EXPORTING THE LAW

A Legal Analysis of State and Federal Outsourcing Legislation

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EXECUTIVE SUMMARY

Proposed state and federal legislation to restrict outsourcing may violate the U.S. Constitution and jeopardize U.S. obligations under international trade agreements. The proposed legislation is thus subject to challenge on a variety of grounds. The National Foundation for American Policy (NFAP) solicited the views of Shannon Thyme Klinger and Lynn Sykes, attorneys in the Washington, D.C. office of Alston & Bird, and joins in their analysis — the first of its kind — which concludes that:

- Prohibitions on state contract work being performed overseas are the most legally suspect category of proposed outsourcing legislation, since courts would likely find that such measures improperly intrude on the federal foreign affairs power and violate the U.S. Constitution's Foreign Commerce Clause.

- State laws offering preferential treatment for in-state interests, though not outright prohibitions, also may violate the U.S. Constitution.

- State and federal measures that restrict or ban sending U.S. consumers' financial, medical, or other related personal information overseas may be unenforceable in whole or in part under the doctrine of preemption. Existing federal laws, including the Fair Credit Reporting Act, the Health Insurance Portability and Accountability Act of 1996, and the Gramm-Leach-Bliley Act of 1999, already address the treatment of certain types of consumer information and permit the sharing of consumer information among affiliated entities without regard to geography and provide mechanisms for recourse against U.S. corporations for failing to take appropriate measures to guard consumer information.

- The Thomas-Voinovich Amendment, which became law as part of a federal omnibus appropriations act on January 23, 2004, bans certain federal overseas contracts. This law may violate U.S. trade obligations under the World Trade Organization's Government Procurement Agreement (GPA) because the GPA prohibits member countries from treating domestic firms less favorably on the basis of "the country of production of the good or service being supplied." At minimum, it appears that the Thomas-Voinovich Amendment, as applied, fails to comply with the non-discrimination and national treatment principles of the Government Procurement Agreement, which may result in an adverse finding by a World Trade Organization dispute settlement body.

- Various proposed state outsourcing bans as well as other proposed federal legislation, including the Dodd Amendment, which makes the Thomas-Voinovich Amendment permanent, are similarly subject to challenge under the Government Procurement Agreement.

Legislators in at least 36 states have introduced more than 100 bills to restrict overseas outsourcing, and legislation on the issue has also proliferated at the federal level. Before moving further down this path of passing or proposing more such measures, policy makers should be fully informed and confident that such actions are both legally sound and capable of withstanding international challenge. International concerns are significant since much of the proposed legislation, if implemented, could invite retaliation by other nations.

This study does not provide an exhaustive analysis of every potential constitutional or other legal challenge to the myriad state and federal pending or existing legislation that prohibits or restricts outsourcing. Its aim is to serve as the beginning of a necessary dialogue that transcends emotion and politics and highlights the core constitutional and legal concerns raised by proposed outsourcing legislation. □

STATE LEGISLATION ON OUTSOURCING: PREEMPTION & CONSTITUTIONAL CONCERNS

By April 2004, at least 36 states had introduced in excess of 100 bills aimed at restricting outsourcing. The National Foundation for American Policy maintains an updated list of such bills and their texts on its web site.[1] (Also see Table 1.) Most of these bills have not yet become law, but at least one has been enacted and the sheer volume of bills seems to indicate that more may become law. State outsourcing legislation generally applies to contracts between private businesses and the state because these contracts, as opposed to contracts between two private companies, are directly under state control. Proposed state legislation also has, however, ventured into regulating the operations of private sector call centers that contact or receive telephone calls from state residents or entities, including centers that send financial, medical, or other data overseas. State outsourcing legislation falls into five general categories. Each category raises preemption and/or constitutional concerns, as discussed on the following pages.

STATE BANS ON PERFORMING PUBLIC CONTRACT WORK OVERSEAS

The most legally suspect category of proposed state legislation includes bills that, in general, require that public procurement and other public contracts be performed within the United States.[2] Some states go even further, both restricting the site of contract performance and requiring that only persons authorized to work in the United States perform the contract.[3] Another formulation prohibits a company from receiving state or local contracts, grants, loans, or bonds if the company has had a net loss of employees in the state during the prior calendar year caused by the company relocating jobs from the state to a site that is located outside the United States.[4] To the extent these laws would restrict performance overseas and not in other states, they raise concerns primarily with state-federal relations as opposed to inter-state issues. These concerns include improperly intruding on the federal foreign affairs power and violating the U.S. Constitution's Foreign Commerce Clause.[5]

