumption.") [↑](#footnote-ref-68)
68. 68 Id. at 1025-26. The dissent discussed the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW at length. The RESTATEMENT, § 403(2) provides for concurrent jurisdiction as long as such jurisdiction is reasonable. *See* Boureslan, 857 F.2d at 1026 n.13 (stating that the RESTATEMENT itself refers to Bryant v. International Sch. Servs., 502 F. Supp. 472 (D.N.J. 1980) (holding Title VII applies extraterritorially)). [↑](#footnote-ref-69)
69. 69 857 F.2d at 1030. [↑](#footnote-ref-70)
70. 70 344 U.S. 280 (1952). [↑](#footnote-ref-71)
71. 71 857 F.2d at 1030 (quoting Steele, 344 U.S. at 285-86 (discussing the use of deceptive and misleading trademarks involving a U.S. national in Mexico)). *See also* United States v. Mitchell, 553 F.2d 996, 1001 (5th Cir. 1977) (supporting extraterritorial application of the Marine Mammal Protection Act to cover the high seas and citing *Steele*). [↑](#footnote-ref-72)
72. 72 Boureslan v. Aramco, Arabian Am. ***Oil*** Co., 892 F.2d 1271 (5th Cir. 1990). [↑](#footnote-ref-73)
73. 73 Id. at 1274. [↑](#footnote-ref-74)
74. 74 *See supra* note 64 and accompanying text. [↑](#footnote-ref-75)
75. 75 *Id.* [↑](#footnote-ref-76)
76. 76 Id. at 1274 (King, J., dissenting). [↑](#footnote-ref-77)
77. 77 *Id.* [↑](#footnote-ref-78)
78. 78 Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949). [↑](#footnote-ref-79)
79. 79 892 F.2d at 1275 (citing Foley, 336 U.S. at 285). [↑](#footnote-ref-80)
80. 80 EEOC v. Arabian Am. ***Oil*** Co., 111 S. Ct. 1227 (1991). [↑](#footnote-ref-81)
81. 81 Id. at 1232. [↑](#footnote-ref-82)
82. 82 Id. at 1234-35. [↑](#footnote-ref-83)
83. 83 Id. at 1230 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949)). [↑](#footnote-ref-84)
84. 84 *Id.* (quoting 336 U.S. at 285). [↑](#footnote-ref-85)
85. 85 *Id.* (explaining this presumption and quoting Benz v. Compania Naviera Hildago, 353 U.S. 138, 147 (1957)). [↑](#footnote-ref-86)
86. 86 *Compare* LMRDA, 29 U.S.C. § 402 (1988) *with* CRA, 42 U.S.C. § 2000e (1988). [↑](#footnote-ref-87)
87. 87 42 U.S.C. § 2000e(g) (1988). [↑](#footnote-ref-88)
88. 88 111 S. Ct. at 1231-32. [↑](#footnote-ref-89)
89. 89 15 U.S.C. § 1127 (1988). The Lanham Act protects trademark rights internationally. For additional examples of extraterritoriality, *see e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (discussing the extraterritorial application of U.S. statutes); Boureslan v. Aramco, Arabian Am. ***Oil*** Co., 892 F.2d 1271, 1277 n.6 (5th Cir. 1990) (en banc) (King, J. dissenting) (citing Note, *Title VII of the Civil Rights Act of 1964 and Multinational Enterprise*, 73 Geo. L.J., 1480-83 (1985)); Schoenbaum v. Firstbrook, 405 F.2d 200, 206, *rev'd on other grounds*, 405 F.2d 215 (1968); United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (applying the "effects test" to find jurisdiction in an antitrust case). *See also* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 Reporters' nn.1-2. [↑](#footnote-ref-90)
90. 90 111 S. Ct. at 1232 (citing Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952)). [↑](#footnote-ref-91)
91. 91 *Id. See also* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS IN INTERNATIONAL ECONOMIC RELATIONS 933-34 (2d ed. 1986) (discussing the "Effects Doctrine."). Such investigations could necessarily involve analysis of the expatriation of funds, work force and employment data. Under *Aramco*, a court can still find a domestic company in de facto control of its foreign subsidiary and impose domestic Title VII protection, but meaningful access is significantly decreased because of the additional expense a showing of this sort of proof would require. [↑](#footnote-ref-92)
92. 92 111 S. Ct. at 1232 (quoting 344 U.S. at 285, 287). [↑](#footnote-ref-93)
93. 93 *Id.* at 1232. [↑](#footnote-ref-94)
94. 94 372 U.S. 10 (1963). [↑](#footnote-ref-95)
95. 95 111 S. Ct. at 1233. [↑](#footnote-ref-96)
96. 96 29 U.S.C. §§ 151-68 (1988) [hereinafter NLRA]. [↑](#footnote-ref-97)
97. 97 372 U.S. at 19, *cited in* 111 S. Ct. at 1232. [↑](#footnote-ref-98)
98. 98 29 U.S.C. §§ 201-219 (1988). Note FLSA's overseas exemption at § 213(f). [↑](#footnote-ref-99)
99. 99 *See* 111 S. Ct. at 1232 (citing Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948)). [↑](#footnote-ref-100)
100. 100 *See* 335 U.S. at 388-90. [↑](#footnote-ref-101)
101. 101 111 S. Ct. at 1233 n.\*\* (citing 42 U.S.C. § 2000e(f)). [↑](#footnote-ref-102)
102. 102 *Id.* (citing Espinoza v. Farah Mfg., 414 U.S. 86 (1973)). [↑](#footnote-ref-103)
103. 103 *Id.* at 1235 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)). The Court pointed to the ADEA amendment, and further cited The Export Import Act of 1979, 50 U.S.C. §§ 2401-2420 (1988) (§ 2415 defines "United States person" to include "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.")); Coast Guard Act, 14 U.S.C. § 89(a) (1988) (allowing search and seizure on the high seas); Criminal Code, 18 U.S.C. § 7(1) (1988) (extending beyond the territorial limit); 19 U.S.C. § 1701 (1988) (providing for Customs enforcement on the high seas, and searches and seizures outside U.S. territorial waters); the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1988) (defining a "national of the United States [as] a natural person who is a citizen of the United States employed by an employer in a workplace in a foreign country"); Logan Act, 18 U.S.C. § 953 (1988) (applying to "any citizen . . . wherever he may be"). 111 S. Ct. at 1235-36. [↑](#footnote-ref-104)
