

**A CONSTITUTIONAL DILEMMA:
THE CONFLICT OF THE TITLE VII ALIEN
EXEMPTION CLAUSE WITH THE CIVIL
RIGHTS ACT OF 1991**

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I. INTRODUCTION

Global commerce began on a small scale in the fifteenth and sixteenth centuries, and, since the early nineteenth century, the world's economies have been highly integrated.¹ Today, several factors allow the world's economies to benefit from a new dimension of globalization.² First, the removal of trade restrictions has greatly influenced companies' decisions to expand trade to other countries.³ Over the last fifty years, the global economy has seen an increase in multilateral and regional agreements that have stimulated global trade.⁴ The

1. See Rolf Banz & Sarah Clough, *Globalization Reshaping World's Financial Markets*, J. FIN. PLAN., Apr. 2002, at 72 (stating that the beginning of global commerce dates back to the fifteenth and sixteenth centuries, but it was the industrial revolution that was the "great enabler" of globalization).

2. See *id.* at 72-73 (discussing the factors influencing globalization).

3. *Id.* at 72.

4. *Id.* See also North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 297 (agreeing to "establish a free trade area" to "contribute to the

second factor increasing the incentives to globalize is the privatization first seen in the 1990s.⁵ Privatization drives globalization by creating aggressive competition in domestic markets.⁶ In turn, competition drives local industries to search the world for new markets and cheaper materials.⁷ Finally, recent internet-related technologies drive globalization by boosting efficiency and growth.⁸ These technologies catalyze rapid industrialization of developing regions by increasing information and improving access to markets.⁹ What would have taken fifty to one-hundred years is now possible in five years or less, thanks to today's superior technology.¹⁰ This increase in globalization raises many interesting legal issues.

The numerous U.S. companies operating internationally initiate much litigation about which U.S. laws apply outside the United States.¹¹ Notably, part of this litigation addresses the employer-employee relationship.¹² To complicate the issue, there is a presumption that the "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."¹³ Thus, debate over extraterritorial application of U.S. law persists.

harmonious development and expansion of world trade"); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (agreeing to multinational "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade").

5. Banz & Clough, *supra* note 1, at 72.

6. *Id.*

7. *Id.* at 72-73.

8. *Id.* at 73.

9. *Id.*

10. *Id.*

11. See *Lauritzen v. Larsen*, 345 U.S. 571, 573 (1953) (discussing the scope of the *Jones Act* in a claim of maritime tort); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952) (holding that the *Lanham Act* applied to trademark infringements committed in Mexico by a U.S. citizen); *N.Y. Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925) (addressing the extraterritorial application of the *Federal Employers' Liability Act*).

12. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 13 (1963) (holding that the jurisdictional provisions of the *National Labor Relations Act* do not apply to foreign flag vessels employing alien seamen); *Foley Bros. v. Filardo*, 336 U.S. 281, 290 (1949) (finding that the *Federal Eight Hour Law* does not apply to a contract between the United States and a private contractor for work in a foreign country).

13. *Foley Bros.*, 336 U.S. at 285.

One important area in the international application of U.S. law is the development of Title VII protection for workers outside of the United States.¹⁴ In the early 1990s, the Supreme Court held that Title VII does not apply to workers outside of the United States.¹⁵ Congress quickly enacted the Civil Rights Act of 1991 “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”.¹⁶ The Act extends Title VII coverage to U.S. citizens working for U.S. companies outside of the United States.¹⁷

This Comment reviews the conflict between the Civil Rights Act of 1991 and the Title VII provision that denies aliens coverage under the alien exemption clause.¹⁸ This Comment demonstrates that alienage is a suspect classification under equal protection jurisprudence, and that any law that classifies people by alienage is subject to strict judicial scrutiny. Part II of this Comment examines the background of the current conflict, including the presumption against extraterritoriality, the Civil Rights Act of 1991, and subsequent cases that apply the Act. Part III argues that the current interpretation of the alien exemption clause creates an unconstitutional denial of equal protection, or, in the alternative, that the clause is ambiguous.

14. Title VII provides in part that “[i]t 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 any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2000).

15. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 244 (1991).

16. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 § 3(4) (1991) (codified as amended in 42 U.S.C. § 1981 (2000)).

17. Civil Rights Act of 1991 § 109 (stating that the definition of employee includes “[w]ith respect to employment in a foreign country, . . . an individual who is a citizen of the United States”).

18. The alien exemption clause in Title VII states that the statute “shall not apply to an employer with respect to the employment of aliens outside any State.” 42 U.S.C. § 2000e-1(a). Compare Civil Rights Act of 1991 § 109 with 42 U.S.C. § 2000e-2(a)(1). The scope of this article will be limited to Title VII, but the principles discussed may be applicable to other employment law statutes. For instance, the Age Discrimination in Employment Act provisions defining employee and outlining foreign employment are virtually identical to those contained in Title VII. *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (1999).

Finally, Part IV of this Comment addresses the implications of finding the alien exemption clause either unconstitutional or ambiguous. This Comment proposes a resolution to the conflict between Title VII and the alien exemption clause based on existing equal protection jurisprudence.

II. BACKGROUND OF CURRENT LAW

A. *The Aramco Decision*

On March 26, 1991, the Supreme Court announced its decision in *EEOC v. Arabian American Oil Co.*, (*ARAMCO*) in which the Court held that Title VII does not apply outside of the United States.¹⁹ In *ARAMCO*, the petitioner, Boureslan, claimed that ARAMCO harassed and wrongfully discharged him based on his race, religion, and national origin.²⁰ Boureslan, of Lebanese decent, was a naturalized citizen of the United States.²¹ In 1979, Boureslan began working for an ARAMCO subsidiary in Houston, Texas; one year later, ARAMCO transferred him to Saudi Arabia, where he remained until his 1984 discharge.²² ARAMCO argued that Title VII did not extend to U.S. citizens working outside the country for U.S. employers.²³ ARAMCO prevailed in the District Court, and the Fifth Circuit affirmed.²⁴

1. *The Presumption against Extraterritoriality*

In *ARAMCO*, the Supreme Court began its analysis by noting that Congress has the authority to enforce its laws outside the United States.²⁵ The Court, however, held that Title VII does not apply extraterritorially to regulate the employment

19. *Arabian Am. Oil Co.*, 499 U.S. at 246–47.

20. *Id.* at 247.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Boureslan v. Arabian Am. Oil Co.*, 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd*, 857 F.2d (5th Cir. 1988).

25. *Arabian Am. Oil Co.*, 499 U.S. at 248. “Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.” *Id.*

practices of U.S. employers who employ U.S. citizens abroad.²⁶ The Court reasoned that, while Congress has the authority to enforce its laws beyond the territorial boundaries of the United States, there is a presumption against extraterritoriality.²⁷ Therefore, unless there is “the affirmative intention of the Congress clearly expressed,”²⁸ the Court will presume that a law is “primarily concerned with domestic conditions.”²⁹

The *ARAMCO* Court’s expression of the presumption against extraterritoriality was not a new principle.³⁰ The first significant use of this presumption occurred in *American Banana Co. v. United Fruit Co.*, when the Supreme Court held that the Sherman Antitrust Act did not extraterritorially regulate the fruit company’s alleged acts in Costa Rica.³¹ The Supreme Court explained that to hold otherwise would not only be “unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”³² The Court further held that “[a]ll legislation is prima facie territorial.”³³

The *ARAMCO* Court rejected Bourseslan’s contention that “the language of Title VII evinces a clearly expressed intent on

26. *Id.* at 259.

27. *Id.* at 248. “[The presumption] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Id.*

28. *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

29. *Id.* (Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

30. See James E. Ward, Comment, “*Is That Your Final Answer?*” *The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 717–22 (2002) (discussing the history of the presumption against territoriality).

31. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357, 359 (1909), *overruling in part recognized by* *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400 (1990).

32. *Id.* at 356. Comity can be defined as “forbearance in the exercise of legitimate jurisdiction when another sovereign also has legitimate jurisdiction under international law.” Varun Gupta, Note, *After Hartford Fire: Antitrust and Comity*, Note, 84 GEO. L.J. 2287, 2289 (1996) (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 281 n.1 (1982)).

33. *Am. Banana Co.*, 213 U.S. at 357.

behalf of Congress to legislate extraterritorially.”³⁴ First, Boureslan argued that the statute’s definitions of the jurisdictional terms “employer” and “commerce” included U.S. firms employing U.S. citizens outside of the United States.³⁵

Boureslan also argued that the Title VII alien exemption clause³⁶ implies that Congress intended to protect U.S. citizens working outside the United States.³⁷ Finally, Boureslan argued that the Court “should defer to the EEOC’s consistently held position that Title VII applies abroad” to the actions of domestic companies.³⁸ The Court rejected the arguments, stating: “[W]hile not totally lacking in probative value, [the evidence falls] short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders.”³⁹

2. *Congress Responds to ARAMCO*

In November 1991, less than one year after the *ARAMCO* decision, Congress overturned *ARAMCO* by enacting the Civil Rights Act of 1991.⁴⁰ Congress expanded Title VII protection to include U.S. citizens who work abroad for U.S. companies.⁴¹ Congress accomplished this new protection by expanding the definition of employee to state: “With respect to employment in a foreign country, [the term employee] includes an individual who

34. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. at 248–49.

35. *Id.*

36. 42 U.S.C. § 2000e–1 (2000).

37. *Arabian Am. Oil Co.*, 499 U.S. at 249.

38. *Id.*

39. *Id.* In the years following *ARAMCO*, there have been a number of Supreme Court decisions discussing the presumption against extraterritoriality. *See Ward, supra* note 30, at 724–29 (detailing the post-*ARAMCO* decisions). Some decisions have helped to refine the presumption, while others have ignored it. *Compare Smith v. United States*, 507 U.S. 197, 203–05 (1993), *and Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993), *with Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (stating that because the question is covered by precedent, it is not worth considering in the case). It is clear that the presumption still applies. *See Ward, supra* note 30, at 729.

40. *See Civil Rights Act of 1991*, Pub. L. No. 102–166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 29, 42 U.S.C.).

41. *See id.* § 109(a); 42 U.S.C. § 2000e(f).

is a citizen of the United States.”⁴² The amendment to Title VII also included a test to determine whether a foreign employer would be covered by the statute and an exemption for actions taken in compliance with foreign laws.⁴³

B. The Courts' Interpretation of the Civil Rights Act of 1991

Courts interpret the changes made by the Civil Rights Act of 1991 to “establish that Title VII applies abroad only when (1) the employee is a citizen of the United States and (2) the corporation is controlled by an American employer.”⁴⁴ The following cases illustrate this interpretation.

1. *Iwata v. Stryker Corp.*⁴⁵

In *Iwata*, a former employee sued U.S.-based Stryker Corporation and its Japanese subsidiary, Matsumoto.⁴⁶ Stryker

42. See Civil Rights Act of 1991 § 109(a); 42 U.S.C. § 2000e(f).

43. See Civil Rights Act of 1991 § 109; 42 U.S.C. § 2000e-1(c). The test distinguishes U.S. corporations operating abroad from foreign corporations.

§ 2000e-1(c). Title VII applies to U.S. corporations, but not foreign corporations. *Id.* The section provides:

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 and 2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

(A) the interrelation of operations;
(B) the common management;
(C) the centralized control of labor relations; and
(D) the common ownership or financial control
of the employer and the corporation.

Id.

44. *E.g.*, *Iwata v. Stryker*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999). One court stated that “the general rule is that with respect to foreign employment Title VII applies only to American citizens employed abroad by American companies or their foreign subsidiaries.” *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997).

45. *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999).

46. *Id.* at 602.

hired Iwata in the United States to serve as Chairman and President of Matsumoto in Japan, requiring Iwata to relocate.⁴⁷ While working for Matsumoto, Iwata made several trips to the United States.⁴⁸ After little more than a year, Stryker discharged Iwata from the company.⁴⁹ Iwata, a Japanese citizen, claimed discrimination based on race, national origin, and age.⁵⁰

The *Iwata* Court dismissed Iwata's claims for lack of subject matter jurisdiction over the case.⁵¹ The Court reasoned that the Title VII alien exemption clause prevented Iwata from being covered.⁵² The Court explained that Congress could have extended coverage to include foreign nationals in the Civil Rights Act of 1991, but declined to do so.⁵³ The court also held that the Age Discrimination in Employment Act (ADEA) excluded claim.⁵⁴ In this case, the court limited Title VII's definition of "employee" to U.S. citizens engaged in foreign employment with U.S. companies.⁵⁵

2. *Shekoyan v. Sibley Int'l Co.*⁵⁶

Shekoyan, an Armenian-born, permanent resident of the United States, sued his U.S. employer for discrimination in violation of Title VII, and for retaliation under the False Claims

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 604. Many courts find that if the plaintiff is not an individual covered under Title VII, then the court lacks subject matter jurisdiction. *See, e.g., id.*; *Gantchar v. United Airlines*, No. 93 C 1457, 1995 WL 137053, at *10 (N.D. Ill. Mar. 28, 1995).

52. *Iwata*, 59 F. Supp. 2d at 604.

53. *Id.*

54. *Id.* at 604–05. Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34 (2000)) [hereinafter ADEA]. The ADEA says that it shall be unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual’s age.” 29 U.S.C. § 623(a)(1) (2000).

55. *Iwata*, 59 F. Supp. 2d at 604–05. *See also* 29 U.S.C. § 630(f) (2000). The court explained that its analysis was the same for the ADEA because it only applies to U.S. citizens working for U.S. employers. *Iwata*, 59 F. Supp. 2d at 604 (citing *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879 (E.D. Pa. 1995)).

56. *Shekoyan v. Sibley Int'l Co.*, 217 F. Supp. 2d 59 (D.D.C. 2002).

Act whistleblower provision.⁵⁷ Shekoyan was hired by a U.S. company as a training advisor for a project in the Republic of Georgia.⁵⁸ Shekoyan reported to the company's corporate headquarters in the District of Columbia for training; however, his primary workstation was in the Republic of Georgia.⁵⁹

The court dismissed Shekoyan's Title VII discrimination claim for lack of subject matter jurisdiction.⁶⁰ Shekoyan argued that he was a U.S. national, as evidenced by his employment contract, and that his status as a covered employee was not exempted from Title VII by the alien exemption clause.⁶¹ The court pointed out that, for a law to apply extraterritorially, there must be evidence of Congress' intent for extraterritorial application in the statute's plain language.⁶² The court stated that "[a]n examination of the plain language of the Civil Rights Act of 1991 demonstrates that Title VII will only apply extraterritorially to United States citizens."⁶³ The court did not address whether Title VII protection extended extraterritorially for U.S. nationals because Shekoyan was not a U.S. national.⁶⁴

3. *Gantchar v. United Airlines*⁶⁵

In 1991, United Airlines (United) bought London air routes from Pan American Airways (Pan Am) and hired part of the former Pan Am workforce, including flight attendants.⁶⁶ After United offered its own flight attendants the opportunity to transfer to its London base, United invited the former Pan Am flight attendants to apply for the remaining positions.⁶⁷

Although the positions were London-based, the air route

57. *Id.* at 61–62 (citations omitted).

58. *Id.* at 62.

59. *Id.*

60. *Id.* at 68–69.

61. *Id.* at 65–66.

62. *Id.* at 65.

