

Backlash to Globalization in the Form of State Legislation: Constitutional Implications

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Introduction

This paper will examine the Constitutional issues raised by the influx of state anti-outsourcing legislation using a recently enacted New Jersey statute. The New Jersey statute is very similar to, and contains many of the same features as, many other bills introduced in legislatures across the nation.¹ Moreover, the political impetus for the introduction and enactment of the legislation reflects the struggle over the outsourcing issue that is occurring in communities nationwide.²

Dislocations caused by the ongoing globalization of the world's economy have instigated a political backlash with the potential of inflicting great damage on the U.S. economy.³ A major manifestation of globalization is the phenomenon of "outsourcing" and its attendant political backlash.⁴ During the 2003-2004 American election-cycle, outsourcing rose as a "front-burner" issue in American

¹ Shannon Klinger and M. Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, (April 2004) (Issued by The National Foundation for American Policy).

² *Id.*

³ Daniel W. Drezner, *The Outsourcing Bogeyman*, *Foreign Affairs*, May/June 2004.

⁴ *Id.* (Outsourcing occurs when a firm subcontracts a business function to an outside supplier. This practice has been common in the U.S. economy for years. However, reduced communication costs coupled with standardized software packages have made it possible to outsource business functions around the world.)

politics. In stump speeches, presidential candidates railed against the “exporting of American jobs.”⁵

Congressional testimony by a Bush Administration economist asserting that outsourcing was a “good thing” for the U.S. economy became a political gaffe and caused President Bush to publicly distance himself from his advisor’s comments.⁶ However, national figures were not the only politicians grappling with the topic of outsourcing; scores of state and local elected officials jumped on the anti-outsourcing bandwagon.⁷

Despite approximately 100 bills having been introduced in 36 state legislatures over the last two years, very few have passed.⁸ However, a slight shift in the U.S. economy, coupled with more media “horror stories” concerning the outsourcing of “American jobs” could cause more of these bills to become law.

The Public’s Inherent Skepticism toward Free Trade

Even during boom times, the American public has always had a robust skepticism about the policy of free or open trade.⁹ For example, polls have shown that nearly sixty-percent of the public believes that government should penalize

⁵ Adam Mordecai, Note, *Anti-Offshoring Legislation: The New Wave of Protectionism The Backlash Against Foreign Outsourcing of American Service Jobs*, 5 Rich. J. Global L. & Bus. 85, 86 (2005).

⁶ *Hastert Rebukes Bush Advisor*, Washington Post, Feb. 12, 2004, at E1.

⁷ Justin Marks, *The Outcry over Outsourcing: a debate rages throughout state capitols over the loss of American jobs to foreign countries*, State Legislatures, May 1, 2004 at 30.

⁸ *Id.*

⁹ Kenneth Scheve and Matthew Slaughter, *Globalization and the Perceptions of American Workers* 14 (2001).

companies that outsource work overseas.¹⁰ This skepticism toward free trade has been fairly constant since the early 1950s. According to Kenneth Scheve and Matthew Slaughter:

“Throughout the late 1990s, majorities of Americans repeatedly affirmed their belief that costs from imports always outweighs the benefits of more imports and that costs from more imports exceed the benefits of more exports. Go back to the early 1950s—when the U.S. was running a massive trade surplus—and a plurality of Americans still supported import restrictions over import expansion... Americans are mercantilists in the sense that they support trade liberalization only when they believe it will improve export opportunities with no threat of increasing imports.”¹¹

This skepticism toward free trade among the American public has grown in recent in years.¹² As the Gallup Organization reports:

“Forty-eight percent of Americans say foreign trade is a ‘threat to the economy,’ compared with 44% who believe foreign trade is an ‘opportunity for economic growth.’ This is a reversal from nearly two years ago (November 2003), when 41% of Americans saw foreign trade as a threat and 49% felt it was an economic opportunity. The June 2005 poll also marks the first time since 1992 that Americans who feel foreign trade is a threat outnumber those who view it as an opportunity to increase U.S. exports.”¹³

Furthermore, this growing trend for protectionism has been stoked by media reports of American workers being “outsourced” from their jobs.¹⁴

¹⁰ Daniel W. Drezner, *Chicago School Trade off*, The New Republic Online, (Post date: 6.25.04), available at <http://www.tnr.com> (Last visited on August 15, 2005).

¹¹ Scheve and Slaughter, *supra* note 9.

¹² Press Release, The Gallup Organization, Gallup Poll Tuesday Briefing, (Aug. 8, 2005).

¹³ *Id.*

¹⁴ Justin Kent Holcombe, *Solutions for Regulating Offshore Outsourcing in the Service Sector: Using the Law, Market, International Mechanisms, and Collective Organization as Building Blocks*, 7 U. Pa. J. Lab. & Emp. L. 539, 544 (2005)

Consequently, much of the American public has an inaccurate understanding about the costs and benefits of foreign trade and the health of the U.S. economy.¹⁵

The Political Firestorms

During the years of 2003 and 2004, very public political debates over outsourcing erupted in several states.¹⁶ Typically, the catalyst of these debates has been the advent of offshore call centers. Due to the function as a voice to voice point of contact for customers among the general public, call centers have often been the tripwire of such controversies. Over the last several years, political and public controversies have erupted when people have learned that the pleasant voice on the other end of the phone is from a person located in India or other distant country.

Influential labor organizations have made anti-outsourcing efforts one of their top policy agendas.¹⁷ Consequently, elected officials, especially those heavily supported by organized labor, will continue to find it tempting to mollify their supporters by supporting anti-outsourcing legislation regardless of its constitutionality.¹⁸

¹⁵ Lisa Schmeiser, *It's not your Father's Job Loss; Big layoffs get the big headlines, but small businesses keep creating jobs*, Investor's Business Daily, June 15, 2005, at A7 (points out that as of summer of 2005, the U.S. unemployment rate was at an historically low 5% and that small businesses are the main engine of U.S. job growth).

¹⁶ Justin Marks, *The Outcry over outsourcing: a debate rages throughout state capitols over the loss of American jobs to foreign countries*, State Legislatures, May 1, 2004, at 30.

¹⁷ Clay Risen, *Is Outsourcing Really So Bad?: Missed Target*, The New Republic, February 2, 2004

¹⁸ *Id.*

However, organized labor and their allies are not without opposition. Trade organizations and business groups such as the U.S. Chamber of Commerce, the Business Roundtable, the American Bankers Association and nearly 200 others have formed “The Coalition for Economic Growth and American Jobs.”¹⁹ This coalition’s mission is to defeat efforts to restrict offshore outsourcing.²⁰

Because a survey of the political outsourcing controversy in every state where it is occurring is far beyond the scope of this paper, the controversies in Colorado and New Jersey will be examined as representative examples of the battles raging in nearly every state.

The New Jersey Firestorm

Such a political firestorm erupted in New Jersey when New Jersey State Senator Shirley Turner learned that welfare recipients in her state were receiving services over the phone from a call center in India.²¹ Senator Turner and other New Jersey officials were outraged.²² State officials were concerned about the message sent to New Jersey’s aid recipients.²³ New Jersey Department of Human Services spokesman, Andy Williams, complained of mixed messages: “the department is telling welfare recipients that they have to work or try to, so to have

¹⁹ *Group Lobbying against curbing exports of jobs*, Houston Chronicle, March 2, 2004 at 10.