104. 104 111 S. Ct. at 1234 (citing 42 U.S.C. § 2000e-9 (1988) (The EEOC may gather evidence obtained in the United States and its territories.)). [↑](#footnote-ref-105)
105. 105 Id. at 1235 (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 140-46 (1976) (discussing a disability benefit plan found not to violate Title VII because of its failure to cover pregnancy related disabilities)). [↑](#footnote-ref-106)
106. 106 *Id.* (Scalia, J., concurring). [↑](#footnote-ref-107)
107. 107 486 U.S. 107 (1988) (discussing the EEOC's interpretation of "terminate"). [↑](#footnote-ref-108)
108. 108 111 S. Ct. at 1236 (Scalia, J., concurring). [↑](#footnote-ref-109)
109. 109 486 U.S. at 115. [↑](#footnote-ref-110)
110. 110 111 S. Ct. at 1237 (Marshall, J. dissenting). [↑](#footnote-ref-111)
111. 111 *Id.* [↑](#footnote-ref-112)
112. 112 Id. at 1241 (citing H.R. 4453, 81st Cong., 1st Sess. (1949)) (discussing the Eight Hour Law, a statute regulating the workday of employees performing contractual work for the U.S.). *See* id. at 1241 n.4. (citing H.R. REP. NO. 914, 88th Cong., 1st Sess. 57 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355). "In section 4 of the Act, a limited exception is provided for employers with respect to employment of aliens outside of any state. . . . The intent of [this] exception 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 and a foreign nation in the employment of aliens outside the United States by an American enterprise." Id. at 1241 (citing H.R. REP. NO. 570, 88th Cong., 1st Sess. 4 (1963), *reprinted in Civil Rights: Hearings on H.R. 7152, as Amended, Before Subcomm. No. 5 of the Comm. of the Judiciary*, 88th Cong. 1st Sess. 2303. [↑](#footnote-ref-113)
113. 113 353 U.S. 138 (1957). [↑](#footnote-ref-114)
114. 114 111 S. Ct. at 1230. [↑](#footnote-ref-115)
115. 115 *See* id. at 1239 (Marshall, J. dissenting). [↑](#footnote-ref-116)
116. 116 *Id.* (quoting NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (holding that religious schools teaching non-secular subjects did not come under the NLRB); citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (discussing the rule in McCullough v. Sociedad Nacional de Marineros, 372 U.S. 10 (1975) which served to avoid constructions that raise "foreign policy implications"); comparing Longshoremen v. Ariadne Shipping Co., 397 U.S. 195, 198-99 (1970) (where the Court declined to follow *Benz* and *McCulloch* in settings where Americans were employed by foreign vessels)). [↑](#footnote-ref-117)
117. 117 *Id.* [↑](#footnote-ref-118)
118. 118 *Id.* at 1241 (citing Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). [↑](#footnote-ref-119)
119. 119 *Id.* [↑](#footnote-ref-120)
120. 120 *Id.* [↑](#footnote-ref-121)
121. 121 *Id.* [↑](#footnote-ref-122)
122. 122 *Id.* [↑](#footnote-ref-123)
123. 123 Espinoza v. Farah Mfg., 414 U.S. 86 (1973). *See supra* notes 59, 60, 98 and the accompanying texts. [↑](#footnote-ref-124)
124. 124 *Id.* [↑](#footnote-ref-125)
125. 125 *See* 111 S. Ct. at 1243 (Marshal, J. dissenting). [↑](#footnote-ref-126)
126. 126 Bryant v. International Sch. Servs., 502 F.2d 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562, 577 n.23 (3d Cir. 1982) (declining to reach the question of Title VII's extraterriality). [↑](#footnote-ref-127)
127. 127 *See* Boureslan v. Aramco, 653 F. Supp. 629 (S.D. Tex. 1987). *See also supra* notes 44, 64 and the accompanying texts. [↑](#footnote-ref-128)
128. 128 111 S. Ct. at 1237-38 (citing Webster v. Doe, 486 U.S. 592, 601, 603 (1988); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985); Kent v. Dulles, 357 U.S. 116, 130 (1958); Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (all supporting the proposition that courts applying certain construction rules are compelled to select perhaps less plausible options from the range of permissible constructions)). [↑](#footnote-ref-129)
129. 129 *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW 832 (2d ed. 1987); I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 414 (1987) (Jurisdiction with Respect to Activities of Foreign Branches and Subsidiaries). [↑](#footnote-ref-130)
130. 130 *See, e.g.*, Blackmer v. United States, 284 U.S. 421 (1932) (respondent failed to respond to subpoenas served in France requiring his appearance in the United States); United States v. Bowman, 260 U.S. 94 (1922) (conspiracy attempts to defraud a U.S. corporation from an off shore location are actionable). [↑](#footnote-ref-131)
131. 131 *See, e.g.*, Steele v. Bulova Watch Co, 344 U.S. 280 (1952); Ramirez & Feraud Chili Co., v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1956), *aff'd. per curiam.* 245 F.2d 874 (9th Cir. 1957), *cert. denied*, 355 U.S. 927 (1958). [↑](#footnote-ref-132)
132. 132 I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 411-13 (1987). *See* Revenue Act of 1921, Pub. L. No. 67-98, § 210, 42 Stat. 227, 233 (1921); Cook v. Tait, 265 U.S. 49, 52 (1923). [↑](#footnote-ref-133)
133. 133 *See* Independent Union of Flight Atttendants v. Pam Am. World Airways, 923 F.2d 678 (9th Cir. 1991), *vacated*, 966 F.2d 457 (9th Cir. 1992). [↑](#footnote-ref-134)
134. 134 *See* Boureslan v. Aramco, 857 F. 2d 1014, 1021 n.1 (5th Cir. 1988) (King, J., dissenting). [↑](#footnote-ref-135)
135. 135 EEOC v. Arabian Am. ***Oil*** Co., 111 S. Ct. 1227, 1235 (1991). [↑](#footnote-ref-136)
136. 136 *See* 857 F.2d at 1022 (King, J., dissenting). [↑](#footnote-ref-137)
137. 137 *See* 42 U.S.C. §§ 2000e, 2000e-2, 2000e-3 (1988). For example, "State" is statutorily defined to include a state in the United States, the District of Colombia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1988). 42 U.S.C. § 2000e(i). *See also* 111 S. Ct. at 1237, 1240, 1241 n.3 (Marshall, J. dissenting). [↑](#footnote-ref-138)