TABLE 1

SUMMARY LIST OF STATES WITH PROPOSED LEGISLATION RESTRICTING OUTSOURCING

STATE	PROPOSED LEGISLATION
Alabama	state contract on overseas work. call center restrictions
Arizona	ban on state contracts with foreign call centers, call center and data transfer restrictions, ban on state contracts for foreign call centers
California	state contract ban, call center, personal data and health care info. restrictions, outsourcing notification requirement
Colorado	state contract ban, data transfer restrictions, ineligibility for state contracts and development assistance if outsourcing job loss
Connecticut	state contract ban, call center, personal data and health care info. restrictions, development assistance restriction for outsourcing companies, ban on state contracts for call centers, in-state preference
Florida	in-state resident requirement for state contractors
Georgia	state contract ban and call center restriction, including state contact ban on foreign call centers
Hawaii	ban on state contracts with foreign call centers, call center and data restrictions
Idaho	employment preference for state residents
Illinois	state contract ban, in-state preferences
Indiana	state contract ban, in-state contract preference
Iowa	state contract ban
Kansas	state contract ban, call center and data transfer restrictions
Kentucky	state contract ban
Louisiana	state contract ban, in-state contract preference
Maryland	state contract ban
Michigan	state contract ban
Minnesota	state contract ban, call center restrictions, including state contact ban on foreign call centers
Mississippi	state contract ban, call center restrictions
Missouri	state contract ban, data transfer and call center restrictions, including state contract ban on foreign call centers, in-state preference
Nebraska	state contract ban
New Jersey	state contract ban, data transfer and call center restrictions
New Mexico	state contract ban
New York	state contract ban, call center restrictions, development assistance restricted for companies that outsource overseas
North Carolina	call center restrictions, including state contract ban on foreign call centers
Pennsylvania	legislative investigation of offshore outsourcing from state
South Carolina	call center restrictions, including state contact ban on foreign call centers
South Dakota	state contract ban
Tennessee	state contract ban, call center restrictions
Vermont	state contract ban and ban on state contracts for foreign call centers
Virginia	state contract ban, in-state preference
Washington	state contract ban, call center and data restrictions
West Virginia	call center restrictions, seven-year ban on state contracts and assistance to companies that outsource overseas and have 100-person job loss
Wisconsin	state contract ban, call center restrictions

Source: National Foundation for American Policy. Note: A "state contract ban" refers to a bill that would prohibit work on state contracts to be performed overseas or by individuals not authorized to work in the U.S. Call center restrictions refer to bills that mandate operators identify their location in some manner. A table tracking the bills and the legislative texts of state and federal bills are available at the NFAP web site at www.nfap.net/researchactivities/globalsourcing. The table and bills are updated regularly. Ohio and Rhode Island also have bills pending.

State laws that prohibit the performance of public contracts overseas may be preempted by the Federal Government's power to set uniform policies for the United States as a whole in dealing with foreign nations.[6] The United States Supreme Court has struck down few state statutes as violative of this federal power, but these instances are instructive as we become a "global economy" and states enact laws addressing matters, such as outsourcing, that have a global effect. In a recent case, the Supreme Court ruled that California's Holocaust Victim Insurance Relief Act (HVIRA) impermissibly interfered with the President's conduct of foreign affairs and was preempted on that basis.[7] That law required any insurer doing business in California that sold insurance policies in Europe that were in effect during the Holocaust era to disclose certain information about those policies to the California Insurance Commissioner or risk losing its license.[8] In another ruling, the Court held that an Oregon statute, which stated the conditions under which an alien not residing in the United States could take property in Oregon by succession or testamentary disposition, constituted an improper state intrusion into the field of foreign affairs, an area that the U.S. Constitution entrusts to the President and Congress.[9] The Court reasoned that the statute as applied had "more than 'some incidental or indirect effect in foreign countries'" and "great potential for disruption or embarrassment" and that it "affects international relations in a persistent and subtle way."[10]