²⁰ *Id.*

²¹ Amy Waldman, *More ‘Can I Help You?’ Jobs Migrate From U.S. to India*, N.Y. Times, May 11, 2003, at 4.

²² *Id.*

²³ *Id.*

a contract where you're exporting service-sector jobs—it just seemed we were working against our clients' interests.”²⁴

Senator Turner's response was to introduce anti-outsourcing legislation. Senator Turner's bill passed in May of 2005²⁵ and is regarded as one of the most “most far-reaching anti-outsourcing measure in the country.”²⁶ The statute prohibits state contract work from being performed outside the United States unless a state official certifies that the service cannot be provided within the United States.²⁷

The Colorado Firestorm

Colorado boasts the highest concentration of tech workers of any state in the United States.²⁸ Thus, outsourcing of tech positions to India by IBM and Hewlett Packard hit Colorado hard.²⁹ Economic development officials in Colorado Springs estimate that the area has lost more than 2000 mostly high tech jobs in the past three years because of work sent offshore.³⁰

These developments caused Democratic Colorado legislators, in 2004, to introduce anti-outsourcing bills that were defeated by the Republican majority in the Legislature.³¹ However, the Republicans' legislative victories in the outsourcing controversy may have been temporary and were probably pyrrhic. In

²⁴ *Id.*

²⁵ Pub. L. 2005, c92, 2005 N.J. Laws.

²⁶ *Proposed Restrictions on Global Sourcing Continue at High Level in 2005*, NFAP Policy Brief, April 2005, at <http://www.nfap.com>.

²⁷ P.I. 2005, Chapter 92.

²⁸ Roger Fillion, *Over There, Over There; Send the Word That the Yanks' (Jobs) Are Coming*, Rocky Mountain News, March 1, 2004, at 1B.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

the November 2004 elections, while President Bush carried Colorado, down the ballot Democrats won control of both Houses of the Colorado Legislature for the first time in 44 years.³²The Democratic legislative victories were described as a “seismic political shift” in Colorado politics by the media.³³ Though it is hard to pinpoint precisely what effect the offshore outsourcing issue played in the results, the emergence of the outsourcing controversy in Colorado occurring in the same year that the party opposed to anti-outsourcing legislation suffers historic election losses indicates that the issue may be a powerful political wedge for anti-outsourcing forces.³⁴

However, despite the Colorado Legislature being under Democratic control, an anti-outsourcing bill died in March of 2005.³⁵ The anti-outsourcing bill³⁶ by

³² Todd Hartman, *Ticket Splitting a Colo. Tradition; Party Affiliation Aside, State a ‘Place where People Pick, Choose,’* Rocky Mountain News, November 4, 2004, at 28A.

³³ Editorial, *Seismic political shift in state*, Denver Post, Nov. 4, 2004, at B14.

³⁴ Though the proponents of anti-outsourcing legislation are usually Democrats or interest groups traditionally affiliated with the Democratic Party, this is not always the case. For example, an Indiana State Senator, a self-proclaimed Conservative Republican, has introduced a bill that prohibited the state from offshore outsourcing in all state contracts. See Greg Schneider, *Anxious About Outsourcing; States Try to Stop U.S. Firms from Sending High-Tech work Overseas*, Washington Post, Jan. 31, 2004, E1. Also, U.S. Senator George Voinovich (R) Ohio introduced legislation that would restrict offshore outsourcing contracts at the federal level. See, Justin Marks, *Supra* note 16.

³⁵ Roger Fillion, *Plug Pulled on Anti-Offshoring Bill; Sponsor Promises to Return with New Proposal Next Year*, Rocky Mountain News, March 16, 2005, at 4B.

³⁶ **24-115-103. Prohibition on the performance of state contracts for services outside of the United States.** (1) NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, THE FOLLOWING PROVISIONS SHALL APPLY TO ALL STATE CONTRACTS FOR SERVICES:

(a) NO STATE CONTRACT FOR SERVICES SHALL BE AWARDED TO A CONTRACTOR WHO PERFORMS, OR HIRES A SUBCONTRACTOR TO PERFORM, THE SERVICES OUTSIDE OF THE UNITED STATES.

(b) PRIOR TO EXECUTING A STATE CONTRACT FOR SERVICES, EACH PROSPECTIVE CONTRACTOR SHALL CERTIFY THAT ALL SERVICES RELATED TO THE STATE CONTRACT FOR SERVICES WILL BE PERFORMED IN THE UNITED STATES. SUCH CERTIFICATION SHALL BE INCLUDED IN ANY BID SUBMITTED TO A STATE AGENCY.

Colorado State Senator Deanna Hanna (D) died due to the same reason that most other state anti-outsourcing bills have died: cost.³⁷ Opponents of the bill, including Colorado's Republican Governor Bill Owens, noted that budget analysts pegged the bill's cost to the state if enacted at \$24 million.³⁸

Despite the defeat of Senator Hanna's bill, the outsourcing fight in Colorado will likely continue to be intensive. In August of 2005, Hewlett-Packard announced that it would layoff 14,500 employees companywide;³⁹ which jeopardizes the jobs of 5,400 Coloradoans who work for Hewlett-Packard.⁴⁰ Furthermore, media reports claim that Hewlett-Packard will shift jobs to Mexico, Costa Rica and Canada and that Hewlett-Packard employees in Colorado are

(c) EACH STATE CONTRACT FOR SERVICES SHALL INCLUDE A PROVISION THAT REQUIRES ALL SERVICES RELATED TO THE STATE CONTRACT FOR SERVICES TO BE PERFORMED IN THE UNITED STATES.

(2) IF, DURING THE LIFE OF A STATE CONTRACT FOR SERVICES, A CONTRACTOR OR A SUBCONTRACTOR PERFORMS WORK RELATED TO THE CONTRACT OUTSIDE OF THE UNITED STATES, THE STATE AGENCY SHALL TERMINATE THE CONTRACT FOR NONCOMPLIANCE WITH THE PROVISIONS OF THIS SECTION AND BREACH OF THE CONTRACT. IN THE EVENT THE CONTRACT IS TERMINATED FOR SUCH NONCOMPLIANCE:

(a) THE CONTRACTOR SHALL PAY DAMAGES TO THE STATE AGENCY IN AN AMOUNT EQUAL TO THE AMOUNT PAID BY THE STATE AGENCY FOR THE PERCENTAGE OF WORK THAT IS PERFORMED OUTSIDE OF THE UNITED STATES AND ANY OTHER DAMAGES RELATED TO THE TERMINATION OF THE STATE CONTRACT FOR SERVICES.

(b) THE CONTRACTOR SHALL BE INELIGIBLE TO RECEIVE A STATE CONTRACT FOR SERVICES FOR A PERIOD OF THREE YEARS FROM THE DATE THAT THE STATE CONTRACT FOR SERVICES IS TERMINATED.

(3) THE STATE AGENCY SHALL BE ENTITLED TO BRING A CIVIL ACTION IN STATE OR FEDERAL COURT TO COMPEL ENFORCEMENT UNDER THIS SECTION.