138. 138 42 U.S.C. § 2000e(g) (1988). [↑](#footnote-ref-139)
139. 139 111 S. Ct. at 1243 (Marshall, J. dissenting). [↑](#footnote-ref-140)
140. 140 *Id.* (citing 42 U.S.C. 2000e-5(f)(3) (1981)). [↑](#footnote-ref-141)
141. 141 *Id.* (citing 46 U.S.C. App. § 688(a)). [↑](#footnote-ref-142)
142. 142 Espinoza v. Farah Mfg., 414 U.S. 86, 95 (1973). A bill introduced by Congressman Adam Clayton Powell (D-N.Y.), Fair Employment Practices Act, H.R. 4453, 81st Cong., 1st Session (1949) (reported out of Committee on Education and Labor, H.R. REP. NO. 1165, 81st Cong., 1st Sess. (1949)) discussed the legislative history and alluded to the unsettled questions of constitutionality and the protection of aliens within the United States. [↑](#footnote-ref-143)
143. 143 414 U.S. at 95. [↑](#footnote-ref-144)
144. 144 111 S. Ct. at 1245 (Marshall, J., dissenting) (quoting the letter). [↑](#footnote-ref-145)
145. 145 Id. at 1242; Boureslan v. Aramco, 857 F.2d 1014, 1032 (5th Cir. 1988) (King, J., dissenting) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)) (discussing price fixing in hearing aid products); Beisler v. Comm'r, 814 F.2d 1304, 1307 (9th Cir. 1987) ("We should avoid an interpretation of the statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.")); *See* United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985), *cert. denied*, 479 U.S. 837 (1986) (discussing the definition of "corruptly" as applied to obstruction of tax laws); Goff v. Taylor, 706 F.2d 574, 587 n.34 (5th Cir. 1983) (discussing trusts and debtors). [↑](#footnote-ref-146)
146. 146 Boureslan v. Aramco, Arabian Am. ***Oil*** Co., 892 F.2d, 1271, 1276 n.2 (King, J., dissenting) (citing House v. Commissioner, 453 F.2d 982, 987 (5th Cir. 1972)) (discussing the tax aspects of small loan companies); Hardin v. City Title & Escrow Co., 797 F.2d 1037, 1039 (D. Col. 1986) (discussing real estate fee splitting)). [↑](#footnote-ref-147)
147. 147 892 F.2d 1271, 1276, 1277 (citing the *Civil Rights: Hearings on H. R. 7152, Before the House Committee on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963) (testimony of Representative James Roosevelt stating that "the intent of the exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise")). [↑](#footnote-ref-148)
148. 148 *See* Boureslan v. Aramco, 857 F.2d 1014, 1032 n.26 (5th Cir. 1988) (King, J., dissenting) (clarifying the legislative course). [↑](#footnote-ref-149)
149. 149 *See id.* [↑](#footnote-ref-150)
150. 150 *Id.* (citing Mills v. United States, 713 F.2d 1249, 1252 (7th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984)) (discussing attorney fees and the Criminal Justice Act); Johnson v. Department of Treasury, 700 F.2d 971, 974 (5th Cir. 1983) (discussing privacy and the IRS). [↑](#footnote-ref-151)
151. 151 Multinational Enterprise [hereinafter MNE] is a business structure. The term refers to a business organization with a dominant "parent" in one country and business operations in another. The operations take different forms *e.g.*, internal corporate branches, subsidiaries, affiliates, and joint ventures. *See generally* Michelle J. Ledina, *The Multinational Enterprise and Title VII: Equal Employment Opportunities For Americans At Home And Abroad*, 4 EMORY INT'L L. REV. 373, 397-98 (1990).

     United States trade laws are quite numerous, *e.g.*, Tariff Act of 1930 Pub. L. No. 361, 46 Stat. 590, 672 (codified as amended at 19 U.S.C. §§ 1001, 1201 (1988)), *amended by* Tarriff Schedules of the United States, Pub. L. No. 87-794, 76 Stat. 882 (1962) (codified as amended at 19 U.S.C. § 1202 (1988)); Buy American Act of 1933 47 Stat. 1520 (codified as amended at 41 U.S.C. §§ 10a-10d (1988)); Trade Expansion Act of 1962 Pub. L. No. 87-794, 76 Stat. 872, 877 (codified at 19 U.S.C. §§ 1862, 1872 (1988)); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified at 19 U.S.C. §§ 2101-2487 (1988)); Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330-1337 (1988)); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 to -2 (1988)); Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. App. § 2401-2420 (1988)); Trade Agreement of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended at 19 U.S.C. §§ 2502-2582 (1988)); Trade & Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended at 19 U.S.C. §§ 2101-2487 (1988); Omnibus Trade and Competitiveness Act of 1989, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. §§ 2901-2906 (1988); International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (codified as amended at 50 U.S.C. App. § 5 (1988); The Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. §§ 2401-2420 (1988)). [↑](#footnote-ref-152)
152. 152 *Civil Rights: Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963) [hereinafter *Civil Rights Hearings*] (explaining the provisions of H.R. 405, which were incorporated into Title VII of H.R. 7152); H.R. REP. NO. 570, 88th Cong., 1st Sess. at 4 (1963) (explaining the alien exemption provision applies to "employment of aliens outside the United States by an American enterprise," *reprinted in Civil Rights Hearings*, at 2303; S. REP. NO. 867, 88th Cong., 1st Sess. at 11 (stating that the alien exemption provision is directed at, "U.S. employers employing citizens of foreign countries in foreign lands"). [↑](#footnote-ref-153)
153. 153 Boureslan v. Aramco, 857 F.2d 1014, 1027 (5th Cir. 1988) (King, J., dissenting). [↑](#footnote-ref-154)
154. 154 Id. at 1027-28. [↑](#footnote-ref-155)