This Supreme Court guidance and other federal court decisions reveal that the following factors are likely to lead a court to strike down a state statute as violative of the federal foreign affairs power: (1) the law is designed and intended to affect the affairs of a foreign country; (2) the state "is in a position to effectuate that design and intent and has had an effect"; (3) the effects of the law likely will be magnified if the law at issue should "prove to be a bellwether for other states (and other governments)"; (4) the law has resulted in "serious protests" from other nations, including allies and trading partners, and foreign bodies (such as the European Union); and (5) the state law diverges from federal law, "thus raising the prospect of embarrassment for the country."[11] It is easy to see how state laws prohibiting the performance of public contracts overseas could do all of these things. As a consequence, these laws would likely improperly intrude on the federal foreign affairs power. Though several bills are pending in Congress to set federal policy on outsourcing, current federal foreign policy does not restrict outsourcing as these state laws would. In fact, the President and his Administration acknowledge that outsourcing is a fact of life in today's global economy, as reflected in Secretary of State Colin Powell's remarks during a recent trip to India.[12]

A number of courts have emphasized the policy dangers of individual states treading into the foreign affairs realm, affirming the shaky legal footing of state laws wholesale restricting public contracts from being performed overseas. "'These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a state created difficulties with a foreign power.'"[13] A state cannot "structure national foreign policy to conform to its own domestic policies."[14] Accordingly, "[a]ny concurrent state power that may exist [in the area of international relations] is restricted to the narrowest of limits…."[15] Although most authority is to the contrary, not all state laws affecting foreign commerce have been found to run afoul of the federal foreign affairs power. Lower courts are split on the constitutionality of state Buy American Acts, and the Supreme Court has not ruled definitively on the issue.[16] For example, the Third Circuit held that a Pennsylvania law requiring agencies of the Commonwealth to include provisions in public works construction contracts requiring that any steel used in those projects be produced in the United States did not interfere with the Federal Government's exercise of foreign affairs power.[17] In contrast, a California court struck down the California Buy American Act.[18] State laws that prohibit the performance of public contracts overseas may also violate the Foreign Commerce Clause of the U.S. Constitution, which establishes Congress's power to "regulate Commerce with foreign Nations."[19] The "dormant" or "negative" Foreign Commerce Clause describes the restrictive effect on states of this broad federal power, and federal law preempts state laws attempting to regulate foreign commerce.[20]

The Foreign Commerce Clause protects American companies acting outside the geographic borders of the United States. "When the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is also referring to attempts to restrict the actions of American companies overseas."[21] State laws that prohibit the performance of public contracts internationally would preclude U.S. interests overseas from working on state contracts. The Supreme Court subjects state laws that affect foreign commerce to a higher level of scrutiny than those affecting only domestic commerce.[22] "If a Court upholds state action affecting foreign commerce, 'it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce.'"[23] This heightened scrutiny is reflected in Supreme Court statements in striking down state statutes as violative of the Federal Commerce Clause: "[W]e think that a state's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination."[24]

As in the area of the Federal foreign affairs power, the Supreme Court considers the effect of other states enacting similar laws. "If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce."[25] A patchwork of state outsourcing laws would create a complicated, unwieldy framework in which businesses with foreign operations or interests would have to tread. Another consideration under both a foreign affairs powers and Foreign Commerce Clause analysis is the possibility of retaliation by foreign nations.[26] The Supreme Court has also noted that, at times: "[r]etaliation by some nations could be automatic" due to statutes requiring reciprocity in trade matters.[27] Given that as of 2001, over 6.4 million Americans were employed directly by foreign corporations doing business in the United States, foreign retaliation could have a substantial effect on the American economy.[28]

A state may, however, avoid the restrictions of the Commerce Clause by acting as a "market participant." "'[A] state's actions constitute "market participation" only if a private party could have engaged in the same actions.'"[29] In contrast, "when the state avails itself of the unique powers or special leverage it enjoys by virtue of its status as a sovereign, it is 'engaging in market regulation.'"[30] Significantly, the application of the market participant doctrine, which was developed in the context of domestic commerce, to foreign commerce is "controversial."[31] The Supreme Court has not resolved whether the market participant exception applies to the Foreign Commerce Clause, but its comments on the market participant exception generally illustrate, as noted above, the Court's heightened scrutiny of state laws affecting international commerce. "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous 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.'"[32]

Courts of Appeal disagree on the application of the market participant exception to the Foreign Commerce Clause. The Third Circuit has extended the exception to the Foreign Commerce Clause, upholding a Pennsylvania law requiring agencies of the Commonwealth, when undertaking public works construction projects, to include provisions in contracts that steel used in all projects be produced in the United States.[33]

The First Circuit, on the other hand, declined to so extend the market participant doctrine:

> Contrary to the Third Circuit's view in Trojan Technologies, we believe that the risks inherent in state regulation of foreign commerce — including the risk of retaliation against the nation as a whole and the weakening of the federal government's ability to speak with one voice in foreign affairs — weigh

> against extending the market participation exception to the Foreign Commerce Clause.[34]

In sum, state laws that prohibit the performance of public contracts outside the United States may violate the Foreign Commerce Clause because they seek to regulate foreign commerce, an area of federal preeminence. Also, courts scrutinize state laws that affect foreign commerce, such as these, more strictly than laws affecting only domestic commerce. In addition, it is unsettled whether the market participant exception applies in the international context, further strengthening the case against the constitutionality under the Foreign Commerce Clause of state laws that prohibit the performance of public contracts outside the United States.