63. *Id.*

64. *Id.* at 67.

65. *Gantchar v. United Airlines*, No. 93 C 1457, 1995 WL 137053 (N.D. Ill. Mar. 28, 1995).

66. *Id.* at *1.

67. *Id.* at *2.

involved flights to and from the United States.⁶⁸ Of the 316 Pan Am applicants for the London positions, United extended offers to 229.⁶⁹ Subsequently, thirty-two former Pan Am flight attendants who were denied London positions sued United, alleging discrimination under Title VII and the ADEA.⁷⁰

The court dismissed the Title VII and ADEA claims of non-U.S.-citizen plaintiffs for lack of subject matter jurisdiction.⁷¹ The non-citizen flight attendants offered proof that a substantial amount of their time was spent either in the United States or in international airspace either in route to or from the United States.⁷² They argued that spending over eighty percent of their time working on flights involving the United States made the location of their work the United States.⁷³ The court noted that neither Title VII nor the ADEA apply to foreign nationals working abroad, and, therefore, the issue was whether the work of the flight attendants was considered extraterritorial.⁷⁴ Finding that the non-citizens spent no more than twenty percent of their time working in the United States, the court deemed the work extraterritorial.⁷⁵ Once the court classified the work as

68. *Id.* at *5.

69. *Id.* at *2.

70. *Id.* at *1–2. A pattern or practice lawsuit is one way to prove illegal discrimination in violation of either Title VII or the ADEA. *Id.* at *2; *Flavel v. Svedala Indus., Inc.*, 868 F. Supp. 1422, 1460 (E.D. Wis. 1994). The plaintiff must show that the employer regularly and purposefully discriminates against a protected group. *Gantchar*, 1995 WL 137053, at *3 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)). The plaintiff must first offer proof of this alleged discrimination, then the burden shifts to the defendant to demonstrate that the defendant did not discriminate against the particular group. *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360–63 (1977)).

71. *Id.* at *16.

72. *Id.* at *5. Almost half (approximately 47%) of the non-citizen attendant's flight segments were between London and the United States. *Id.*

73. *Id.*

74. *Id.* at *6.

75. *Id.* at *6–8, 10. The Court discussed one ambulatory employment case that held that the location where one applies for a job is a controlling factor in failure to hire cases. *Id.* at *7 (discussing *EEOC v. Bermuda Star Line, Inc.*, 744 F. Supp. 1109, 1111 (M.D. Fla. 1990)). Another case the Court discussed asserted the proposition that an ambulatory employee is employed wherever they perform the majority of their work. *Id.* (examining *Hodgson v. Union de Permisionarios Circulo Rojo, S. de R.L.*, 331 F. Supp. 1119, 1121–22 (S.D. Tex. 1971)).

extraterritorial, the presumption against extraterritoriality and the alien exemption clause denied the court subject matter jurisdiction over the foreign national's claims.⁷⁶ Consequently, the Title VII claims of all of the plaintiffs had to be dismissed for lack of subject matter jurisdiction.⁷⁷

4. *No Case Has Considered the Conflict Between the Alien Exemption Clause and the Constitution*

The problem that arises with the court's interpretation of Title VII in the above cases is that such interpretation favors U.S. citizens over aliens. Alienage, however, is a protected class under the Constitution.⁷⁸ U.S. resident aliens cannot be treated differently than U.S. citizens under equal protection law without a compelling justification.⁷⁹

Under current interpretation, the alien exemption clause unconstitutionally excludes Title VII protection in several circumstances. For instance, consider a U.S. resident alien working legally in the United States as a secretary. The employee is protected by Title VII in the employment relationship.⁸⁰ A problem may arise, however, if the employee were to accompany his or her employer outside the United States for a business meeting. Consider a scenario in which the boss sexually harasses the employee while outside the United States but never violates Title VII when present in the United States. Under present interpretations of Title VII, a court may hold that the employee is not protected because the employee is an alien and the claim involves employment outside the United States. Perhaps the employee could make the argument similar

76. *Id.* at *8-10. International airspace should be considered an extraterritorial workplace under Title VII because there was not a clear congressional expression otherwise, especially in light of the existing language at the pertinent time period. *Id.* at *9.

77. *Id.* at *10.

78. See discussion *infra* Part III; see also *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 647 (14th ed. 2001).

79. See discussion *infra* Part III.

80. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (agreeing that aliens within the United States are protected from discrimination under Title VII).

to that put forth by the flight attendants in *Gantchar*,⁸¹ but, nonetheless, the plain language of Title VII suggests that such sexual harassment would not be covered.⁸² Another hypothetical situation is that the secretary is transferred out of the country for a long-term work assignment. While it is clear that the secretary was protected by Title VII when employment began,⁸³ any subsequent discrimination in the foreign work place would not be covered.

While these two scenarios may occur rarely, the rapid increase in international operations of U.S. companies will increase the frequency of their occurrence. The current application of Title VII could lead to increased discrimination and encourage corporations to favor foreign workers. Companies can take advantage of the fact that, regardless of the extent to which any employment is related to the United States, as long as the alien worker is working outside of the United States, Title VII will not protect such a worker. Under current interpretations of employment law, a company that wants to discriminate can transfer non-U.S. citizen employees abroad and then terminate them for improper reasons. In light of our increasingly-mobile world, more aliens should have the protection of U.S. employment laws when they are outside the United States. If the alien exemption clause were found to be unconstitutional—or ambiguous—then courts could extend Title VII protection to situations where common sense and equity dictate that it should apply.

III. THE ALIEN EXEMPTION CLAUSE, AS ENFORCED, IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION

This section argues that the Title VII alien exemption clause should be subjected to strict scrutiny review. Even though any

81. 1995 WL 137053, at *5. The flight attendants argued that the amount of time spent within the United States or traveling to or from the United States should be enough to find that they were working in the United States. *Id.*

82. See 42 U.S.C. § 2000e-1(a) (2000) (stating that the statute “shall not apply to an employer with respect to the employment of aliens outside any State”). Even if the secretary tried to argue ambulatory employment, a court would need to deal with the fact that the injury occurred only while outside of the United States.

83. 42 U.S.C. § 2000e-2(a)(1) (2000).

equal protection claim made against Title VII would be covered under the Fifth Amendment,⁸⁴ this section discusses the treatment of the alien exemption clause under the Fourteenth Amendment⁸⁵ because equal protection analysis under the Fifth and Fourteenth Amendments is identical.⁸⁶ This section shows that alienage is a suspect classification subject to strict scrutiny review under both the Fifth and the Fourteenth Amendments. This section applies strict scrutiny to the alien exemption clause and then describes a device by which the courts could avoid applying strict scrutiny to the clause.

A. *STATE CLASSIFICATIONS ON THE BASIS OF ALIENAGE ARE SUBJECT TO STRICT SCRUTINY*

Lawfully admitted U.S. resident aliens and U.S. citizens are entitled to equal protection under the law of the state where they reside. Laws that classify people by certain protected characteristics require courts to apply a more rigid scrutiny than normal. These laws are said to encompass “suspect” or “quasi-suspect” classifications.⁸⁷ Any laws that classify people in a way that disadvantages them because of their gender, illegitimacy, or alienage are entitled to this heightened scrutiny.⁸⁸ The Title VII alien exemption clause provides that Title VII “shall not apply to an employer with respect to the employment of aliens outside any State.”⁸⁹ This classification of employees as either alien or non-alien, used to determine whether Title VII applies, disadvantages a group based on their alienage.

In *Graham v. Richardson*, the Supreme Court held that

84. The Fifth Amendment provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Supreme Court has always understood the clause to provide some measure of protection against arbitrary treatment by the Federal Government, but has held that it does not explicitly guarantee equal treatment like the Fourteenth Amendment. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995).