155. 155 Id. at 1028 (citing H.R. REP. NO. 1370, 87th Cong., 2d Sess. 2156 (1962) (report on Equal Opportunity Act - a forerunner of H.R. 7152, which became the Civil Rights Act of 1964)). [↑](#footnote-ref-156)
156. 156 *Id.* (citing Special Message to Congress by the President (June 19, 1963) *in* 109 CONG. REC. 1055, 1063). [↑](#footnote-ref-157)
157. 157 *See supra* note 141 and accompanying text (quoting March 17, 1975 letter from William Carey to Senator Frank Church). [↑](#footnote-ref-158)
158. 158 857 F.2d at 1019 (citing H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), *reported in* 1964 U.S.C.C.A.N. 2391, 2402). The report supported Title VII as a means "to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution." 1964 U.S.C.C.A.N. 2391, 2402. [↑](#footnote-ref-159)
159. 159 857 F.2d at 1019 (quoting 1964 U.S.C.C.A.N. 2488). [↑](#footnote-ref-160)
160. 160 *Id.* (citing the Civil Rights Act of 1964, H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S.C.C.A.N. 2516). [↑](#footnote-ref-161)
161. 161 *See supra* note 27, and accompanying text. [↑](#footnote-ref-162)
162. 162 857 F.2d at 1026 (citing Special Message to Congress by the President (June 19, 1963) *in* 109 CONG. REC. 1055, 1063). [↑](#footnote-ref-163)
163. 163 110 S. Ct. 1056 (1990). [↑](#footnote-ref-164)
164. 164 Id. at 1060-61. [↑](#footnote-ref-165)
165. 165 *Id.* ("The purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of United States territory."). [↑](#footnote-ref-166)
166. 166 Independent Union of Flight Attendants v. Pan Am. World Airways, 923 F.2d 678 (9th Cir. 1991), *vacated*, 966 F.2d 457 (9th Cir. 1992). The court referred to this jurisdictional barrier technique as a form of "judicial passivity by way of extraterritorial escape." *Id.* [↑](#footnote-ref-167)
167. 167 Cherian, *supra* note 1, at 600. Other types of decisions will also be affected by the plurality's decision. See Decision 84-2 of the 1983 Fair Employment Practice Cases for a discussion on the numerous instances of foreign activity that are already recognized as being within the control by Title VII. For instance, a Japanese corporation not operating any business in the United States but recruiting employees in the United States to work in its offices in Japan, was considered an "employer" within the meaning of Title VII. Permanent employees in the United States were unnecessary to invoke the Act. Such a corporation was engaged "in commerce," and had "sufficient contacts," with the United States to be amenable to suit and the administration of Title VII. Sumitomo Shoji Am., Inc. v. Avigliano, 473 F. Supp. 506 (S.D.N.Y. 1979), *rev'd in part* 638 F.2d 552 (2d Cir. 1981), 457 U.S. 176 (1982). [↑](#footnote-ref-168)
168. 168 *See* Cherian, *supra* note 1. [↑](#footnote-ref-169)
169. 169 *Id.* [↑](#footnote-ref-170)
170. 170 *Id.* at 600-01 (citing Johnson v. Cheney, EEOC No. 05910253 (applying Title VII to a federal employee's allegations of employment discrimination in Germany)). [↑](#footnote-ref-171)
171. 171 *Losing Job Protection Abroad*, J. OF COM., April 5, 1991. [↑](#footnote-ref-172)
172. 172 *See* RECUEIL DES COURS, COLLECTED COURSE OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1982); 13 UNITED NATIONS RESOLUTION SERIES 1 (1980). [↑](#footnote-ref-173)
173. 173 *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (*entered into force with respect to the United States* July 7, 1976). [↑](#footnote-ref-174)
174. 174 May 2, 1948, 27 U.S.T. 3301, Organization of American States (OAS) Treaty No. 23, O.A.S. Off. Rec. OEA/Ser. A/6 (SEPF) (*entered into force with respect to the United States* May 24, 1976). [↑](#footnote-ref-175)
175. 175 Art. 8. [↑](#footnote-ref-176)
176. 176 May 18, 1904, 35 Stat. 1979, T.I.A.S. No. 496, *as amended* by The Proctocol, May 4, 1949, 2 U.S.T. 1999, 92 U.N.T.S. 19. [↑](#footnote-ref-177)
177. 177 *opened for signature* Dec. 26, 1933, 49 Stat. 2957, T.S. No. 875 (*entered into force with respect to the United States* May 24 1976). [↑](#footnote-ref-178)
178. 178 MALVINA HALBERSTAM & ELIZABETH DEFEIS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA? 50 (1987); *see generally* Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L. L. 173 (1992). [↑](#footnote-ref-179)
179. 179 Dec 21, 1965, 660 U.N.T.S. 195, U.N. Doc. A/6014 (1965). *See also International Convention On The Elimination Of All Forms Of Racial Discrimination*, G.A. Res. 2106, U.N. Doc. A/6014 (1965). [↑](#footnote-ref-180)
180. 180 Art. 1, para. 3, Art. 55, 56, para. c (stating the U.N.'s purpose is to promote universal respect for human rights and fundamental freedoms without distinction as to sex). [↑](#footnote-ref-181)
181. 181 Mar. 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1967) *reprinted in* 6 I.L.M. 360 (1967). [↑](#footnote-ref-182)
182. 182 Jan. 3, 1976, G. A. Res. 2220, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967). [↑](#footnote-ref-183)
183. 183 July 18, 1978, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (Jan. 7, 1970), *reprinted in* 1969 Y.B. on Human Rights 390, 65 A.J.I.L. 679 (1971), 9 I.L.M. 673 (1970). [↑](#footnote-ref-184)
184. 184 G.A. Res. 180, U.N. GAOR 3d Comm., 34th Sess., U.N. Doc. A/34/46 (1979). [↑](#footnote-ref-185)
185. 185 HALBERSTAM & DEFEIS, *supra* note 178, at 30 (1987). [↑](#footnote-ref-186)
186. 186 *Id.* at 30-33. [↑](#footnote-ref-187)
187. 187 42 U.S.C. § 2000e-2(e) (1988) (Title VII's BFOQ exception). The BFOQ of Title VII has been interpreted in ***Kern*** v. Dynalectron Corp., 557 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984), so the plurality's perceived barrier of violation of international law with extraterritorial application is incorrect. [↑](#footnote-ref-188)