STATE BILLS REQUIRING PUBLIC CONTRACTS TO BE PERFORMED BY INDIVIDUALS AUTHORIZED TO WORK IN THE UNITED STATES

Another related category of state bills requires that state contracts be performed by individuals who are United States citizens or authorized to work in the United States. Some proposed legislation incorporates these provisions into call center restriction bills to restrict the status of call center employees.[35] Other bills restrict employment in performing any state contract.[36]

These bills, as with bills restricting the location of work to be performed under state contracts, may improperly intrude on the federal foreign affairs power and violate the Foreign Commerce Clause. Note that a United States citizen working abroad would be eligible to work on public contracts for states that prohibit the work from being done by individuals who are not United States citizens or authorized to work in the United States but would be ineligible to work on public contracts for states that prohibit the work from being done overseas. This scenario is just one example of the myriad of complications that will arise in applying these varied state outsourcing provisions. Whether the drafters thought these issues through is unknown.[37]

STATE BILLS RESTRICTING CALL CENTERS AND SENDING DATA OVERSEAS

State call center bills generally provide that individuals receiving telephone calls from or placing calls to customer sales or service centers have the right to certain information about the call center employees with whom they are speaking, such as the location of the call center employee, the employee's place of business, and the name of the employee.[38] A number of these bills also prohibit customer sales or service centers from sending certain financial or personal identifying information to a foreign country without the express written consent of the customer.[39]

Some proposed legislation both prohibits the state from contracting for telemarketing or telephone center services with any vendor employing the services of persons not authorized to work in the United States and requires that the call center services be performed in the United States.[40] Another variation, in the case of private sector call centers, gives the caller or called party the right to be transferred to a contact center in the United States upon request,[41] apparently presuming that a caller would rather speak with someone in the United States than overseas. Although these call center restrictions do not raise significant constitutional concerns on their face, they may nonetheless, as applied, implicate the federal foreign affairs power and the Foreign Commerce Clause.

Proponents of proposed limitations on the ability of corporations to utilize offshore call centers or otherwise avail themselves of outsourcing when medical, financial, or other personal data is involved often do so under the justification that the restrictions are necessary in order to protect the privacy interests of the American public. As Rep. Edward J. Markey (D-MA) recently stated: "in their rush to cut costs and increase their bottom line… companies may be sacrificing the privacy protections the law affords to American citizens by transferring sensitive information to off-shore companies that are outside of the reach of U.S. privacy law beyond the jurisdiction of U.S. regulators."[42]

The legal basis for such alarmist concerns is questionable. First, as discussed in more detail below, the United States is subject to a variety of trade obligations, including its obligations under the World Trade Organization's (WTO) Agreement on Government Procurement (GPA).[43] An outright ban on the global sourcing of, among other things, call center functions, medical records transcription, or the processing of financial transactions would likely run afoul of one or more such trade agreements.

Second, such an argument fails to appreciate that Congress has already passed a number of federal laws aimed at protecting consumer privacy, including the Fair Credit Reporting Act,[44] the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[45] and the Gramm-Leach-Bliley Act of 1999 (GLB).[46] Each of these statutes contains provisions that may preempt in whole or in part efforts undertaken by the various states to limit the global sourcing of personal information.

For example, recent amendments to the FCRA severely limit the ability of the states to restrict the distribution of consumer credit information between a credit reporting agency and its affiliates,[47] while HIPAA expressly provides that business entities covered thereby are "permitted to disclose protected health information to their business associates, and to allow those business associates to create and receive protected health information on the covered entity's behalf, but only if the covered entity obtains 'satisfactory assurances' that the business associate will appropriately safeguard the information."[48] Gramm-Leach-Bliley similarly permits a financial institution to provide nonpublic personal information to a third party to perform services for or functions on behalf of the financial institution, provided that the financial institution fully discloses to consumers that this information will be provided to third parties and enters into a contract with the third party that requires the third party to maintain the confidentiality of the information.[49]

None of these statutes appears to make a distinction between affiliates and business associates located within the United States and affiliates and business associates located throughout the rest of the world. State laws purporting to make such a distinction, then, could be subject to challenge because they are arguably preempted by federal law.