85. The Fourteenth Amendment states: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

86. *See infra* Part III(B).

87. SULLIVAN & GUNTHER, *supra* note 78 at 647.

88. *Id.*

89. 42 U.S.C. § 2000e-1(a) (2000).

strict scrutiny applied to classifications based on alienage.⁹⁰ The Court held that state statutes denying welfare benefits to U.S. resident aliens, or requiring them to reside in the United States for a specified period prior to receiving benefits, violate the Equal Protection Clause of the U.S. Constitution.⁹¹ Justice Blackmun wrote that the “Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”⁹² In expressing the rationale, he continued: “Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate. Accordingly . . . ‘the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.’”⁹³ The Court pointed out that, like U.S. citizens, aliens pay taxes, can be called into the armed forces, and may have lived in a state for many years, contributing to its economic growth.⁹⁴ The Court stated: “[T]he Fourteenth Amendment and the laws adopted under its authority . . . embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.”⁹⁵

Since *Graham*, the Supreme Court continues to support its holding.⁹⁶ In one case decided two years after *Graham*, the Court invalidated Connecticut’s exclusion of U.S. resident aliens from the practice of law.⁹⁷ During that same term, the Court held that a New York law banning U.S. resident aliens from permanent positions in the competitive classified civil service was an invalid denial of equal protection.⁹⁸

90. *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

91. *Id.* at 376.

92. *Id.* at 372.

93. *Id.* (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948)).

94. *Id.* at 376.

95. *Id.* at 374 (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948)).

96. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Bernal v. Fainter*, 467 U.S. 216 (1984).

97. *In re Griffiths*, 413 U.S. at 718.

98. *Sugarman*, 413 U.S. at 635, 646.

There are, however, exceptions to the strict scrutiny standard articulated in *Graham*.⁹⁹ In *Sugarman v. Dougall*,¹⁰⁰ Justice Blackmun noted that an exception to the equal protection requirement exists when the state addresses matters within its “constitutional prerogatives.”¹⁰¹ This exception, known as the “governmental function” exception, has been applied to allow for deferential review when there is an exclusion of aliens from certain types of public employment, like law enforcement officers and public school teachers.¹⁰² In *Bernal v. Fainter*,¹⁰³ Justice Marshall explained that the limits of the governmental function exemption require it to be narrowly construed; otherwise, “the exception [would] swallow the rule and depreciate the significance that should attach to the designation of a group as a ‘discrete and insular’ minority for whom heightened judicial solicitude is appropriate.”¹⁰⁴ The key to the governmental function exception is finding that the law is sufficiently tailored and applied only to persons who “participate directly in the formulation, execution, or review of broad public

99. *Id.* at 646–48.

100. *Id.* at 634.

101. *Id.* at 648. Justice Blackmun stated the following:

[The Court does not] hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. . . . “[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” Such power inheres in the State by virtue of its obligation . . . “to preserve the basic conception of a political community.” And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There, as Judge Lumbarb phrased it in his separate concurrence, is “where citizenship bears some rational relationship to the special demands of the particular position.”

Id. at 647 (citations omitted).

102. See SULLIVAN & GUNTHER, *supra* note 78, at 686–87; *Bernal v. Fainter*, 467 U.S. 216, 220 (1977) (police officers and teachers); *Cabell v. Chavez-Salido*, 454 U.S. 432, 433 (1982) (probation officers). The Court has also referred to the exception as the “political function exception.” *Bernal*, 467 U.S. at 222 n.7.

103. *Bernal*, 467 U.S. at 216.

104. *Id.* at 222 n.7 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 11 (1977)).

policy.”¹⁰⁵ Clearly, the Title VII alien exemption clause cannot be grouped into the governmental function exception because non-citizens working outside the United States do not participate directly in the formulation, execution, or review of public policy. Therefore, if Title VII were a state law, the Fourteenth Amendment would mandate strict judicial scrutiny.

B. ACTIONS BY THE FEDERAL GOVERNMENT THAT CLASSIFY PEOPLE BASED ON ALIENAGE ARE ALSO SUBJECT TO STRICT SCRUTINY

The scrutiny given to federal government actions that classify people based on alienage is similar, but not identical, to the scrutiny given to actions of a state government. In 1976, the Supreme Court decided *Hampton v. Mow Sun Wong*,¹⁰⁶ in which U.S. resident aliens challenged discriminatory regulations of the Civil Service Commission (CSC) that excluded such aliens from federal employment.¹⁰⁷ In *Hampton*, the Court held that the CSC regulations were unconstitutional and invalid under the Fifth Amendment.¹⁰⁸ The Court conceded that “there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.”¹⁰⁹ In this case, however, the Court held that national interests could not provide an acceptable rationalization for the CSC to exclude aliens.¹¹⁰ The Court invalidated the CSC regulations—not on equal protection grounds—but because there was a denial of due process.¹¹¹

While *Hampton* was not decided on equal protection grounds, dicta in the case indicate how the Court would analyze a classification based on alienage under the Fifth Amendment.¹¹²

105. *Id.* at 222 (quoting *Cabell*, 454 U.S. at 440 (quoting *Sugarman*, 413 U.S. at 647)).

106. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

107. *Id.* at 90–91.

108. *Id.* at 88.

109. *Id.* at 100.

110. *Id.* at 116.

111. *Id.* at 119 (Rehnquist, J., dissenting). (“[W]hile positing an equal protection problem, the Court does not rely on an equal protection analysis”).

112. *See id.* at 100 (discussing that although the Fifth Amendment’s guarantee of

Justice Stevens explained: “[W]hen a federal rule is applicable to only a limited territory . . . and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.”¹¹³ When a federal rule has nationwide impact, the Court agreed that the federal government could provide a justification for classification by citizenship when there were “overriding national interests,” while a state could not provide a similar classification.¹¹⁴ The Court, however, disagreed with the assertion that “the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all [U.S.] resident aliens to different substantive rules from those applied to citizens.”¹¹⁵

While the Supreme Court has never determined the scrutiny that classifications based on alienage should be afforded under the Fifth Amendment, there are several cases important to the analysis in which the Court has dealt with similar issues. In *Matthews v. Diaz*,¹¹⁶ the Supreme Court examined whether Congress could require that aliens reside in the United States for at least five years and be admitted for permanent residence before they could participate in a federal medical insurance program.¹¹⁷ In holding that Congress could make Medicare coverage for aliens conditional, the Court explained that the responsibility for regulating the relationship between aliens and the United States has been committed to the political branches of the government.¹¹⁸ The reasons that preclude the review of political questions dictate a narrow standard of review in the area of immigration and naturalization.¹¹⁹ The Court held that “it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal

due process and the Equal Protection Clause of the Fourteenth Amendment “require the same type of analysis . . . the two protections are not always coextensive”).

113. *Id.*

114. *Id.* at 100–01.

115. *Id.*

116. *Matthews v. Diaz*, 426 U.S. 67, 69 (1976).

117. *Id.* at 69.

118. *Id.* at 81.

119. *Id.* at 81–82.

Judiciary, to regulate the conditions of entry and residence of aliens,” not a denial of due process under the Fifth Amendment¹²⁰ nor violative of the Equal Protection Clause.¹²¹

Another important case is *Adarand Constructors Inc. v. Pena*,¹²² in which the Supreme Court determined that benign, race-based classifications are subject to strict scrutiny.¹²³ In *Adarand*, one major issue was whether the Fifth Amendment provides the same type of equal protection as the Fourteenth Amendment.¹²⁴ Since 1964, cases have treated the equal protection obligations under the Fifth and Fourteenth Amendments the same.¹²⁵ The Court in *Adarand* noted that “the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth.”¹²⁶ They also stated that *Hampton* does not detract from that general rule.¹²⁷ Further, the Court said that the principles of equal protection jurisprudence “together stood for an ‘embracing’ and ‘intrinsically sound’ understanding of equal protection ‘verified by experience.’”¹²⁸ This understanding is that “the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection

120. *Id.* at 84.