188. 188 *See* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403 cmt. a, 443 (1987). The act of state and foreign compulsion doctrines also temper any intrusive effects of Title VII. With these defenses, violations of the employment discrimination statutes caused by the foreign government, compelled by the foreign government, or reasonably necessary to the operation of the particular business are excused. Michelle J. Ledina, *The Multinational Enterprise and Title VII: Equal Employment Opportunitities for Americans at Home and Abroad*, 4 EMORY INT'L L. REV. 373, 385-86 (1990). [↑](#footnote-ref-189)
189. 189 *See* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d (1987). [↑](#footnote-ref-190)
190. 190 *See, e.g.*, Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990) (discussing the interplay of intentional infliction of emotional distress and hostile work environments in Title VII gender discrimination). A hostile environment arises when submission to sexual conduct has the purpose or effect of unreasonably interfering with an individual's work or in creating an intimidating, hostile, or offensive working environment. *Id.* For hostile work environment-sexual harassment to be actionable, it must be severe and alter the conditions of the victim's employment. Whether the conduct is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. *Id.*

     If an act of sexual discrimination were perpetrated overseas by an American corporation it would also have a substantial effect within the U.S. because of the likely potential that the female employee would not achieve professional or civil equality with her male counterparts as a result of depredation of her Title VII rights. *See generally* Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990). "As women attempt to rise to positions of power, a new set of evaluation standards based on intangible assets is applied." *Id.* "Unlike entry-level positions, which pose no threat to those already in power, the promotion of women to positions involving prestige and influence is a direct threat to male decision makers." Id. at 484. The note discusses the competitive interaction which occurs as men realize that women want their jobs, just like their male counterparts. *Id.* Once overseas, a competitor can harass a female candidate without fear of reprisal. If she succumbs "quid pro quo" her apparent indiscretion can be used to control or displace her, and if she leaves, the male has won power by eliminating the female competitor. [↑](#footnote-ref-191)
191. 191 *See generally* Marley S. Weiss, *Risky business: Age and Race Discrimination in Capitol Redeployment Decisions*, 48 MD. L. Rev. 901 (1989) (discussing discrimination in business decision practices). [↑](#footnote-ref-192)
192. 192American citizens have a legitimate expectation that they will not lose the protection of Title VII when they accept a position with the foreign office of an American enterprise." Boureslan v. Aramco, Arabian Am. ***Oil*** Co., 892 F.2d 1271, 1281 (5th Cir. 1990) (King, J., dissenting). Since World War II, multi-national enterprises have become the dominant business form. *See* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 414, Reporters' n.1. *See generally*, James M. Zimmerman, *International Dimension of U.S. Fair Employment Laws: Protection or Interference?*, 131 INT'L LAB. REV. 217 (1992). [↑](#footnote-ref-193)
193. 193 755 F.2d 554 (7th Cir. 1985). [↑](#footnote-ref-194)
194. 194 Id. at 558 (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 418 cmt. f (Tentative Draft No. 2, 1981)). [↑](#footnote-ref-195)
195. 195 *See e.g.*, Mas Marques v. Digital Equip. Corp., 490 F. Supp. 56 (D. Mass.) (mem.), *aff'd*, 637 F.2d 24 (1st Cir. 1980) (where a U.S. citizen denied employment by a West Germany subsidiary of a U.S. parent corporation suffered from sex and national origin discrimination and holding that the parent had no effective control of the foreign subsidiary corporation). *Cf.* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5, 1970) (applying the place of incorporation test instead of the corporate nationality test, or the effective control test).

     Some factors to consider in establishing "control" as used by the National Labor Relations Board are: interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control. *See Extraterritorial Application of the United States Employment Discrimination Laws*, 1991 N.Y.S.B.A. COMM. & FED. LITIG. SEC. 12. [↑](#footnote-ref-196)
196. 196 53 Empl. Prac. Dec. (CCH) P40,011 at 62,911-14 (W.D. Wash. June 7, 1990). [↑](#footnote-ref-197)
197. 197 *Id.* at 62,911-12. Under Turkish law, a woman's domicile is that of her husband; but, that is not true of American men marrying Turkish women. Since the plaintiffs were married to local nationals, the defendant did not consider them "ordinarily resident" in Turkey, and forced them to relinquish such privileges as payment in United States currency, exemption from Turkish taxes, and base privileges. *Id.* at 62,912. [↑](#footnote-ref-198)
198. 198 *Id.* at 62,912-13. [↑](#footnote-ref-199)
199. 199 744 F. Supp. 1109 (M.D. Fla. 1990). [↑](#footnote-ref-200)
200. 200 Id. at 1112-1113. [↑](#footnote-ref-201)
201. 201 738 F. Supp. 1252 (S.D. Iowa 1990) (plaintiffs argued breach of contract and discriminatory purpose for relief under the Civil Rights Act). [↑](#footnote-ref-202)