IN-STATE OR U.S.-BASED COMPANY PREFERENCES IN STATE CONTRACTING

Some bills — and a new state law — couch local favoritism as preferences, rather than as outright requirements or prohibitions. The most striking example is a new Indiana law, which will go into effect on July 1, 2004.[50] This law offers price preferences of between one and five percent to Indiana companies in awarding state contracts. The law also contains a reciprocal benefit carve-out, which provides that the preference does not apply to the detriment of businesses from states bordering Indiana if the bordering states do not provide purchasing preferences to their businesses more favorable than preferences provided to Indiana businesses under the law. Other states have bills or executive orders with similar preferences for in-state businesses. A related type of proposed legislation prohibits private companies from receiving state or local contracts, grants, loans, or bonds if they have had a loss of employees in the state caused by the relocation of jobs from the state to a site that is located outside of the United States.[51]

Preferential treatment bills are on their face discriminatory. While not an outright prohibition on outsourcing, their restrictions operate largely to the same effect. Potential constitutional problems with preferential treatment bills focus on the relationship among states and include potential violations of the Commerce Clause, the Privileges and Immunities Clause, and principles of Full Faith and Credit.

There are sound reasons to believe that state preferential treatment laws may violate the Commerce Clause, which, in addition to providing for Congress's power to regulate commerce with foreign nations, establishes Congress's power to "regulate Commerce . . . among the several States."[52]

As noted above, the "dormant" or "negative" Commerce Clause describes the negative effect on states of this broad federal power, and federal law preempts state laws attempting to regulate interstate commerce.[53]

States generally may not regulate commerce outside their borders. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[54] "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[55]

Nor may states enact blatantly protectionist laws without substantial justification. The Supreme Court "consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. . . . '[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.'"[56] "[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal."[57]

In almost any Commerce Clause case, including in the outsourcing context, a state can argue that it has an interest in supporting local businesses and employment. "Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition."[58] State preferential treatment laws would attempt to do just that.

In conducting this Commerce Clause analysis, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[59] As in the international context, a patchwork of state outsourcing laws would create a complex, strained environment for inter-state relations.

In sum, a state may not enact baldly protectionist laws solely for local economic benefit. With respect to domestic commerce, though, as discussed above in the context of the Foreign Commerce Clause, states have a greater likelihood of being found to be a "market participant" and therefore free from the strictures of the Commerce Clause. But once a state starts giving in-state interests preferential treatment over the interests of citizens of other states, the Privileges and Immunities Clause comes into play and may invalidate the discriminatory law.

The Privileges and Immunities Clause of Article IV of the U.S. Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[60] The Privileges and Immunities Clause of the Fourteenth Amendment prohibits states from making or enforcing any law "which shall abridge the privileges or immunities of citizens of the United States."[61] The purpose of these provisions "is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."[62] That some state outsourcing laws would be preferences rather than outright restrictions or prohibitions does not save them from scrutiny under the Privileges and Immunities Clause because their effect is nonetheless to discriminate against nonresidents.[63] Analyzing a State statute under the Privileges and Immunities Clause involves considering whether, through the law at issue, "a State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens, and ... if so, whether there is sufficient justification for the discrimination."[64] A state can show a "sufficient justification" by "demonstrating (a) a substantial reason for the discrimination, and (b) a reasonable relationship between the degree of discrimination exacted and the danger sought to be averted by the enactment of the discriminatory statute.[65]

A court considers the availability of less restrictive means when evaluating "the measure and degree of the relationship between the discrimination and state interest."[66] This analysis includes determining whether the state has "demonstrated a substantial factor unrelated to economic protectionism to justify the discrimination."[67] And, of particular significance in the outsourcing context: "As part of any justification offered for the discriminatory law, nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.'"[68]

Case law analyzing Privileges and Immunities challenges distinguishes between rights concerning public and private employment. "[I]t was long ago decided that one of the privileges which the [Privileges and Immunities] clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."[69] "But 'direct public employment,' where the state imposes a restriction on its own hiring practice, is not an actionable right. Nonetheless there is a fundamental right to employment where the employee is hired by a private employer who receives a government contract to work on a public project."[70]