I. **SECTION Effective date - applicability.** This act shall take effect July 1, 2005, and shall apply to all state contracts for services entered into on or after said date.

SECTION Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

³⁷ Roger Fillion, *Supra* note 36.

³⁸ *Id.*

³⁹ *H-P Confirms Colorado Jobs Going to Mexico; Support Positions Being Cut in Littleton, Springs*, Rocky Mountain News, Aug. 9, 2005, at 2B.

⁴⁰ *Id.*

“training their replacements.”⁴¹ Mass layoffs of Hewlett-Packard employees in Colorado could be the event that gives Senator Hanna’s bill enough support to overcome arguments about its cost and pass the next session of the Colorado Legislature.

Policy Considerations of Anti-Outsourcing Legislation

The Anti-Outsourcing position

However, for many, the intuitive argument against outsourcing is simply more compelling than lectures about “comparative advantage.”⁴² “It’s a load of crap. This is exactly what we were told about manufacturing jobs 15 years ago,” said an AFL-CIO official in response to an assertion that outsourcing is good for the U.S. economy in the long run.⁴³

This intuitive argument against outsourcing can be summarized as follows:

“The sudden creation of large numbers of IT jobs in India coincided with a sharp fall in demand for IT companies in America and Europe. From a peak in 2001, employment in the IT industry contracted sharply in the rich countries, as firms adjusted to new, lower levels of demand. Politicians, IT workers and commentators then linked these two events: companies were firing in the West so that they could hire cheaper ones in the east.”⁴⁴

⁴¹ *Id.*

⁴² Campbell R. McConnell and Stanley L. Brue, *Economics: Principles, Problems, and Policies*, 766-771, (14th ed., Irwin McGraw-Hill). (The economic theory of “comparative advantage” holds that countries are best off when they focus on sectors or markets where they have the lowest opportunity costs of production. Allowing countries to specialize accordingly increases productivity across all countries. This specialization translates into cheaper goods, and a greater variety of them, for all consumers.)

⁴³ Roger Fillian, *Supra* note 29.

⁴⁴ *Learning to Love outsourcing*, *The Economist*: The World in 2005, December, 2004, at 16.

Anti-outsourcing advocates point to research studies done in 2002 and 2003 that show an acceleration of American jobs being outsourced to other nations.⁴⁵

Additionally, economists at the University of California's Haas School of Business report that outsourcing puts downward pressure on the jobs remaining in the United States.⁴⁶

From a public relations point of view, the most powerful arguments against offshore outsourcing are the personal stories of individuals who had their jobs outsourced overseas. The story of Marty McClelland is a typical example. Mr. McClelland was a 56 year-old software engineer for Hewlitt Packard who routinely trained Indian Software engineers, who traveled the United States and returned to India upon completion of training, for Hewlitt Packard.⁴⁷ Eventually, Mr. McClelland was replaced by software engineers in India.⁴⁸

Pro-Outsourcing policy arguments

The problem for free-trade advocates is that their argument is counter-intuitive. Just as Galileo was unable to convince many of the truth of the Earth rotating around Sun when everyone can plainly see the Sun rise in the East, move

⁴⁵ Clay Risen, *Off Sure*, The New Republic Online, (Post Date: 8.2.04) *available at* <http://www.tnr.com>; Daniel W. Drezner, Chicago School Trade Off, The New Republic Online, (Post Date: 6.25.04) *available at* (The McKinsey Global Institute estimates that the volume of offshore outsourcing will increase by 30 to 40 percent a year for the next five years. Forrester Research estimates that 3.3 million white-collar jobs will move overseas by 2015. The Gartner research firm has estimated that by the end of 2004, 1/10th It jobs will be outsourced overseas. Deloitte Research predicts the outsourcing of 2 million financial-sector jobs by 2009).

⁴⁶ Roger Fillian, *Supra* note 29.

⁴⁷ *Id.*

⁴⁸ *Id.*

across the sky during the course of the day, and eventually set in the West,⁴⁹ free-trade advocates have a near equally hard time convincing people of the benefits of free-trade when more and more people notice that there are jobs that, for years, were almost exclusively performed in the United States and are now performed all over the globe.⁵⁰

Many economists from both parties support outsourcing due to the free-trade theory of “comparative advantage”⁵¹ and use empirical data to show that outsourcing is actually good for the U.S. economy.⁵² Also, they contend that the loss of jobs to outsourcing has been exaggerated⁵³ and that the increase in IT workers in India does not necessarily mean fewer IT jobs in the United States.⁵⁴

Furthermore, offshore outsourcing has cushioned the fall for many IT firms after the burst of the tech bubble in 2000. Just as the anti-outsourcing side has its

⁴⁹ Galileo Project, Rice University, available at <http://galileo.rice.edu>

⁵⁰ Daniel W. Drezner, *Supra*, note 3.

⁵¹ Roger Fillian, *Supra* note 29.

⁵² Clay Risen, *Off Sure*, The New Republic Online, (Post Date: 8.2.04) available at <http://www.tnr.com> (According to the Mckinsey Global Institute, the macro benefits of offshore outsourcing, due to increased efficiencies and economies of scale, mean \$1.12 in benefits to the U.S. economy for every dollar that goes overseas); Also, See Daniel W. Drezner, *Supra*, note 3; Robert J. Samuelson, *The World Is Still Round*, Newsweek, July 25, 2005; *Learning to Love Outsourcing*, *Supra*, note 45.

⁵³ Robert J. Samuelson, *The World Is Still Round*, Newsweek, July 25, 2005, (“Yes, some computer, software and engineering jobs have moved to India, China and other low cost countries. But the process is limited. The Mckinsey Global Institute says that 750,000 American service jobs have been “offshored” out of total U.S. jobs of approximately 140 million. Perhaps 9% of U.S. service jobs might theoretically migrate abroad, McKinsey says, but ‘it is unlikely that all these... jobs will move offshore over the next 30 years.’ There are practical obstacles: language differences; management resistance; computer incompatibilities. Similarly, it’s easy to overrate trade’s impact on factory jobs. A study by economists Martin Baily of McKinsey and Robert Lawrence of Harvard attributes roughly 90% of manufacturing’s recent job losses to domestic forces.”); Lisa Schmeiser, *supra*, note 15, (Media reporting of layoffs by large corporations gives the false impression that job losses to the U.S. economy are larger than they are).

⁵⁴ Daniel W. Drezner, *Supra*, note 3.

heart wrenching stories of workers “outsourced” out of their careers; the supporters of outsourcing have stories of firms that have survived and managed to retain jobs because they were able to reduce costs via outsourcing.