202. 202 923 F.2d 678 (9th Cir. 1992). [↑](#footnote-ref-203)
203. 203 743 F. Supp. 856 (S.D. Fla. 1990). [↑](#footnote-ref-204)
204. 204 Id. at 858. [↑](#footnote-ref-205)
205. 205 Smith v. United States, 932 F.2d 791 (9th Cir. 1991) (denying extraterritorial effect in the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680(k) (1982)). Envronmental Defense Fund v. Massey, 772 F. Supp. 1296 (D.C. 1991) (mem.) (holding that the National Environmental Policy Act did not apply extraterritorially), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993). [↑](#footnote-ref-206)
206. 206 Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(c), 105 Stat. 1071, 1078 (1991). [↑](#footnote-ref-207)
207. 207 *Cutoff Date Set for Civil Rights Claims*, CHI. TRIB., Dec. 31, 1991 at 9. [↑](#footnote-ref-208)
208. 208 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified scatterred sections of 42 U.S.C.). [↑](#footnote-ref-209)
209. 209 *Id.* [↑](#footnote-ref-210)
210. 210 *Id.* [↑](#footnote-ref-211)
211. 211 *Id.* [↑](#footnote-ref-212)
212. 212 *Id.* at § 109, 105 Stat. at 1077. [↑](#footnote-ref-213)
213. 213 *Id.* at § 109(c)(1), 105 Stat. at 1077 (codified at 42 U.S.C. § 2000e-nt (Supp. III 1991)). [↑](#footnote-ref-214)
214. 214 *Id.* at § 109(c)(3)(A,B,C,D), 105 Stat. at 1077 (codified at 42 U.S.C. § 2000e-1(c)(3) (Supp. III 1991)). *Cf. supra* text accompanying note .192 (noting the requirements of the NLRB). [↑](#footnote-ref-215)
215. 215 Civil Rights Act of 1991, Pub. L. No. 102-166 § 102, 105 Stat. 1071, 1072 (1991). [↑](#footnote-ref-216)
216. 216 *Id.* at § 109(a), 105 Stat. at 1077 (codified at 42 U.S.C. § 2000e(f) (Supp. III 1991)). [↑](#footnote-ref-217)
217. 217 Joy Cherian, *Enforcement of American Workers' Rights Abroad*, 43 LAB. L.J. 563, 564 (1992). [↑](#footnote-ref-218)
218. 218 § 109(b), 105 Stat. at 1077 (codified at 42 U.S.C. § 2000e-1(b) (Supp. III 1991)). [↑](#footnote-ref-219)
219. 219 § 109(b)(1)(B), 105 Stat. at 1077 (codified at 42 U.S.C. § 2000e-1(b) (Supp. III 1991)). [↑](#footnote-ref-220)
220. 220 § 107(a), 105 Stat. at 1075 (codified at 42 U.S.C. § 2000e-2(m) (Supp. III 1991)). [↑](#footnote-ref-221)
221. 221 H.R. REP. NO. 40 (I), 102d Cong., 1st Sess. 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552. [↑](#footnote-ref-222)
222. 222 H.R. REP. NO. 40 (I) at 15, *reprinted in* 1991 U.S.C.C.A.N. at 553. [↑](#footnote-ref-223)
223. 223 *See Bryant* line of cases, *supra* note 7. [↑](#footnote-ref-224)
224. 224 28 U.S.C. §§ 1602-11 (1988). [↑](#footnote-ref-225)
225. 225 22 U.S.C. §§ 288-288f-3 (1988). [↑](#footnote-ref-226)
226. 226 *See, e.g.*, Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1548, 1562-63 (E.D.N.Y. 1990) (FCN treaty between the United States and Japan allows a foreign bank operating in the United States to hire managers based on their citizenship, but not on their race or ethnicity). [↑](#footnote-ref-227)
227. 227 *See, e.g.*, Exec. Order 11,246, § 204, 3 C.F.R. 339 (1965), *reprinted as amended in* 42 U.S.C. § 2000e (note) (1988), which authorizes the Secretary of Labor to exempt federal government contractors from affirmative action requirements for work done abroad if no recruitment of workers has taken place in the United States. The order applies to discrimination based on race, color, religion, sex or national origin. *Cf.* Rehabilitation Act of 1973, 29 U.S.C. § 793(c) (1988), which permits the President to waive affirmative action requirements placed on federal contractors regarding the employment of handicapped people. [↑](#footnote-ref-228)
228. 228 28 U.S.C. § 1605(a)(2) (1988). [↑](#footnote-ref-229)
229. 229 574 F. Supp. 134 (S.D.N.Y. 1983). [↑](#footnote-ref-230)
230. 230 Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988). [↑](#footnote-ref-231)
231. 231 739 F. Supp. 906 (S.D.N.Y. 1990). [↑](#footnote-ref-232)
232. 232 950 F.2d 389 (7th Cir. 1991). [↑](#footnote-ref-233)
233. 233 *See id. Fortino* held that an American corporation with a foreign parent corporation may invoke the FCN Treaty as a defense to charges of preferential hiring and dismissals on the basis of citizenship, but not national origin. *Id.* [↑](#footnote-ref-234)
234. 234 Cherian, *supra* note 1, at 597 n.4. [↑](#footnote-ref-235)
235. 235 29 U.S.C. §§ 623(h)(1), 630(f) (1988). [↑](#footnote-ref-236)
236. 236 Cherian, *supra* note 1, at 597 n.4. [↑](#footnote-ref-237)
237. 237 *Id.* [↑](#footnote-ref-238)
238. 238 29 U.S.C. § 623(h)(2) (1988). [↑](#footnote-ref-239)
239. 239 Cherian, *supra* note 1, at 597 n.4. [↑](#footnote-ref-240)
240. 240 Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077-78 (1991). [↑](#footnote-ref-241)
241. 241 Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991). [↑](#footnote-ref-242)
242. 242 *See, e.g.*, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, NATIONAL LEGISLATION AND REGULATION RELATING TO TRANSNATIONAL CORPORATIONS. [↑](#footnote-ref-243)
243. 243 *See* Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958) (FCNs define the way each country is to treat nationals of the other.). [↑](#footnote-ref-244)
244. 244 Citizenship is not identical to national origin. Under an FCN, discrimination on the basis of citizenship is permissible but not on the basis of national origin. *See, e.g.*, Adames v. Mitsubishi Bank, 751 F. Supp. 1548 (E.D.N.Y. 1990); Ross v. Nikko Securities Co., 53 Fair Empl. Prac. Cas. (BNA) 1121 (S.D.N.Y. 1990); Fernandes-Middleton v. Air India, 52 Empl. Prac. Dec. (CCH) P39, at 570 (D.D.C. 1989). [↑](#footnote-ref-245)