A number of cases address the requirement that, to justify a state law that discriminates against nonresidents, nonresidents be shown to "constitute a peculiar source of the evil at which the statute is aimed."[71] In the leading case of Hicklin v. Orbeck,[72] the Supreme Court held that the Alaska Hire law that requires that all oil and gas leases, easements, or right-of-way permits for oil or gas pipeline purposes and unitization agreements to which the State is party contain the requirement that qualified Alaska residents be hired in preference to nonresidents violated the Privileges and Immunities Clause.[73] The Court ruled that, even if it accepted a state's showing as sufficient evidence that nonresidents were "'a peculiar source of evil,'" the statute still was unconstitutional because its discrimination against nonresidents did not bear a "substantial relationship" to the particular "'evil'" they were said to present.[74] The Court explained that the law

> simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents — again, a policy which may present serious constitutional questions — the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit.[75]

Supreme Court precedent "make[s] clear that there must be some evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents...."[76] "Our insistence on data may seem niggling," but "[t]he preference law might have no effect on the unemployment rate in Illinois. Worse, it could boomerang, and actually increase unemployment in the construction industry."[77] As one United States district court noted: "The argument that nonresidents are a 'peculiar source of evil' to the general welfare of the local citizenry because they displace residents from the local job market has also been rejected in previous cases."[78]

Accordingly, in A.L. Blades & Sons, Inc. v. Yerusalim,[79] the Third Circuit found the state's proffered justifications of alleviating high unemployment in the Commonwealth's construction industry and avoiding the loss of economic benefits resulting from the expenditure of Commonwealth funds on nonresident workers to be insufficient to "'substantially justify'" the Commonwealth's discriminatory approach of requiring that contractors hire only in-state workers on Commonwealth-funded public works projects.[80] The court found that the Commonwealth offered "no evidence" as to why nonresident employees constituted a "peculiar source" of these purported problems; it was not sufficient that they were merely a "contributor to the problem."[81] The court noted that it was even "uncertain whether there is a net economic loss to the Pennsylvania economy."[82]

In sum, while a state may restrict direct employment with the state, it may not constitutionally, under the Privileges and Immunities Clause, restrict an individual's employment by a private employer that is performing work under a state contract. State outsourcing laws also may violate the Privileges and Immunities Clause by denying out-of-state individuals the "privilege" of working in the state without offering a sufficient justification for the restriction and being able to show how the out-of-state workers constitute a "peculiar source" of the state's unemployment and related problems.

As with the other types of state outsourcing bills, in addition to constitutional concerns, preferential treatment bills raise problems in application. Consider state citizens living temporarily in another state. Or citizens of another state temporarily living in the state offering the in-state preferences. How do the preferences affect these individuals? What about an employee of a company based in the state but with a division overseas? Or an employee of a foreign company, such as BMW, with a division located in the state that employs local workers? These questions and many others — in addition to legal challenges — face states that seek to enact outsourcing legislation with in-state preferences.

State preferential treatment laws also would raise concerns under the Full Faith and Credit Clause of the U.S. Constitution, which states: "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State."[83] Most relevant here, Supreme Court precedent "clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."[84] If state preferential treatment bills incite litigation involving interests in different states, the courts likely will face related conflicts of law issue and Full Faith and Credit Clause issues.

It would be absurd to require, for example, Wisconsin to enforce Indiana's preferences against its residents under Indiana's outsourcing law when a Wisconsin resident files a lawsuit in Wisconsin against the state of Indiana. Wisconsin certainly has a good faith argument that Indiana's preference law violates Wisconsin's public policy. Conflicts of law and Full Faith and Credit issues of this sort are likely to arise in applying and enforcing these state outsourcing laws.

STATE TAX AND BUDGETARY INCENTIVE BILLS

Other state legislation attempts to limit awarding state funding or tax incentives to private businesses unless those businesses restrict their own outsourcing activities. Proposed legislation in New York, for example, would prohibit entities that receive developmental assistance from relocating or moving jobs from New York "to an outside locality" and require the return of any public funding from an entity that did so.[85] Other state bills restrict the state's award of tax preferences to private corporations by requiring corporations, in order to quality for these "tax preferences," to conform to specific wage and hiring requirements, including the affirmative creation of new jobs within the state.[86]

These bills differ from those prohibiting state contract work from being done overseas because they affect private companies performing private contracts with public assistance as opposed to public contracts. This type of incentive framework generally is the least problematic approach — from a legal challenge perspective — because it is most similar to a legitimate exercise of state spending power.