For example, according to the CEO of Evolving Systems, outsourcing has saved his company.⁵⁵ During the economic slowdown of 2001, Evolving Systems was hemorrhaging red ink.⁵⁶ The company’s collapse would cause 300 employees to lose their jobs.⁵⁷ By shifting much of its software development work to India, Evolving Systems was able to reduce its costs and return to profitability.⁵⁸ Though the company now only has 100 employees, down from 300 in 2001, a collapse that would have caused even more job losses was avoided.⁵⁹

Additionally, the anti-outsourcing side often ignores the other side of the ledger; “insourcing” or “inshoring.” Many firms, concerned with employee loyalty and the protection of their intellectual property have returned previously outsourced functions back to the United States.⁶⁰

An Onslaught of State Legislation

Dozens of anti-outsourcing bills were introduced in state legislatures across the nation.⁶¹ Many of the bills attempt, under the guise of protecting consumers’

⁵⁵ Roger Fillian, *Supra*, note 29.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Josh Friedlander, *Inshoring’- The New Antidote to Outsourcing; Beset by defections and idea theft, some outsourcers look closer to home*, Investment Dealers Digest, July 18, 2005, (This article describes the downside to outsourcing for companies).

⁶¹ Shannon Klingler and M. Lynn Sykes, *Supra*, note 1.

privacy, to restrict personal information from being transferred overseas.⁶² It is most likely that if these bills are found to be preempted they will more likely be preempted by the federal government's negative foreign affairs power or the dormant foreign Commerce Clause.⁶³ This is because federal privacy legislation, such as the Gramm-Leach-Bliley Act explicitly permits State legislation that contains more privacy protections than required under the federal law.⁶⁴

Other bills seek to require disclosure of offshore call centers; such as requiring call center workers to disclose their locations or by requiring that customers have the option of speaking with someone at a call center located in the United States.⁶⁵ A bill in the Arizona Legislature would void any commercial transaction whenever a call center operator failed to disclose his or her location.⁶⁶

Much of the legislation, such as New Jersey's, attempt to punish firms that outsource to offshore locations by denying them state contracts or by weighting the bidding process for state contracts against them.⁶⁷ New Jersey's statute is more restrictive than other state anti-outsourcing measures in that it does not merely grant a preference to domestic service providers, but, absolutely, prevents foreign contract or subcontract work for the state.⁶⁸

⁶² Tamara Hrivnak and Andrew Smith, *View From Here: Offshore Backlash*, Legal Week, June 30, 2005.

⁶³ Justin Kent Holcombe, *Supra*, note 14.

⁶⁴ Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102 (2000).

⁶⁵ Tamara Hrivnak and Andrew Smith, *Supra*, note 29.

⁶⁶ SB 1260, 47th Arizona Legislature, (2005).

⁶⁷ Tamara Hrivnak and Andrew Smith, *Supra*, note 29.

⁶⁸ **AN ACT** concerning the performance of certain State contracts and supplementing 34 of Title 52 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

C.52:34-13.2 State contracts, services performed within U.S.; exceptions.

1. a. Every State contract primarily for the performance of services shall include provisions which specify that all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States.

b. The provision of subsection a. of this section shall not apply whenever:

(1) the Director of the Division of Purchase and Property or the Director of the Division of Property Management and Construction, as appropriate, certifies in writing a finding that a service is required by the Executive Branch of the State and that the service cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the State Treasurer;

(2) the contracting officer for the Legislature or for any office, board, bureau or commission within or created by the Legislative Branch certifies in writing a finding that a service is required by the Legislature or the office, board, bureau or commission within or created thereby and that the service cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the appropriate legislative authority;

(3) the contracting officer of any independent State authority, commission, instrumentality or agency certifies in writing a finding that the service required by the independent State authority, commission, instrumentality or agency cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the executive director or other equivalent authority of that authority, commission, instrumentality or agency; or

(4) any of the directors or contracting officers in paragraphs (1) through (3) of this subsection b., as may be applicable, certifies in writing a finding that inclusion in the State contract of a provision as described in subsection a. of this section with respect to the performance of a service required by their contracting entity under the State contract would violate the terms, conditions, or limitations of any grant, funding or financial assistance from the federal government or any agency thereof, and the certification is approved by the appropriate approval officer.

As used in this section, "State contract" means every contract entered into by (1) the Governor, the head of any of the principal departments in the Executive Branch of the State Government, and the head of any division, board, bureau, office, commission or other instrumentality within or created by such department, (2) the contracting officer of the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch, and (3) the head or contracting officer of any independent State authority, commission, instrumentality or agency within or created by such an authority, who is authorized to enter into contracts that include the performance of services. A county, municipality or school district shall not be deemed an agency or instrumentality of the State for the purpose of this section.

2. The State Treasurer shall review all State contracts, as defined in section 1 of P.L.2005, c.92 (C.52:34-13.2), primarily for the performance of services, which contracts have not been completed or terminated, and determine if any of the services performed by the contractor and any subcontractor are being performed outside of the United States. Within 180 days after the effective date of P.L.2005, c.92, the findings of the review shall be reported in writing to the Governor, the President of the Senate, the Minority Leader of the Senate, the Speaker of the General Assembly, and the Minority Leader of the General Assembly, and shall be made available to the general public.

3. This act shall take effect on the 90th day following enactment

Furthermore, the statute does not make any accommodations for cost to the state by providing an exception for foreign contract work in situations where there is a large price differential between foreign and domestic services.⁶⁹

Recently, many scholarly articles that have examined this upswing in state legislation have opined that most of them are blatantly unconstitutional.⁷⁰ The most common observations are that the bills and statutes are preempted by treaty; violate the federal government's foreign affairs power, or violate the Commerce Clause to the Constitution.⁷¹ However, the sheer number of bills makes it likely that, if enacted, some of these bills could withstand constitutional scrutiny.

Preemption by federal law

Because of the supremacy Clause to the U.S. Constitution, federal law preempts any conflicting state law.⁷² Moreover, Congress, when enacting a statute, may specifically decide to “occupy the field” and expressly prohibit parallel state legislation.⁷³ Also, Congress may, by implication, occupy a field.⁷⁴ However,

Approved May 5, 2005.

⁶⁹ Pub. L. 2005, c92, 2005 N.J. Laws.

⁷⁰ Mark B. Baker, “*The Technology Dog Ate My Job*”: *The Dog-Eat-Dog World of Offshore Labor Outsourcing*, 16 Fla. J. Int'l L. 807 (2004); Aaditya Mattoo and Sacha Wunsch-Vincent, *Pre-empting Protectionism in Services: The GATS and Outsourcing*, 7 J. Int'l Econ. L. 765 (2004); Joseph B. Crace, Jr. Note, *GARA-MENDING The Doctrine of Foreign Affairs Preemption*, 90 Cornell L. Rev. 203 (2004); Shannon Klinger and M. Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, (April 2004) (Issued by The National Foundation for American Policy).

⁷¹ *Id.*

⁷² U.S. CONST. art. VI.

⁷³ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Courts do not presume that Congress intends to preempt state legislation without “an appropriate indication from the language or purposes of the federal action or regulation.”⁷⁵

In *Crosby v. Nat’l Foreign Trade Council*,⁷⁶ a recent decision regarding preemption, the Supreme Court struck down a Massachusetts law that restricted the state government and its agencies in contracting with firms that conduct business with Burma.⁷⁷

The Massachusetts Burma statute was modeled after anti-apartheid statutes that were aimed at the white-only government of South Africa.⁷⁸ Massachusetts legislators hoped that a state statute that applied economic restrictions on Burma (Myanmar) might cause the Burmese government to reform and improve its deplorable human rights record.⁷⁹

However, the United States Congress passed a similar, but more flexible law three months after the Massachusetts Legislature passed its statute.⁸⁰ The Court held that a federal statute that gave the President flexibility to ratchet sanctions up or down in accordance with the President’s judgment on Burma’s human rights record preempted the more rigid Massachusetts law; even though the federal

⁷⁴ *Id.*

⁷⁵ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *PG&E Co. v. State Energy*, 461 U.S. 190 (1983).