245. 245 *See, e.g.*, MacNamara v. Korean Airlines, 863 F.2d 1135, 1140 (3d Cir. 1988) (discrimination on the basis of citizenship allowable but not on race, national origin, or age), *cert. denied*, 493 U.S. 944 (1989); Wickes v. Olympic Airways, 745 F.2d 363, 367 (6th Cir. 1984) (FCN treaty allows narrow preference for Greek citizens in managerial and technical jobs); Spiess v. C. Itoh & Co., 643 F.2d 353 (5th Cir. 1981) (FCN exempts Japan from Title VII of the Civil Rights Act of 1964), *vacated on other grounds*, 457 U.S. 1128 (1982), *and cert. denied*, 469 U.S. 829 (1984). [↑](#footnote-ref-246)
246. 246 Fair Empl. Prac. Man. (BNA) 405:6663 (1990). [↑](#footnote-ref-247)
247. 247 457 U.S. 176 (1982). [↑](#footnote-ref-248)
248. 248 863 F.2d 1135 (3d Cir. 1988). [↑](#footnote-ref-249)
249. 249 Cherian, *supra* note 1, at 597-98. [↑](#footnote-ref-250)
250. 250 863 F.2d at 1145. [↑](#footnote-ref-251)
251. 251 Cherian, *supra* note 1, at 598. [↑](#footnote-ref-252)
252. 252 29 U.S.C. § 623 (h)(1) (1988). [↑](#footnote-ref-253)
253. 253 § 623(h)(2). [↑](#footnote-ref-254)
254. 254 § 623(h)(3). [↑](#footnote-ref-255)
255. 255 *See* Lavrov v. NCR Corp., 600 F. Supp. 923, 927 (S.D. Ohio 1984) (test used to determine single-employer status); Rivas v. State Bd. for Community Colleges and Occupational Educ., 517 F. Supp. 467, 470 (D. Colo. 1981) (ultimate authority over hiring not prerequisite to being a single-employer). [↑](#footnote-ref-256)
256. 256 Avigliano v. Sumitomo Shoji Am., 638 F.2d 552, 559 (2d Cir. 1981), *vacated*, 457 U.S. 176 (1982). *See also* Kristen Crabtree, *The Employment Regulation of Americans Abroad and in Foreign Owned Businesses in the U.S.*, 43 LAB. L.J. 685, 719 (1992) (review of Supreme Court decisions). [↑](#footnote-ref-257)
257. 257 638 F.2d at 559. [↑](#footnote-ref-258)
258. 258 Sumitomo Shoji Am. v. Avigliano, 457 U.S. 176, 189 (1982). The Court did not decide if Japanese citizenship per se was a proper BFOQ or business necessity defense. Id. at 189 n.19. *See accord* EEOC Dec. No. 86-2, 40 Fair Empl. Cas. (BNA) 1879, 1880 (Nov. 25, 1985). [↑](#footnote-ref-259)
259. 259 457 U.S. at 189-90 n.19. [↑](#footnote-ref-260)
260. 260 950 F.2d 389 (7th Cir. 1991). [↑](#footnote-ref-261)
261. 261 Id. at 392-93. [↑](#footnote-ref-262)
262. 262 55 Fair Empl. Prac. Cas (BNA) 1534 (N.D. Ill. July 11, 1990). [↑](#footnote-ref-263)
263. 263 *Id.* [↑](#footnote-ref-264)
264. 264 582 F. Supp. 669, 675 (N.D. Ill. 1984). [↑](#footnote-ref-265)
265. 265 *Id.* [↑](#footnote-ref-266)
266. 266 643 F.2d 353 (5th Cir. 1981), *rev'g* 469 F. Supp. 1 (S.D. Tex. 1976), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984). [↑](#footnote-ref-267)
267. 267 469 F. Supp. at 11, *rev'd on other grounds*, 643 F.2d 353. [↑](#footnote-ref-268)
268. 268 743 F. Supp. 856 (S.D. Fla. 1990), *rev'd on other grounds*, 939 F.2d 920, 921 (11th Cir. 1991). *But see supra* notes 196-97 and accompanying text (holding EEOC had jurisdiction). [↑](#footnote-ref-269)
269. 269 743 F. Supp. at 859 (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963)). [↑](#footnote-ref-270)
270. 270 *See* RAJ. K. GUPTA, A LOOK AT 1991's MOST SIGNIFICANT DECISIONS OF THE U.S. EEOC COMMISSIONERS. FED. EQUAL OPPORTUNITY 1992 DESK BOOK, I-1, citing Johnson v. Cheney, 92 FEOR 3115 (May 10, 1991) (involving discriminatory reprisal on the basis of race and sex); Huyck v. Cheney, 92 FEOR 3117 (July 1, 1991) (remanding for investigation a claim of sexual discrimination by a male DOD elementary school teacher in Guantanamo Bay, Cuba). [↑](#footnote-ref-271)
271. 271 Cherian, *supra* note 1, at 600-01 (1991). [↑](#footnote-ref-272)
272. 272 *Id.* [↑](#footnote-ref-273)
273. 273 *Id.* [↑](#footnote-ref-274)
274. 274 577 F. Supp. 1196, 1199-201 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). *See supra* notes 28, 64, 188 and accompanying text. [↑](#footnote-ref-275)
275. 275 581 F. Supp. 1570, 1579 (S.D. Tex. 1984), *aff'd in relevant part*, 805 F.2d 528 (5th Cir. 1986). [↑](#footnote-ref-276)
276. 276 581 F. Supp. at 1574. [↑](#footnote-ref-277)
277. 277 653 F.2d 1273 (9th Cir. 1981). [↑](#footnote-ref-278)
278. 278 Id. at 1276-77. [↑](#footnote-ref-279)
279. 279 Bryant v. International Sch. Servs., 675 F.2d 562, 570 (3d Cir. 1982). *See also supra* note 46 and accompanying text. [↑](#footnote-ref-280)
280. 280 755 F.2d 554, 558 (7th Cir. 1985). *See supra* note 35 and accompanying text. [↑](#footnote-ref-281)
281. 281 *See* Cleary v. United States Lines, 728 F.2d 607, 610 (3d Cir. 1984); Lopez v. Pan Am World Servs., 813 F.2d 1118 (11th Cir. 1987). [↑](#footnote-ref-282)
282. 282 Civil Rights Act of 1991, Pub. L. No. 102-166, § 402(b), 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981 (Supp. III 1991)). [↑](#footnote-ref-283)
283. 283 416 U.S. 696 (1974). [↑](#footnote-ref-284)
284. 284 Id. at 711 (discussing attorney's fees). [↑](#footnote-ref-285)
285. 285 488 U.S. 204 (1988). [↑](#footnote-ref-286)
286. 286 Id. at 208. [↑](#footnote-ref-287)
287. 287 494 U.S. 827, 837 (1990) (post-judgment interest in an anti-trust suit). [↑](#footnote-ref-288)
288. 288 Id. at 841 (Scalia, J. concurring). [↑](#footnote-ref-289)
289. 289 Id. at 853 (Scalia, J., concurring). [↑](#footnote-ref-290)
290. 290 *See generally* Thamer E. Temple, III, *Retroactivity of the 1991 Civil Rights Act in Title VII Cases*, 43 LAB. L.J. 299, 303-07 (1992) (analyzing inconsistent retroactivity case law and arguing against retroactivity). [↑](#footnote-ref-291)
291. 291 779 F. Supp. 94 (N.D. Ill. 1991). [↑](#footnote-ref-292)
292. 292 782 F. Supp. 74 (N.D. Ill. 1992). [↑](#footnote-ref-293)