These laws would raise the same constitutional concerns as preferential treatment laws, due to their effect on interstate and foreign commerce, albeit to a lesser extent. Some scholars question whether such laws make policy sense, particularly since a company is unlikely to agree to an incentive package to locate in a state if doing so will tie its hands on future personnel policy.[87]

STATE EXECUTIVE ORDERS

In addition to the proposed state legislation discussed above, the governors of at least four states have issued Executive Orders that manifest the intent to study, ban, or severely restrict outsourcing.[88] To the extent that these orders go beyond the creation of agencies tasked with studying or monitoring outsourcing and instead restrict or eliminate overseas or interstate outsourcing, the Executive Orders would be subject to the same challenges set forth above.

ANALYSIS OF FEDERAL OUTSOURCING LEGISLATION

A number of outsourcing-related bills or proposed amendments are now pending in Congress. The federal measures on outsourcing tend to avoid the constitutional questions present in much of the proposed state legislation. Proposed federal legislation, however, including one provision that has become law, raises other serious questions and may violate U.S. obligations under international trade agreements.

FEDERAL LEGISLATION TO LIMIT THE TRANSFER OF DATA OVERSEAS

One category of legislation that holds promise to interfere with international commerce under the guise of "privacy" protection is federal legislation that prohibits sending individuals' data overseas without the express permission of the consumer. Sen. Hillary Clinton (D-NY) and Sen. Bill Nelson (D-FL), to cite two examples, have stated their intentions to introduce bills or amendments to restrict the sending of U.S. consumers' data for processing overseas.[89] While these bills may not violate U.S. trade obligations on their face, these bills, as applied, may raise concerns under international trade agreements to which the United States is a party.[90]

FEDERAL CONTRACTING BANS

Other proposed federal legislation attempts to ban or severely restrict the performance of federal contract work overseas. Senator Christopher Dodd's bill (S. 2094), The United States Workers Protection Act — known as the "Dodd Amendment" — is probably the most widely publicized pending federal outsourcing legislation. The measure would prohibit federal contract work from being performed overseas unless the President deems a contract to be in the national security interests of the United States. The Dodd Amendment also prohibits state contract work from being performed overseas with money received from federal grants and would make the Thomas-Voinovich Amendment's ban on certain federal outsourcing permanent.

Other proposed federal legislation imposes obligations on Federal Government contractors to employ their workers domestically or to observe a minimum domestic requirement,[91] or attempts to require employees at call centers to disclose their physical locations to the called parties.[92]

Still other federal bills propose preferential treatment toward U.S. businesses, as in the case of H.R. 3911, which proposes to make certain companies that have outsourced jobs during the previous five years ineligible for federal funding.

Whatever issues this federal protectionist legislation may create related to the constitutional prohibitions on national origin discrimination, it is doubtful that the proposed federal legislation creates the kind of constitutional issues discussed earlier with respect to similar state legislation, due to federal dominance of the applicable fields. What the proposed federal legislation *does* do, however, is risk placing the United States in violation of its obligations under a variety of trade agreements, including the North American Free Trade Agreement,[93] the Uruguay Round Agreements,[94] and, most importantly, the World Trade Organization Government Procurement Agreement (GPA).[95]

Although a thorough analysis of these trade agreements is beyond the scope of this paper, a brief review of the GPA is warranted. In a nutshell, the Government Procurement Agreement obligates contracting parties, such as the United States, to establish minimum procedural and substantive rights in their national laws and regulations with respect to the treatment of other GPA members. Specifically, a GPA member country must give foreign suppliers, goods, and services "no less favourable" treatment than those same good or services would be given domestically and member countries must not discriminate among or between foreign suppliers, goods, or services.[96] The Government Procurement Agreement also prohibits member countries from discriminating among domestic suppliers on the basis of foreign ownership or the provision of foreign goods or services.[97] It is important to remember that unlike other WTO agreements pursuant to which all WTO members are obligated, the GPA is what is known as a plurilateral agreement, meaning that membership is by choice. Only after a country opts-in to the GPA does it agree to be bound by the GPA's provisions, and even then, it is only bound to the GPA's provisions to the extent that other member countries have agreed to be similarly bound.