121. *See id.* at 80 (stating “the fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious’”). The Court noted: “[T]he real question . . . is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination [w]ithin the class of aliens allowing benefits to some aliens but not to others is permissible.” *Id.* That question “has been committed to the political branches of the Federal Government.” *Id.* at 81.

122. *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995).

123. *Id.* at 235–36.

124. *Id.* at 213. The Court noted that *Adarand*’s claim arose under the Fifth Amendment, which provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” *Id.*; U.S. Const. amend V. The amendment has always been interpreted to provide some protection against “arbitrary treatment by the federal government” although “it is not as explicit a guarantee of equal treatment as the Fourteenth Amendment.” *Adarand*, 515 U.S. at 213 (emphasis omitted).

125. *Adarand*, 515 U.S. at 217.

126. *Id.* (quoting *United States v. Paradise*, 480 U.S. 149, 166 (1987) (Brennan, J., plurality opinion)).

127. *Id.* at 218.

128. *Id.* at 231.

of the laws.”¹²⁹

C. APPLYING STRICT SCRUTINY TO THE ALIEN EXEMPTION CLAUSE

Because the Fifth and the Fourteenth Amendments confer the same equal protection obligations on the federal government as they confer on the states,¹³⁰ a *Graham* analysis should determine whether the alien exemption clause of Title VII is constitutional.¹³¹ Under *Graham*, the Court stated that laws based on alienage are subject to close judicial scrutiny, and the power to apply laws to alien inhabitants as a class is confined within narrow limits.¹³² This close judicial scrutiny was best articulated by Justice O'Connor in *Adarand*: “[W]henever the government treats any person unequally . . . that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.”¹³³

1. *Strict Scrutiny Applied to the Alien Exemption Clause Would Invalidate the Clause*

“Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some rather than all of [a particular problem].”¹³⁴ That judgment is usually given the benefit of “every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious.”¹³⁵ However, when a classification is among those deemed to be suspect, the analysis will change.¹³⁶ “Unless Congress clearly articulates the need and basis for a

129. *Id.* at 231–32.

130. *Id.* at 217.

131. *See* *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (indicating that strict scrutiny should be applied to any classification based on alienage); *infra* Part III(A).

132. *Id.* at 372.

133. *Adarand*, 515 U.S. at 229–30 (1995).

134. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

135. *Id.*

136. *See, e.g., Pers. Adm’r of Mass. v. Feeny*, 442 U.S. 256, 272 (1979).

[suspect] classification, and also tailors the classification to its justification, the Court should not uphold [a] statute.”¹³⁷ The Supreme Court has stated that “requiring that Congress, like the States, enact [suspect] classifications only when doing so is necessary to further a ‘compelling interest’ does not contravene any principle of appropriate respect for a coequal branch of the Government.”¹³⁸ The Supreme Court has also held that certain suspect classifications, “regardless of purported motivation, [are] presumptively invalid and can be upheld only upon an extraordinary justification.”¹³⁹ Thus, in order to classify on the basis of a suspect trait Congress must *narrowly tailor* any classification to serve a *compelling need*.

The legislative history of the Title VII alien exemption clause, combined with the context of the clause, illustrates that Congress included the clause to prevent conflicts with the laws of other nations.¹⁴⁰ Language used in the alien exemption clause first appeared in an employment-discrimination bill introduced in 1949.¹⁴¹ Congress revived this provision and included it in Title VII.¹⁴² The 1949 Congress stated that “[t]he 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 enterprise.”¹⁴³ Thus, “Congress had the situation of ‘U.S. employers employing citizens of foreign countries in foreign lands’ firmly in mind when it enacted that [alien exemption] provision.”¹⁴⁴

137. *Adarand*, 515 U.S. at 229 (emphasis omitted) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980)).

138. *Id.* at 230.

139. *Feeny*, 442 U.S. at 272 (identifying a racial classification as “presumptively invalid”).

140. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 268-69 (Marshall, J. dissenting).

141. H.R. 405, 88th Cong., 1st Sess. (1963); *Arabian Am. Oil Co.*, 499 U.S. at 268.

142. *See Arabian Am. Oil Co.*, 499 U.S. at 268-69 (Marshall, J., dissenting); *see also* 42 U.S.C. § 2000e-1 (2000) (stating that Title VII “shall not apply to an employer with respect to the employment of aliens outside any State”).

143. *Arabian Am. Oil Co.*, 499 U.S. at 269 (quoting H.R. REP. NO. 88-570, at 4 (1963)).

144. *Id.* at 271 (Marshall, J., dissenting).

Such examination of the legislative history of the alien exemption clause supports the proposition that the clause does not survive strict scrutiny review. First, Congress has not clearly articulated a need for the alien exemption clause.¹⁴⁵ While there is a need to avoid conflicts of law with other nations, the alien exemption clause is not necessary to accomplish this purpose. Instead, Congress could have included a provision that did not classify people by alienage. For instance, Congress could have easily included a provision stating that foreign law applies to any foreign national working for a U.S. company outside the United States. Thus, congress would not run the risk of discriminating against any U.S. resident aliens. Only when Congress uses classifications that encompass U.S. resident aliens is there the danger of running afoul of the Constitution. A choice of law provision could have avoided this classification.

Even if a court were to find that there was a need for a clause expressly discriminating on the basis of alienage, they then must also find that the need for the classification is compelling.¹⁴⁶ One rare situation where the Supreme Court upheld a discriminatory statute based on a compelling need is *Toyosaburo Korematsu v. United States*.¹⁴⁷ In *Korematsu*, the Supreme Court noted that normally “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,”¹⁴⁸ but the fact that the United States was at war provided a “[p]ressing public necessity” that allowed the existence of such restrictions.¹⁴⁹ Restrictions that curtail the rights of people based on alienage, like race, are suspect and

145. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228–29 (1995) (stating that “unless Congress clearly articulates the need and basis for a racial classification. . . the Court should not uphold this kind of statute”) (quoting *Fullilove v. Krutznick*, 448 U.S. 448, 545 (1980)).

146. *Id.* at 230.

147. *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944).

148. *Id.* at 216.

149. *Id.* The Court then stated that “exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when. . . our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.” *Id.* at 220.

require a compelling justification.¹⁵⁰ While important, the problem of international conflicts of law surely does not rise to the pressing public necessity discussed in *Korematsu*.¹⁵¹ Courts routinely deal with conflicts between the laws of the United States and other nations.¹⁵²

Finally, even if there is a credible argument that the alien exemption clause serves a compelling need, it should not survive strict scrutiny because it is too broad. To survive strict scrutiny a law must be *narrowly tailored* to further a compelling governmental interest.¹⁵³ The alien exemption clause states that Title VII “shall not apply to an employer with respect to the employment of aliens outside any State.”¹⁵⁴ In order to avoid potential conflicts with foreign law, the statute need not exclude U.S. resident aliens from coverage. The statute could have avoided the foreign law conflicts with which Congress was concerned by simply exempting non-U.S. resident aliens outside the United States from Title VII coverage. Therefore, the alien exemption clause seems to fail strict scrutiny because there is no need for the clause, there is not a compelling reason for its existence, and it is too broad.

D. A COURT MUST INTERPRET A STATUTE IN A WAY THAT AVOIDS A CONSTITUTIONAL QUESTION

“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”¹⁵⁵ Out of deference for Congress, courts presume that Congress’ legislation is constitutional.¹⁵⁶ This presumption minimizes disagreements between the judicial and

150. See *supra* Part III.B..

151. *Korematsu*, 323 U.S. at 216.

152. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–98 (1993) (regarding conflict between U.S. and U.K. laws); *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2nd Cir. 1956) (resolving conflict between U.S. and Saudi Arabian laws).

153. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis added).

154. 42 U.S.C. § 2000e-1 (2000).

155. *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (quoting Justice Holmes from *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

156. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

legislative branches by preserving Congress' bills that might otherwise stumble into constitutional opposition.¹⁵⁷ "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter."¹⁵⁸ Thus, if the alien exemption clause can be construed in a manner that avoids strict scrutiny, a court will be bound to adopt that construction.¹⁵⁹ A court does not have to find the clause unconstitutional to adopt a different construction;¹⁶⁰ rather, a court must find that there is serious constitutional doubt.¹⁶¹ A different rule would require courts to "first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution. . . ."¹⁶² If a court were to find that the alien exemption clause was subject to strict scrutiny, that finding would be enough to allow the application of the doctrine of constitutional doubt.¹⁶³

157. *Almendarez-Torres*, 523 U.S. at 238. The court also noted, however, that the doctrine "is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended." *Id.*

158. *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

159. *See id.*

160. *See id.* at 408.

161. *Almendarez-Torres*, 523 U.S. at 239.

162. *United States ex rel. Attorney Gen.*, 213 U.S. at 408.

163. Commentaries have long put forth the notion that strict scrutiny is "strict in theory but fatal in fact." *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In *Adarand*, Justice O'Connor addressed this concern by stating that "[the Court] wish[es] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)). The fact that the Court is concerned with dispelling the notion—that strict scrutiny is strict in theory but fatal in fact—demonstrates that the belief is widespread. In *Adarand*, Justice O'Connor did not cite to a single case in which a statute survived strict scrutiny. *See id.* Recently, however, the Supreme Court upheld the use of race in law school admissions when it was merely a consideration and necessary to achieve the school's compelling interest of diversity. *See Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003). Oddly enough, Justice O'Connor wrote the opinion in which she was finally able to "dispel the notion." *See id.*; *see also Adarand*, 515 U.S. at 237.

The alien exemption clause can be construed in a manner that would circumvent the application of strict scrutiny by a reading that does not treat U.S. resident aliens differently from U.S. citizens. Courts could then avoid the disparate treatment of U.S. resident aliens by ruling that the term “alien,” as used in Title VII, is ambiguous.

“Whether the language of a statute is plain or ambiguous is determined by ‘reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’”¹⁶⁴ If, after considering such factors, the statute is susceptible to more than one interpretation, it is ambiguous.¹⁶⁵ In fact, the Supreme Court has issued “varying statements as to how [a statute] should be construed.”¹⁶⁶ The truth is that “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation” to apply once a term is found to be ambiguous.¹⁶⁷ Of course, when a statute is plain and unambiguous, a court must give effect to the legislature’s express intent.¹⁶⁸ The Supreme Court has stated that a basic principle of statutory construction provides that words that are undefined in a statute must be given their ordinary meaning.¹⁶⁹ The Court, however, also recently stated: “If the statute speaks clearly ‘to the precise question at issue,’ we ‘must give effect to the unambiguously expressed intent of Congress.’”¹⁷⁰ When the intent is ambiguously expressed, the Supreme Court has considered the entire range of conventional sources to ascertain congressional intent, including legislative history, statutory structure, and

164. Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of Interior, 526 U.S. 86, 101 (1999) (O’Connor, J., dissenting) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

165. *See id.*

166. *Smith v. United States*, 507 U.S. 197, 203 (1993).

167. Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 587 (1996); *see also Smith*, 507 U.S. at 203 (illustrating the opposing views on statutory interpretation by the Supreme Court).

168. *See Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002).

169. *See United States v. Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J. dissenting).

170. *Yellow Transp., Inc.*, 537 U.S. at 45 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

administrative interpretations.¹⁷¹ Therefore, to determine if the term “alien” is ambiguous, the statute must first be consulted.¹⁷²

The face of the alien exemption clause does not answer whether the word “alien” in the alien exemption clause includes U.S. resident aliens.¹⁷³ Consequently, the clause must be examined in the context of Title VII in its entirety.¹⁷⁴

“Alien” is not defined by Title VII.¹⁷⁵ Further, there is no mention of the word “alien” outside of the alien exemption clause.¹⁷⁶ The term “employee,” seems at first to be broad enough to include U.S. resident aliens. Yet, the definition goes on to state that “[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”¹⁷⁷ This definition of employee, when read in combination with the alien exemption clause, suggests that an alien employed in a foreign country would not, in fact, be considered an employee for Title VII purposes. Indeed, some courts have reached this conclusion.¹⁷⁸ Even if this were true, the question still remains whether the term “alien” includes U.S. resident aliens. Thus, when read in the context of Title VII as a whole, the term “alien,” as used in the alien exemption clause, does not specifically answer this question.

When the four corners of a statute cannot resolve an ambiguity, it is proper to consider “the entire range of conventional sources ‘whereby unexpressed congressional intent may be ascertained,’ including legislative history, statutory

171. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262–63 (1991) (Marshall, J., dissenting).

172. *See Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 101 (1999) (O’Connor, J. dissenting) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

173. *See* 42 U.S.C. § 2000e (2000); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43; *Yellow Transp., Inc.*, 537 U.S. 36 (2002).

174. *See id.*

175. 42 U.S.C. § 2000(e).

176. *Id.* §§ 2000e-1–2000e-17.

177. *Id.* § 2000e(f). “The term ‘employee’ means an individual employed by an employer, except that the term ‘employee’ shall not include any person elected to public office With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.” *Id.*

178. *See Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999).

structure, and administrative interpretations.”¹⁷⁹ It is likewise proper, where words in a statute are not defined, that they be given their ordinary meaning.¹⁸⁰

The legislative history of Title VII contains no specific reference to whether the term “alien” was meant to include U.S. resident aliens.¹⁸¹ It only seems to suggest that the alien exception clause’s purpose is to avoid conflict of law.¹⁸² Because there is nothing in the conventional sources that is instructive on the scope of the term “alien,” the courts are free to adopt an interpretation that will prevent questions about the clause’s constitutionality from arising.

The term “alien,” as used in Title VII, could be ruled ambiguous. This would allow courts to hold that U.S. resident aliens are not the type of aliens that Congress had in mind when they drafted the alien exemption clause.

The largest hurdle to this argument is that the word alien has a readily ascertainable ordinary meaning.¹⁸³ In its ordinary usage, the word alien refers to an unnaturalized foreign resident of a country.¹⁸⁴ To establish that the alien exemption clause is ambiguous, a court must overlook the fact that, when referencing the language of the clause by itself, there is no ambiguity. All of the words, while not specifically defined in the statute, have common meanings. When read in context with the rest of the statute, however, it might be argued that the term “alien” does not include U.S. resident aliens. If the statute provides protection for U.S. resident aliens when they are working in the United States, it should not remove the protection as they cross over the U.S. border.¹⁸⁵ It should not be,

179. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 263 (1991) (Marshall, J., dissenting) (citation omitted).

180. *See United States v. Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J., dissenting).

181. *See, e.g.*, S. REP. NO. 872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355; H. REP. NO. 914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355.

182. *See Arabian Am. Oil Co.*, 499 U.S. at 269 (Marshall, J., dissenting).

183. *See United States v. Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C. J. dissenting).

184. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed. 2000).

185. *See* 42 U.S.C. § 2000e(f) (2000) (stating that “[t]he term ‘employee’ means an

as one attorney involved in the *ARAMCO* case stated after the decision, that the Title VII violations of “sexual harassment or racial and religious discrimination can start at the water’s edge.”¹⁸⁶

IV. THE IMPACT ON THE APPLICATION OF TITLE VII’S ALIEN EXEMPTION CLAUSE

The impact on the application of Title VII will differ depending upon whether courts find the alien exemption clause unconstitutional or simply ambiguous. The results of finding the alien exemption clause ambiguous will be examined first, followed by a discussion of the ramifications of a court finding the alien exemption clause to be unconstitutional.