⁷⁶ *Crosby*, 530 U.S. 363 (2000).

⁷⁷ *Id.*

⁷⁸ Wendy L. Wallace, *Are States Denied a Voice?: Citizen Driven Foreign Policy after Crosby v. National Foreign Trade Council*, 52 Case W. Res. L. Rev. 793 (2002).

⁷⁹ *Id.*

⁸⁰ *Crosby*, 530 U.S. 363 (2000), (The Massachusetts Burma law passed in June of 1996. The federal Burma Legislation passed in September of 1996).

legislation did not have any language that explicitly preempted Massachusetts' statute.⁸¹

The Court found that the state's Burma law was "an obstacle to the accomplishment of Congress's full objectives under the federal Act" and that the state law "undermines the intended purpose and 'natural effect'" of several issues of the federal Act.⁸²

The Supreme Court's opinion upheld the First Circuit's decision finding that the State statute was preempted.⁸³ However, the Supreme Court decision only held that Massachusetts' Burma law was preempted by federal statute.⁸⁴ Thus, the Supreme Court left untouched the First Circuit's finding that the State statute was also preempted by the federal government's foreign affairs authority and the commerce clause.⁸⁵

Preemption by treaty

Opponents of state anti-outsourcing laws are usually quick to point out the likelihood that even if such laws are not preempted by federal law then they are likely preempted by treaty.⁸⁶ It is true that the federal government's treaty power

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Natsios v. Nat'l Foreign Trade Council*, 181 F.3d 38 (1999) (Stephen P. Crosby was Massachusetts' Secretary of Administration and Finance at the time the Supreme Court granted certiorari and was one of the state officials charged with enforcing the State's Burma Statute. Mr. Crosby's predecessor in office was Andrew Natsios).

⁸⁴ *Crosby*, 530 U.S. 363 (2000).

⁸⁵ *Id.*

⁸⁶ Aaditya Mattoo and Sacha Wunsch-Vincent, *Preempting Protectionism in Services: The GATS and Outsourcing*, 7 J. Int'l Econ. L. 765 (2004).

is extensive. Acts of Congress and treaties are legal equivalents.⁸⁷ Also, under the Supremacy Clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control⁸⁸ and when there is a conflict between federal law and a treaty provision, “the last expression of the sovereign will must control.”⁸⁹

However, as with other laws, the application of treaties is a matter for the courts.⁹⁰ Moreover, federal courts have found that the treaty power has constitutional limits.⁹¹ While it is beyond the scope of this paper to discern if there are specific treaty provisions that preempt New Jersey’s anti-outsourcing law, it is important to note that the mere existence of treaties that touch and concern outsourcing or international trade does not necessarily preempt state laws that impact international trade.

Preemption by executive agreements

The Constitution does not explicitly limit international agreements to treaties.⁹² It has not been uncommon for Presidents to make accords with foreign

⁸⁷ Lawrence Tribe, *American Constitutional Law*, § 4-4 (3d ed. 2000).

⁸⁸ *Ping v. United States*, 130 U.S. 581 (1889); *but see*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997) (however, when federal law alleges to prohibit state action in areas traditionally regulated by the states, it is assumed that those historic police powers of the state are not to be preempted unless that was the “clear and manifest purpose” of the federal law).

⁸⁹ *Id.*

⁹⁰ *Asakura v. Seattle*, 265 US 332 (1924)

⁹¹ *Reid v. Covert*, 354 U.S. 1 (1957); *De Geoffrey v. Riggs*, 133 U.S. 258.

⁹² U.S. CONST. art. II, § 2.

nations without Senate approval.⁹³ Despite the lack of Senate consent, constitutionally sound executive agreements⁹⁴ have preempted state legislation.⁹⁵

For example, in *United States v. Pink*, the Supreme Court upheld an executive agreement between the Soviet Union and United States, though the agreement lacked ratification by the United States Senate.⁹⁶ The executive agreement involved the assets of a Russian Insurance Company that were held in New York.⁹⁷ After the Russian Revolution, the new Soviet government nationalized the Russian insurance industry and sought to seize the assets of Russia's insurance companies.⁹⁸ An executive agreement negotiated between President Franklin Roosevelt's administration and the Soviet government called for the New York held assets of a Russian Insurance company to be assigned to the United States federal government with a superior claim to the corporation and foreign creditors.⁹⁹ In exchange, the United States government would diplomatically recognize the Soviet government.¹⁰⁰

However, New York State officials and New York State Judges refused to recognize the executive agreement and thus did not recognize the federal government's title to the property.¹⁰¹ The Court rejected the State of New York's

⁹³ John E. Nowack & Ronald D. Rotunda, *Constitutional Law* § 6.9 (7th Ed. 2004).

⁹⁴ *Id.* (There are basically four types of executive agreements).

⁹⁵ *United States v. Pink*, 315 U.S. 203 (1942).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

position by declaring that the non-ratified international agreement had invalidated the actions of New York State.¹⁰²

The Court held that the President of the United States has considerable power in the conduct of diplomacy with other nations.¹⁰³ According to the Court, the President not only has the authority to determine which government should be recognized as the legitimate government of a foreign country, but that power also includes “the power to determine the policy which is to govern the question of recognition” and that any objections to that policy should not be directed toward the courts.¹⁰⁴

Furthermore, for purposes of preempting state laws, the Court put executive agreements on the same level as treaties and thus found New York’s actions as contradictory to the language contained in the executive agreement.¹⁰⁵

“State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement... Then the power of a State to refuse enforcement of rights based on foreign law which run counter to the public policy of the forum... must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.”¹⁰⁶

While it is beyond the scope of this paper to examine which executive agreements currently in-force would preempt state anti-outsourcing legislation, it is important to note that executive agreements can preempt state law. Furthermore,

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

it is important to note that if an executive agreement is not found to preempt a state law because it lacks explicit language that contradicts the state law or because it lacks a preemption clause, the agreement may still lead to preemption due to the State law's interference with a foreign policy embodied in the agreement.¹⁰⁷

For example, in *American Insurance Ass'n v. Garamendi*,¹⁰⁸ an association of insurance companies sued to stop California's Insurance Commissioner¹⁰⁹ from enforcing a statute mandating disclosure of insurance policies from the NAZI era.¹¹⁰ The Court found that though California's statute was not specifically preempted by the executive agreement in question,¹¹¹ the statute was preempted by a foreign policy, embodied in the agreement, adopted by the President.¹¹²

Foreign Affairs Power

The Constitution grants specific power regarding foreign affairs to the President and Congress.¹¹³ For example, Article II delegates to the President the authority to negotiate treaties, with the advice and consent of the Senate; to appoint ambassadors and the power to receive ambassadors and other public

¹⁰⁷ *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (John Garamendi was the State's elected Insurance Commissioner at the time.)