293. 293 *Id.*; 779 F. Supp. at 99. [↑](#footnote-ref-294)
294. 294 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992). [↑](#footnote-ref-295)
295. 295 Fair Empl. Prac. Cas. (BNA) 1226 (N.D. Ga. Dec. 3, 1991). [↑](#footnote-ref-296)
296. 296 *Id.*; 963 F.2d at 932. [↑](#footnote-ref-297)
297. 297 *See generally* Temple, *supra* note 290, at 306. [↑](#footnote-ref-298)
298. 298 *See generally* Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173 (1992). [↑](#footnote-ref-299)
299. 299 Judith Lichtman & Holly Fechner, *Almost There*, HUMANRIGHTS, Summer 1991, at 16, 18. [↑](#footnote-ref-300)
300. 300 *Id.* Only 14% of all new EEOC charges resulted in settlement of any kind, as compared to a 32% settlement rate in 1980. The EEOC filed only 42 class actions in fiscal year 1991, only 8.6% of all cases filed. Moreover, in 1980, two thirds of all cases filed were class actions. The situation is dramatically demonstrated by the reduction in the number of Equal Pay Act cases. In 1980, 79 cases were filed, while in 1991 only six were. *Id.* [↑](#footnote-ref-301)
301. 301 Thamer E. Temple III, *supra* note 290, at 299 n.3 (citing Khandelwal v. CompuAdd Corp., 780 F. Supp. 1077 (E.D. Va. 1992)). [↑](#footnote-ref-302)
302. 302 *Id.* [↑](#footnote-ref-303)
303. 303 Pub. L. No. 102-166 § 102(b)(1), 105 Stat. 1071, 1073 (codified as amended at 42 U.S.C. § 1981a(b)(1) (1991)). [↑](#footnote-ref-304)
304. 304 Civil Rights Act, Pub. L. No. 102-166, § 102(b)(3)(A), 105 Stat. 1071, 1073 (1991) (codified at 42 U.S.C. § 1981a(b)(1) (1991)). [↑](#footnote-ref-305)
305. 305 Richard Seymour, *How To Stem the Erosion*, HUMANRIGHTS, Summer 1992, at 12, 13. [↑](#footnote-ref-306)
306. 306 42 U.S.C. §§ 2000e-5(g), 2000e-5(k) (1988). [↑](#footnote-ref-307)
307. 307 Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b)(1), 105 Stat. 1071, 1073 (1991). [↑](#footnote-ref-308)
308. 308 421 U.S. 454 (1975). [↑](#footnote-ref-309)
309. 309 Id. at 459-60. [↑](#footnote-ref-310)
310. 310 § 102(c). [↑](#footnote-ref-311)
311. 311 Thomas J. Piskorski & Michael A. Warner, *The Civil Rights Act of 1991: Overview and Analysis*, 8 LAB. LAW. 9 (1992). The Act amends the CRA of 1964 (Title VII). 42 U.S.C. §§ 2000c-2000c-17 (1991). [↑](#footnote-ref-312)
312. 312 415 U.S. 36 (1974). [↑](#footnote-ref-313)
313. 313 *Id.* [↑](#footnote-ref-314)
314. 314 111 S. Ct. 1647 (1991). [↑](#footnote-ref-315)
315. 315 *Id.* [↑](#footnote-ref-316)
316. 316 948 F.2d 305 (6th Cir. 1991) (sexual discrimination and arbitration clauses). [↑](#footnote-ref-317)
317. 317 939 F.2d 229 (5th Cir. 1991) (discriminatory discharge and arbitration clauses). [↑](#footnote-ref-318)
318. 318 Id. at 230; 948 F.2d at 307. [↑](#footnote-ref-319)
319. 319 401 U.S. 424 (1971). *See also* Mark H. Grunewald, *Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's Bakke*, 49 WASH. & LEE L. REV. 53 (1992). [↑](#footnote-ref-320)
320. 320 401 U.S. at 431. *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employers must prove business necessity); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (emphasising that employers have the burden of proving business necessity). [↑](#footnote-ref-321)
321. 321 787 F.2d 318 (8th Cir. 1986), *cert. denied*, 479 U.S. 910 (1986). [↑](#footnote-ref-322)
322. 322 433 U.S. at 329 (quoting 401 U.S. at 432) *See also* W. Randall Kammeyer, *Disparate Impact Cases Under the Civil Rights Act of 1991*, 43 LAB. L.J. 639 (1992). [↑](#footnote-ref-323)
323. 323 490 U.S. 642 (1989). *See generally* Pamela L. Perry, *Balancing Equal Employment Opportunity with Employer's Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1 (1990). [↑](#footnote-ref-324)
324. 324 490 U.S. 642. [↑](#footnote-ref-325)
325. 325 Robert K. Robinson et al., *Equal Employment Requirements for Employers: A Closer Review of the Effects of the Civil Rights Act of 1991*, 43 LAB. L.J. 725 (1992). [↑](#footnote-ref-326)
326. 326 Id. at 733. Both federal and private employers had previously used adjusted scores to attain a racially normed criteria. [↑](#footnote-ref-327)
327. 327 490 U.S. 228 (1989). [↑](#footnote-ref-328)
328. 328 Civil Rights Act, Pub. L. No. 102-166, §§ 107(b)(3)(B)(i), 107(b)(3)(B)(ii), 105 Stat. 1071, 1075 (1991). [↑](#footnote-ref-329)
329. 329 490 U.S. 755 (1989). [↑](#footnote-ref-330)
330. 330 *Id.* [↑](#footnote-ref-331)
331. 331 Civil Rights Act, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076 (1991). [↑](#footnote-ref-332)
332. 332 490 U.S. 900 (1989). [↑](#footnote-ref-333)
333. 333 Robinson, *supra* note 325, at 729 n.32. [↑](#footnote-ref-334)
334. 334 Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078 (1991). [↑](#footnote-ref-335)
335. 335 42 U.S.C. § 2000e-5(f) (1988). [↑](#footnote-ref-336)
336. 336 482 U.S. 437, 445 (1987). [↑](#footnote-ref-337)
337. 337 28 U.S.C. § 1821(b) (1988), *amended by* Pub. L. No. 101-650, § 314(a), 104 Stat. 5115 (1990) (raising witness and expert fees from $ 30 to $ 40 per day). [↑](#footnote-ref-338)
338. 338 499 U.S. 83 (1991). [↑](#footnote-ref-339)
339. 339 491 U.S. 754 (1989). [↑](#footnote-ref-340)
340. 340 Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (1991). [↑](#footnote-ref-341)
341. 341 491 U.S. 164 (1989). [↑](#footnote-ref-342)
342. 342 Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991). *See also* Theodore McMillian, *The Civil Rights Act of 1991 - One Step Forward on a Long Road*, 22 STETSON L. REV. 69, 70 (1992). The Fall 1992 edition features several articles on the new Act. [↑](#footnote-ref-343)
343. 343 U.S. CONST. art. VI, cl. 2. [↑](#footnote-ref-344)