A. *IF THE ALIEN EXEMPTION CLAUSE IS SIMPLY AMBIGUOUS, COURTS WILL HAVE TO DETERMINE WHICH ALIENS ARE EXCLUDED FROM COVERAGE*

Although finding the exemption clause to be ambiguous is rather weak,¹⁸⁷ a court in the position of choosing between the possibility of ambiguity and unconstitutionality may prefer to entertain a tenuous argument. If a court were to find that the alien exemption clause is ambiguous, the court could then turn to “the entire range of conventional sources ‘whereby unexpressed congressional intent may be ascertained,’ including legislative history, statutory structure, and administrative interpretations.”¹⁸⁸

The legislative history of the alien exemption clause supports the conclusion that Congress was concerned about possible conflicts with foreign law.¹⁸⁹ The administrative interpretations of the alien exemption clause have concluded

individual employed by an employer”) (emphasis added) U.S. resident aliens working in the United States are considered employees covered by Title VII. *See, e.g.,* *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94–95 (1973) (stating that aliens within the United States are protected from discrimination under Title VII).

186. *See Civil Rights That Stop at Waters Edge*, L.A. TIMES, Mar. 31, 1991, at 4.

187. *See supra* Part IV.B.2.

188. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 263 (Marshall, J., dissenting) (citation omitted).

189. *See id.* at 269 (Marshall, J., dissenting).

that aliens working outside of the United States have no Title VII protection.¹⁹⁰ As we have seen, though, this interpretation is precisely the problem that the courts face.¹⁹¹ One way that courts could determine the meaning of the alien exemption clause is by applying the principle expressed by Justice Holmes: a statute should be interpreted to avoid grave doubts regarding its constitutionality.¹⁹² Also instructive to a courts interpretation should be the purpose and spirit, as expressed by Congress.¹⁹³

If a court applied these principles to resolve the ambiguity, the court could rule that although it was Congress' intention for Title VII to apply to aliens with respect to employment outside of any state, Congress did not intend for those aliens already covered by the statute to lose their protection "at the water's edge."¹⁹⁴ Congress intended to include U.S. resident aliens in the class of people generally given Title VII protection.¹⁹⁵ The definition of employee in Title VII is broad enough to include aliens,¹⁹⁶ and courts have recognized this fact for many years.¹⁹⁷

190. *See id.* at 256–57.

191. *See supra* Part II.C.4. In *Arabian Am. Oil Co.*, the Court was faced with an EEOC interpretation of Title VII that did not favor their ultimate conclusion. 499 U.S. at 256. The Court stated that the level of deference afforded "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 257 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

192. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

193. "The purpose of this title is to eliminate . . . discrimination in employment based on race, color, religion, or national origin." H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401. The Civil Rights Act of 1991 also stated that one of the purposes of the Act is to provide appropriate remedies for international discrimination. Pub. L. No. 102-166 § 3(1), 105 Stat. 1071.

194. *See Civil Rights That Stop at Waters Edge*, L.A. TIMES, Mar. 31, 1991, at M4 (quoting an attorney involved in the ARAMCO case who said that the ARAMCO decision indicates that "sexual harassment or racial and religious discrimination can start at the water's edge," while arguing that Congress should amend Title VII "to clearly state that it applies abroad").

195. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973) (stating that aliens within the United States are protected by Title VII because the statute uses the term "individual" rather than "citizen").

196. *See* 42 U.S.C. § 2000e(f) (2000) (stating that the term employee means an individual employed by an employer covered under Title VII).

197. *See, e.g., Espinoza*, 414 U.S. at 94; *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 255 (1991); *Reyes-Gaona v. North Carolina Growers Assn., Inc.*, 250 F.3d 861,

Also, when Congress amended Title VII to apply extraterritorially, they did so to provide protection for U.S. employees working abroad.¹⁹⁸ In the Civil Rights Act of 1991, Congress carefully chose to explain that the definition of “employee” includes citizens, but avoided stating what the definition did not include.¹⁹⁹ Further, Congress specifically identified the purpose of the amendments as providing appropriate remedies for international discrimination.²⁰⁰ Finally, courts can avoid the constitutional question that arises when the alien exemption clause is interpreted in a way that excludes *all* aliens from extraterritorial coverage by adopting this approach.

If the courts adopted a rule that subjected the definition of alien to different interpretations, Title VII protection could reasonably extend to a number of situations. For instance, to continue with the earlier examples, Title VII protection could be extended to U.S. resident aliens when they leave the United States or are transferred to a different country for work. The interpretation may also allow for other extensions of Title VII. By finding that the alien exemption clause is ambiguous, courts may avoid constitutional problems and advance the stated purpose of Title VII.

B. IF THE ALIEN EXEMPTION CLAUSE IS UNCONSTITUTIONAL, THE COURTS SHOULD APPLY A CONFLICT OF LAWS ANALYSIS TO DETERMINE COVERAGE

Once a statutory provision is found unconstitutional, a court must then determine whether it is severable from the rest of the Act.²⁰¹ A court must find that a provision is severable “[u]nless it is evident that the Legislature would not have enacted those

866–67 (4th Cir. 2001).

198. In the Civil Rights Act of 1991, Congress added: “With respect to employment in a foreign country, [the term employee] includes an individual who is a citizen of the United States.” Pub. L. No. 102-166 § 109(a), 105 Stat. 1071; 42 U.S.C. § 2000e(f).

199. See Civil Rights Act of 1991, Pub. L. No. 102-166 § 109(a), 105 Stat. 1071.

200. *Id.* Note again that Congress was broad in their language. Congress could have stated that the purpose was to provide remedies for international discrimination of U.S. citizens, but they chose wording that was much broader in scope. See *id.*

201. See *New York v. United States*, 505 U.S. 144, 186 (1992).

provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”²⁰² Title VII of the Civil Rights Act of 1964 was enacted “to eliminate . . . discrimination in employment based on race, color, religion, or national origin.”²⁰³ Congress was not concerned about aliens. In fact, the alien exemption clause was added to prevent conflicts of law problems.²⁰⁴ Because Congress was primarily concerned with eliminating employment discrimination, it is unlikely that the exclusion of the alien exemption clause would have prevented the passage of Title VII. Further, the statute can fully operate without the clause. Removing the alien exemption clause from Title VII would not necessarily result in coverage for all aliens working for U.S. employers. Rather, a court would have to determine whether to apply U.S. law or that of another country. Therefore, if a court were to find that the alien exemption clause is unconstitutional, it is also likely that the court would find it to be severable. Without the alien exemption clause, courts would be required to determine whether or not U.S. law governs any challenged employment relationship.

1. *The Federal Choice of Law Rule*

Conflict of laws is a special body of rules and methods for determining which law to apply when one or more states have an interest in resolving a legal question.²⁰⁵ In the case of *Swift v. Tyson*,²⁰⁶ the Supreme Court established that a federal common law would be applied to resolve issues of law in federal court. The use of federal common law, however, was abolished in *Erie Railroad Co. v. Tompkins*.²⁰⁷ In *Erie*, the Supreme Court held:

202. *Id.* (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

203. H.R. Rep. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2401.

204. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 269 (1991) (Marshall, J. dissenting).

205. See Daniel C. K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 170 (1988).

206. *Swift v. Tyson*, 41 U.S. 1, 18–20 (1842), overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

207. *Erie*, 304 U.S. at 77–78.