¹¹⁰ *Id.* (The statute, titled "Holocaust Victim Insurance Relief Act" required any insurance company doing business in the state to disclose information about insurance policies that were sold in Europe from 1920 to the end of World War II in 1945 or face loss of their license to sell insurance in California.)

¹¹¹ *Id.* (The Clinton Administration and the government of German Chancellor Gerhard Schroeder negotiated the "German Foundation Agreement," which was designed to settle claims and litigation pertaining to insurance policies that were in force during the Holocaust era by encouraging cooperation with an international commission set up to settle such claims).

¹¹² *Id.*

¹¹³ U.S. CONST. art. I; U.S. CONST. art. II.

ministers. Also, the Constitution assigns the President the role of Commander in Chief over the military.¹¹⁴ Furthermore, the Congress is granted the authority to declare war, to define and punish crimes on the high seas and offenses against the “law of nations;” regulate foreign commerce, regulate the value of foreign coin and establish law regarding naturalization.¹¹⁵

While simultaneously granting extensive foreign affairs power to the federal government; the Constitution simultaneously imposes various restrictions pertaining to foreign affairs on the states.¹¹⁶ Unless they have the blessing of Congress, states may not enter into agreements, alliances or treaties with foreign nations; nor may they engage in war unless invaded or in imminent danger.¹¹⁷

Federal courts and many legal scholars have concluded that, taken together, these Constitutional grants to the federal government of foreign affairs authority, combined with restrictions on the states’ ability act in foreign affairs have vested in the national government exclusive power in the realm of foreign affairs.¹¹⁸

Consequently, federal case law has created a common law that preempts state and local governments to intrude on foreign affairs, even when their actions are not preempted by any treaty or federal statute.¹¹⁹ Though the Supreme Court

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 *Syracuse L. Rev.* 923 (2003).

¹¹⁹ *Id.*

has expounded on the subject in recent years, the relatively few cases have endorsed the concept of a dormant federal foreign affairs power.

Federal Case Law

Power over external affairs is vested exclusively in the federal government and not shared by the states.¹²⁰ “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”¹²¹ There is a threshold level of involvement in and impact on foreign affairs which the states may not exceed.¹²² Discerning the exact location of that threshold level of involvement and impact is the central question in determining whether or not a state statute runs afoul of the federal foreign affairs power.

As previously discussed, most foreign affairs questions involving a state statute revolve around whether or not the statute is superceded by a federal legislation or a treaty. However, just as there is a “dormant Commerce Clause,” courts have also recognized a federal dormant foreign affairs power that can preempt certain state legislation even in the absence of a contrary treaty provision or federal statute.¹²³

¹²⁰ *Pink*, 315 U.S. 203 (1942).

¹²¹ Federalist No. 42, (James Madison).

¹²² *Natsios*, 181 F.3d 38 (1999) referring to *Zschernig v. Miller*, 389 U.S. 429 (1968).

¹²³ Foreign Relations Law, Bradley and Goldsmith discussing *Zschernig*.

Interpretations of *Zschernig*

It has been noted that under the American Constitutional structure “on a national level, a trio of voices contributes to making U.S. foreign policy.”¹²⁴ The Senate may decline to ratify a treaty. Congress may declare war and pass statutes affecting foreign affairs.¹²⁵ Also, the courts, in the course of their constitutional duties may intrude on foreign affairs when adjudicating cases, such as extradition requests, interpreting treaties or executive agreements, suits against foreign governments and individuals and entities.¹²⁶ Additionally, courts intrude on foreign affairs when they rule on the foreign affairs actions of the other two branches.¹²⁷

However, the Office of the President has acquired further foreign affairs powers through a series of U.S. Supreme Court decisions. In *United States v. Curtiss-Wright Export Corp.*,¹²⁸ the Court explained that the President of the United States has broad foreign affairs power. According to the Court, “the President is the sole organ of the nation in its external relations and its sole representative with foreign nations.”¹²⁹ *Curtiss-Wright* concerned an arms embargo proclaimed by the President.¹³⁰ The presidential proclamation was

¹²⁴ Sarah H. Cleveland, *Crosby and the ‘One Voice’ Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975 (2001).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹²⁹ *Id.*

¹³⁰ *Id.*

pursuant to a congressional resolution that had delegated such power to the President.¹³¹

The constitutionality of the embargo was challenged by defendants accused of conspiring to violate the arms embargo. The resulting opinion from the U.S. Supreme Court upholding the legality of the embargo described the President's foreign affairs power as being broad.¹³² However, the written Constitution does not broadly grant general foreign affairs power to the President, but rather lists specific powers.¹³³ This discrepancy provides the main conflict in the cases involving the President's foreign affairs power.

For example, in *Zschernig v. Miller*, the U.S. Supreme Court struck down an Oregon statute, not because it was preempted by a federal statute or treaty provision, but because it has "a direct impact upon foreign relations," which the Court declared to be the sole province of the federal government.¹³⁴

Zschernig concerned an Oregon statute that prevented foreigners from taking property by testamentary disposition or intestate succession unless three conditions were met; (i) a reciprocal right of a U.S. citizen to take property via disposition or intestate succession in the foreigner's nation; (ii) the right of U.S. citizens to be paid from estates in the foreigner's nation; and (iii) the right of the foreigner to receive the proceeds of the estate without it being confiscated by his

¹³¹ *Id.*

¹³² Nowack & Rotunda, *supra* note 93, § 6.2

¹³³ U.S. CONST. art. II.

¹³⁴ *Zschernig*, 389 U.S. 429 (1968).

or her government.¹³⁵ The Supreme Court found that Oregon’s statute was concerned more with the Cold War and the Communist bloc than with any issues unique to probate law.¹³⁶ According to the Court, “the statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.”¹³⁷

The Supreme Court held that this Oregon statute was not only preempted by a treaty,¹³⁸ but also violated the federal government’s exclusive domain of foreign affairs.¹³⁹ The Court distinguished this case from a case where they had upheld the validity of a similar California statute.¹⁴⁰ The difference for the Court was that, unlike the California statute, the Oregon statute had more than an “incidental or effect in foreign countries” and required a search for a “democracy quotient” in the foreign country by a way of “minute inquiries concerning the actual administration of foreign law.”¹⁴¹

Justice Harlan, in a concurring opinion,¹⁴² disagreed with the Court’s finding that Oregon’s probate statute was unconstitutional because it was

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (referring to *Clark v. Allen*, 331 U.S. 503 (1947)).

¹⁴¹ *Id.*

¹⁴² *Id.* (Justice Harlan agreed with the majority that the Oregon statute was preempted, but not by a dormant federal foreign power, but because he believed that the statute was preempted by a treaty).

preempted by the federal government’s dormant foreign affairs power.¹⁴³ Harlan noted that:

“Prior decisions have established that in the absence of a conflicting policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations. Application of this rule to the case before us compels the conclusion that the Oregon statute is constitutional.”¹⁴⁴

Recently, in *Garamendi*, the Court discussed the two theories of foreign affairs preemption used in the Court’s *Zschernig* decision.¹⁴⁵ The Court noted that the two theories of foreign affairs preemption as “complementary.”¹⁴⁶ Justice Souter, in a majority opinion, explained in a footnote that if a State took a position on foreign policy without a “serious claim to be addressing a traditional state responsibility,” then field preemption might be appropriate because the federal government has exclusive foreign affairs power.¹⁴⁷ In such a situation there would be no need to find a conflict between the federal policy and the state action.

On the other hand, when a State is acting in an area of its “‘traditional competence,’ but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.”¹⁴⁸

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Garamendi*, 539 U.S. 396 (2003) (Justice Douglas’s majority opinion is an example of “field preemption” and Justice’s Harlan’s concurrence is an example of “conflict preemption.”)

¹⁴⁶ *Id.* (Footnote 11).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

However, a State should not expect success if they argue that anti-outsourcing legislation similar to New Jersey's is within an area of the State's traditional competence.

When adjudicating state offshore outsourcing legislation, such as New Jersey's statute, analysis using the field preemption theory would be the form of legal analysis by default, in that constitutional Commerce Clause jurisprudence has emphatically not permitted states to have economic protectionism as a basis for state action or legislation.¹⁴⁹ Thus, States would be prevented from arguing that economic protectionism is an area of traditional competence for the State.

The Court, in *Garamendi*, found a sufficient conflict between the state law and federal foreign policy to preempt the statute under conflict theory.¹⁵⁰ According to the Court, though executive agreement negotiated by the President and the leaders of Germany and Austria did not explicitly preempt the State statute, the agreements were evidence of the President's foreign policy on the matter.¹⁵¹ And "the express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield."¹⁵²

Foreshadowing the dicta and footnote in the *Garamendi* decision that explained that both the field and conflict preemption theories are complimentary,

¹⁴⁹Nowack & Rotunda, *supra* note 93, § 8.1 ("If the state regulation, even under the guise of a legitimate goal, attempts to afford residents an economic advantage at the expense of a free-flowing national market, the countervailing national interest will override. Local economic measures are more likely to be upheld if there is no discriminatory purpose or effect.")

¹⁵⁰ *Garamendi*, 539 U.S. 396 (2003).

¹⁵¹ *Id.*

¹⁵² *Id.*

the First Circuit Court of Appeals crafted a series of factors drawn from both preemption theories in its decision in *Natsios v. Foreign Trade Council*.¹⁵³ The First Circuit, in *Natsios*, understood *Zschernig* as standing “for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed.”¹⁵⁴ The First Circuit’s decision was upheld by the Supreme Court in *Crosby v. National Foreign Trade Council*.¹⁵⁵

In *Natsios*, the First Circuit struck down a Massachusetts statute that restricted the state government and its agencies in contracting with firms that conduct business with Burma. The Court had found that the purpose of Massachusetts’ Burma law was to be an incentive for the Burmese government to improve its abysmal human rights record.¹⁵⁶

The problem with the Massachusetts statute was that it had more than an incidental or indirect effect on foreign relations, as described in the Supreme Court’s *Zschernig* decision, because of a combination of factors:

“(1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts, with its \$2 billion in total annual purchasing power by scores of state authorities and agencies, is in a position to effectuate that design and intent and has had an effect; (3) the effects of the law may well be magnified should Massachusetts prove to be a bellwether for other states (and other governments); (4) the law has resulted in serious protests from other countries” and (5) the law is preempted by a federal statute in at least five

¹⁵³ *Natsios*, 181 F.3d 38 (1999).

¹⁵⁴ *Id.*

¹⁵⁵ *Crosby*, 530 U.S. 363 (2000).

¹⁵⁶ *Id.*

ways and, thus, increase the likelihood of embarrassment to the country.”¹⁵⁷

The *Natsios* Factors for determining if a state statute violates the federal government’s foreign affairs power as discussed in *Zschernig*.

Clearly, New Jersey’s statute is not aimed at changing or affecting the affairs of a foreign government; instead it is an effort to maintain job opportunities for residents of New Jersey and, in general, for U.S citizens. But, the state of New Jersey’s purchasing power is considerable¹⁵⁸ and is likely to have an effect on foreign affairs. Thirdly, it is too soon to know if New Jersey will prove to be a bellwether. Though there are dozens of anti-outsourcing bills in state legislatures across the country,¹⁵⁹

New Jersey, so far, has been the only state to actually pass such far-reaching anti-outsourcing legislation. Time will tell if New Jersey is leading a national trend. Fourth, foreign governments, especially India, have argued against American efforts to thwart outsourcing by state and local American governments.¹⁶⁰ Additionally, a consortium of Indian outsourcing firms, Nasscom, has been organized to lobby against outsourcing restrictions.¹⁶¹ Furthermore,

¹⁵⁷ *Id.*

¹⁵⁸ New Jersey Dept. of Treasury, *available at* <http://www.state.nj.us/treasury/omb/publications/04budget/pdf/overview.pdf>, (New Jersey had a state budget over \$23 billion for fiscal year 2003).

¹⁵⁹ *Proposed Restrictions on Global Sourcing Continue at High Level in 2005*, *Supra*, note 27.

¹⁶⁰ Thabo Mkhize, *Indian ambassador says there is a positive side to outsourcing*, *St. Louis Post-Dispatch*, July 29, 2005, at C2.

¹⁶¹ *U.S. move point of concern, but business impact nil*, *The Press Trust of India*, Jan. 24, 2004.

officials with the Canadian government have expressed concern with New Jersey's anti-outsourcing legislation.¹⁶²

Canadian officials, aware that they have 4,500 call centers that could be affected have claimed Senator Turner's statute and others like it undermine NAFTA¹⁶³ and may file a complaint under that treaty.¹⁶⁴ Additionally, an official with the Provincial government of Ontario actually traveled to New Jersey's state capital to lobby against passage of Senator Turner's legislation.¹⁶⁵

Fifth, inconsistencies between a federal policy and state law can be a source of embarrassment to the United States in the conduct of foreign affairs. However, in *Trojan Technologies*, the Third Circuit held, in a case concerning a buy-American state statute, that the possibility of "international scrutiny" alone cannot justify the invalidation of the statute.¹⁶⁶ Moreover, the Third Circuit observed that the statute might align with Congress's policy goals:

"Congress has recently directed its attention to such restrictions and has taken no steps to preempt them through federal legislation. Indeed, in light of Congress' concern with achieving freer trade on a reciprocal basis, to strike Pennsylvania's statute would amount to a judicial redirection of established foreign trade policy—a quite inappropriate exercise of judicial power."¹⁶⁷

¹⁶² Stephen Handelman, *Getting Hung Up on Call Centers: Why an anti-outsourcing bill in New Jersey could wreak havoc in Canada*, Time International, April 18, 2005, at 30..

¹⁶³ North American Free Trade Agreement.

¹⁶⁴ Stephen Handelman, *Supra*, note 163.

¹⁶⁵ *Id.*

¹⁶⁶ *Trojan Technologies v. Commonwealth of Pa*, 916 F.2d 903 (1990).