“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”²⁰⁸ After *Erie*, federal courts were split on whether or not to abandon federal choice of law rules.²⁰⁹ The Supreme Court finally resolved the issue by holding that federal courts must apply the conflict of law rules of the state where the court sits.²¹⁰

The general rule that there is no federal common law is not without exceptions.²¹¹ Federal courts have developed specialized federal common law in a number of contexts.²¹² In the area of choice of law, an emerging trend is to use a federal choice of law rule in situations where a state has no legitimate interest.²¹³

In 1996, in *Bickel v. Korean Air Lines Co.*, the Sixth Circuit Court of Appeals ruled that when interpreting a federal statute or treaty a federal choice of law rule is needed.²¹⁴ In *Bickel*, the survivors of an air crash sued the airline under a provision of the Warsaw Convention.²¹⁵ Article 24(2) of the Convention, however, requires courts to measure damages according to the “internal law of a party to the Convention.”²¹⁶ Thus, the court was faced with the decision of whether to apply the law of the former Soviet Union—the U.S.S.R.—Korea, or the United States.²¹⁷

The court stated that a federal choice of law rule was appropriate in this case because “[t]he Warsaw Convention . . .

208. *Id.* at 78.

209. *See* Chow, *supra* note 205, at 179.

210. *Id.* (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)).

211. *See id.* at 216 (detailing several exceptions to the *Erie* Doctrine).

212. *Id.* at 197–98. One type of federal common law exists in situations where courts have found it necessary to safeguard unique federal interests. *Id.* at 198. These situations occur when the federal government asserts an interest in property, makes contracts, or deals in commercial paper. *Id.* Another example of federal common law is seen when courts apply it to fill the gaps in federal legislation. *Id.* A third example can be seen in cases involving issues of national sovereignty. *Id.*

213. *Bickel v. Korean Air Lines Co.*, 83 F.3d 127 (6th Cir. 1996), *vacated in part on separate issue*, 96 F.3d 151 (6th Cir. 1996).

214. *Id.* at 130.

215. *Id.* at 128–29. The air-crash was the result of a Russian fighter jet shooting down the Korean airplane when it accidentally entered Russian air-space. *Id.*

216. *Id.* at 130.

217. *Id.*

embodies a concrete federal policy of uniformity and certainty, which would be undermined by the use of state choice of law rules.”²¹⁸ The court then adopted, as the federal choice of law rule, the choice of law provisions of the Restatement (Second) of Conflict of Laws.²¹⁹ Under the Restatement approach, the law of the site of the injury will govern a case unless some other state²²⁰ has a more significant relationship to the occurrence.²²¹ Since *Bickel*, other circuits have adopted the notion that a federal choice of law rule is appropriate.²²²

If the alien exemption clause is excluded from Title VII, the federal choice of law rule should apply to determine whether to apply Title VII extraterritorially. State control of international

218. *Id.* (citation omitted).

219. *Id.* at 130–31. The Restatement (Second) of Conflict of Laws states:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1969).

220. The term “state” in the Restatement is defined as “a territorial unit with a distinct general body of law.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (1969). Thus, countries or subdivisions within them are considered states. *Id.*

221. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 175 (1969). The principles that help to determine which state has the most significant relationship are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability, and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 6(2) (1969).

222. *See, e.g., Maddox v. Am. Airlines, Inc.*, 298 F.3d 694, 699 (8th Cir. 2002) (stating that federal choice of law rules apply to situations where the choice is between foreign laws or those of the United States). This Comment assumes that a federal choice of law rule is applicable. Even if it is inapplicable, most jurisdictions apply the Restatement (Second) of Conflicts test embodied in the federal common law. SYMEON C. SYMEONIDES ET AL., *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 139 (1998) (noting that by 1997 over twenty-one states had adopted the Restatement (Second) position for tort conflicts, with several more states adopting a mixed approach).

choice of law would probably lead to variable results.²²³ This sort of diversity of results circumvents the important federal policy of maintaining consistency in foreign relations.²²⁴

2. *Application of the Choice of Law Rule*

In applying the federal choice of law to the international employment problem created by removing the alien exemption clause, a court will apply the law of the site of injury unless another state has a more significant relationship to the employment.²²⁵ Returning to the above example of the U.S. resident secretary, if she leaves the United States for a short-term work assignment, Title VII should apply even though the discrimination occurred in another country.²²⁶ The factors pointing to the application of Title VII are that the employment relationship began in the United States, the policy of the United States is not to allow U.S. companies to unfairly discriminate in the employment setting, the secretary probably thinks that Title VII protection exists, and Title VII is easy to apply for a United States court.²²⁷ In fact, the only tie to the other country would be that the discrimination took place while the secretary was there.²²⁸

If the same secretary were transferred abroad for a long-term assignment, Title VII may apply even though the injury occurred outside of the United States. The factors pointing to application of Title VII are that the employment relationship began in the United States, the policy of the United States regarding employment discrimination, and the ease of application for courts within the United States. The case, however, becomes a little stronger for the application of foreign law.²²⁹ The employee agreed to move to the foreign country to work. In addition, the secretary is probably covered under any employment law within the foreign country. Lastly, the injury

223. Chow, *supra* note 205, at 189.

224. *Id.*

225. See Restatement (Second) Conflict of Laws § 175 (1969).

226. See *infra* Part II(B)(4).

227. See Restatement (Second) Conflict of Laws § 6 (1969).

228. See *id.* § 175.

229. See *id.* § 6.

occurred in that foreign country. The determination in this situation may turn on other factors, such as whether the employee is a native of the foreign country²³⁰ or whether the employee is working in a transplant U.S. workplace.²³¹

Under this approach to handling the territorial reach of Title VII, courts may extend protection to those situations where fairness and equity dictate, while at the same time balancing the intent of Congress that Title VII not apply to certain aliens working in foreign countries.

V. CONCLUSION

U.S. resident aliens are a “discrete and insular minority” for whom special protection exists.²³² Among these protections is that any law that discriminates on the basis of alienage must be narrowly tailored to further a compelling governmental interest.²³³ Prior to the Civil Rights Act of 1991, U.S. citizens and resident aliens were treated the same.²³⁴ Since Congress enacted the Civil Rights Act of 1991 to “provide appropriate remedies for international discrimination,”²³⁵ courts have interpreted the extension of law to apply to only U.S. citizens.²³⁶ This violation of equal protection can be remedied only by extending similar protection to U.S. resident aliens.

In the world’s increasingly mobile, globalized employment environment, extending Title VII protection to U.S. resident aliens can be accomplished without a major change in the employment relationship. Most situations where Title VII should apply involve circumstances where the statute already

230. *See id.* § 6(c). In this case the foreign state has a much greater interest in the determination of the matter. *See id.*

231. *See id.* § 6(d). If almost all of the other co-workers were U.S. citizens, then it is more likely that the secretary would think that Title VII applies to the employment relationship. *See id.*

232. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

233. *See id.* at 219.

234. *See, e.g., Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 603–04 (N.D. Tex. 1999); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249 (1991).

235. Civil Rights Act of 1991, Pub. L. No. 102-166 § 3(1), 105 Stat. 1071.

236. *See, e.g., Iwata*, 59 F. Supp. 2d at 604; *Gantchar v. United Airlines, Inc.*, 1995 WL 137053, at *4 (N.D. Ill. 1995).

applies for most employees. Many of the rules governing international employment and the extraterritorial effects of U.S. law were developed at a time when it was not difficult to determine the location of a company's operation and the injured employee's workplace.²³⁷ Thus, rationalizing legal cannons based on "an assumed single-nation workplace" makes no sense in today's world.²³⁸ By determining that the alien exemption clause is either ambiguous or unconstitutional, courts will be in a better position to carry forth the purposes of Title VII without treating U.S. resident aliens unfairly.

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237. See Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employers Outside the United States*, 17 LAB. LAW. 417 (2002).

238. *Id.*

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