¹⁶⁷ *Id.*

Critics of the Third Circuit’s decision in Trojan Technologies might note that since that decision was issued in 1990, congresses and presidential administrations of both parties have endorsed sweeping free trade agreements.¹⁶⁸ However, supporters of anti-outsourcing bills could point out that Congress has not been consistent in its support of free trade.¹⁶⁹ For example, in January of 2004, the President signed a spending bill that contained a provision that temporarily prevented companies that outsource certain work to foreign countries from receiving federal contracts.¹⁷⁰

The Dormant Foreign Commerce Clause

In that India is a leader in outsourcing and, thus, is the country most likely to feel the sting of state anti-outsourcing legislation, it is important to examine the federal government’s diplomatic approach to India.¹⁷¹ The Bush Administration has insisted that “there is no higher priority” for U.S. foreign policy than increasing ties between the United States and India.¹⁷²

¹⁶⁸ In 1994, President Clinton and a Democratic Congress approved NAFTA; President Clinton, with a Republican Congress approved of membership in the WTO; In 2005, President Bush and a Republican Congress approved CAFTA.

¹⁶⁹ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 767, 118 Stat. 3 (2004) (House Resolution 2673).

¹⁷⁰ Greg Schneider, *Anxious About Outsourcing; States Try to Stop U.S. Firms from Sending High-Tech Work Overseas*, Washington Post, Jan. 31, 2004, at E1.

¹⁷¹ *India set to become exciting market place*, The Press Trust of India, July 20, 2005; David C. Yang, Note, *Globalization and The Transnational Asian “Knowledge Class,”* 12 Asian L.J. 137 (2005).

¹⁷² *Together at last; India and America*, The Economist, July 23, 2005.

This high priority was reinforced by a rare White House state dinner for Indian Prime Minister Manmohan Singh.¹⁷³ Several factors are motivating administration to warm up to India; the increased connectedness between the U.S and Indian economy;¹⁷⁴ India's democratic system of government in a region known for despotic governments and India's growing military and economic power being a counterweight to China's growing economic and military power.

There is little doubt that a multitude of state anti-outsourcing legislation, though ostensibly not directed toward any particular nation, would seriously impact economic ties between the United States and India. Furthermore, such state legislation would hamper efforts by the President and his administration in fostering a closer diplomatic relationship with India.

The states' regulatory authority is more circumscribed when it concerns foreign commerce than when it merely covers domestic commerce. The principle that the government must speak with "one voice" in the arena of foreign affairs has been a constant refrain in the Supreme Court cases that have grappled with preemption of state law by the federal government's foreign affairs power; dormant or otherwise.

¹⁷³ Anil Padmanabhan and Raj Chengappa with Saurabh Shukla, *Big Step Forward*, India Today, August 8, 2005 (Historically speaking, state dinners have been very rare during the Bush Presidency. The state dinner for the Indian Prime Minister was only the fifth state dinner of George W. Bush's presidency).

¹⁷⁴ Saritha Rai, *M.B.A. Students Bypassing Wall Street for a Summer in India*, N.Y. Times, August 10, 2005, at 1, (India's influence in the U.S. economy is so great that American business students from top MBA programs are now taking internships in India to further understand a globalizing world economy and the growing nexus between the U.S. and Indian economies).

For example, in *Japan Line v. County of Los Angeles*,¹⁷⁵ the Court struck down a state tax on cargo containers used exclusively in foreign commerce because it violated the foreign Commerce Clause by risking international multiple taxation and by frustrating the federal government’s ability to “speak with one voice”¹⁷⁶

The Court first determined that the cargo containers were instrumentalities of foreign, rather than interstate commerce.¹⁷⁷ Then, after an inquiry, the Court concluded that the tax “created a substantial risk of international multiple taxation.”¹⁷⁸ Furthermore, the Court noted that the containers were “based, registered and subject to property tax in Japan;”¹⁷⁹ that other states were imposing similar taxes.¹⁸⁰ The Court was also concerned with the reaction of the Japanese government and noted that “such retaliation of necessity would be felt by the nation as a whole.”¹⁸¹

Four years later, in *South-Central Timber Development Inc. v. Wunnicke*,¹⁸² the Court reiterated its concern about the nation speaking with one voice. In *Wunnicke*, the Court noted:

“It is a well accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous

¹⁷⁵ *Japan Line, Ltd., v. County of Los Angeles*, 441 U.S. 434 (1979).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (the court was concerned that multiple state taxes would cause multiple taxation for the plaintiffs).

¹⁸¹ *Id.*

¹⁸² *South-Central Timber Development v. Wunnicke*, 467 U.S. 82, 100 (1984).

and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that 'the federal government... speak with one voice when regulating commercial relations with foreign governments.'¹⁸³

More recently, in *American Insurance Ass'n v. Garamendi*,¹⁸⁴ the Court again emphasized the need to speak with one voice in foreign affairs. The Court, again, stressed the importance of speaking with one voice:

“There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the ‘concern for uniformity in this country's dealings with foreign nations’ that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.”¹⁸⁵

However, when the Court has discerned that the federal government has not intended to speak with one voice they have not invoked the dormant federal Commerce Clause to preempt a state law.¹⁸⁶ For example, the Court held a Florida statute on aviation fuel did not threaten the federal government's ability to speak with one voice, because international agreements “demonstrate that the federal government has affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel.”¹⁸⁷ Furthermore, the Court took notice

¹⁸³ *Id.*

¹⁸⁴ *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003).

¹⁸⁵ *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 406 U.S. 759)

¹⁸⁶ *Wardair Canada Inc., v. Florida Dept. of Revenue*, 477 U.S. 1 (1986).

¹⁸⁷ *Id.*

of actions by the federal government accepting of the authority of the States to tax aviation fuel.¹⁸⁸

In distinguishing this case with Japan Line:

“we explained that Foreign Commerce Clause analysis requires that the court ask whether a state tax ‘prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments.’ But we never suggested in that case or any other that the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.”¹⁸⁹

In another case revolving around a tax imposed by a State, the U.S. Supreme Court upheld the worldwide combined reporting requirement for calculating California’s corporate franchise tax.¹⁹⁰ In *Barclays*, the Court explained that its previous cases discussed the speaking-with-one-voice issue only after determining that the State practice was otherwise constitutional.¹⁹¹

The Court emphasized that the federal government’s acknowledgement that certain State practices do not impede its ability to speak with one voice need not be conveyed “with unmistakable clarity.”¹⁹² In other words, the federal government may “implicitly” permit a State practice.¹⁹³

The Court took notice of the fact that Congress was aware that foreign governments had complained about the computation of California’s corporate

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

franchise tax but still took no preemptive action.¹⁹⁴In fact, Congress had defeated several bills that would have explicitly preempted the California tax scheme.¹⁹⁵The First Circuit, in *Natsios*, noted that Barclays did not undercut the speaking-with-one-voice doctrine, but simply determined that Congress had “condoned” California’s corporate franchise tax scheme.¹⁹⁶

Conclusion

The ongoing globalization of the world’s economy will cause multiple challenges for American courts. The public’s anxiety about economic security will cause their representatives to draft more legislation aimed at countering outsourcing. Secondly, as technology makes the world smaller, state legislation will have a greater impact on foreign affairs. Courts will have to balance federalism concerns with the Constitutional requirement for the federal government to be the preeminent voice in foreign affairs.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Natsios*, 181 F.3d 38 (1999).