Although the Government Procurement Agreement as originally conceived was applicable only to member countries, a mechanism was established to allow so-called sub-national governments — in the case of the United States, individual states — to agree to be bound by the GPA's provisions. Thirty-seven states obligated themselves in whole or in part to the GPA's provisions,[98] while North Dakota and West Virginia committed to providing nondiscriminatory treatment of suppliers, goods, and services from Europe with respect to state procurements.[99] Moreover, as members of the United States, which has the constitutional authority to act on behalf of the states in the international arena, and certainly to the extent that states receive federal monies, for example, on a mass transit or highway project, all states are arguably required to comply with the federal statutory requirements incorporating the GPA regardless of whether they expressly agreed to the Government Procurement Agreement provisions.

These trade agreements have a significant impact on the current outsourcing debate. For the federal government and at least thirty-nine states, the analysis is clear: laws enacted that impermissibly conflict with federal and/or state trade obligations place the United States at risk of being found in violation of one or more of the trade agreements set forth above.[100] The gravity of this circumstance has not been lost on legislators. For example, the Dodd Amendment partially carves out from its application countries who are GPA signatories. In addition, the legislature in at least one state, Nebraska, has made similar allowances in its proposed outsourcing legislation.[101]

THE THOMAS-VOINOVICH AMENDMENT

Given the number and variation of proposed state and federal laws that ban outsourcing, in whole or in part, perhaps the best example to illustrate the consequences of enacting protectionist legislation without regard to U.S. trade obligations is the federal Thomas-Voinovich Amendment. The Thomas-Voinovich Amendment provides that "[a]n activity or function of an

Executive agency . . . may not be performed by a contractor outside of the United States" unless the activity or function was previously performed by federal employees outside of the United States.[102]

As noted above, the GPA obligates contracting parties to establish minimum procedural and substantive rights in their national laws and regulations. Specifically, Article III of the Government Procurement Agreement provides that:

> With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties . . . treatment no less favourable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party.

The Government Procurement Agreement further provides that each Party thereto shall not discriminate against domestic suppliers either on the basis of foreign ownership, in whole or in part, or on the basis that the goods and services supplied by the domestic corporation were produced in a foreign country, provided that the foreign country is also a Party to the Government Procurement Agreement.

While the Thomas-Voinovich Amendment is likely not, on its face, violative of the Government Procurement Agreement because it forces all contractors, regardless of nationality, to use domestic workers, as applied, it may lead to several violations of the principles of national treatment and non-discrimination.[103] First, foreign corporations seeking government contracts may have a large majority of their workforce firmly established in countries other that the U.S.[104] Should one of these companies wish to compete for a government contract, it would be forced under the new law to relocate any and all employees that may work on the contract to the United States, thus raising the costs of the contract to levels much higher than those of domestic bidders whose workforce is primarily located in the U.S. and providing "less favorable treatment" than that accorded domestic firms.[105]

Second, the Thomas-Voinovich Amendment may further violate the GPA because it necessarily discriminates against domestic firms that currently outsource work overseas.[106] As noted above, the Government Procurement Agreement prohibits procuring agencies from treating domestic firms less favorably on the basis of "the country of production of the good or service being supplied." The Thomas-Voinovich Amendment appears to create the functional equivalent of a ban on bids from any domestic firm that currently outsourced some or all of its work overseas unless and until the company agreed to produce all goods and services under the contract in the United States.

It could be argued, then, that the Thomas-Voinovich Amendment, as applied (and in the absence of a waiver exempting all GPA signatories), fails to comply, at a minimum,[107] with the non-discrimination and national treatment principles of the GPA. Indeed, the likelihood that a WTO dispute settlement body would find a violation further increases when coupled with the purpose of the Amendment, as stated by both its sponsors and critics in the Congressional record, that the Amendment was needed to prohibit the movement of current federal jobs overseas.[108] Given that the Dodd Amendment fails to create an exception in making the Thomas-Voinovich Amendment permanent for countries who have signed the Government Procurement Agreement, this issue is not likely to disappear anytime soon.

CONCLUSION

Based on the analysis set forth above, it is clear that proposed state and federal legislation, which bans or restricts outsourcing raises core constitutional and legal concerns that merit further study. Before moving too much further down the legislative path, policy makers should ensure that their proposed legislation is capable of withstanding constitutional and other legal challenge. □

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Started in 2003, the National Foundation for American Policy (NFAP) is a non-profit, non-partisan organization dedicated to public policy research on trade, immigration and other issues of national importance. Its Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Rep. Guy Vander Jagt (ret.), Cesar Conda, until recently Vice President Dick Cheney's chief domestic policy adviser, former INS Commissioner Jim Ziglar and other individuals.

ENDNOTES

[1] The list and text of the bills is available at http://www.nfap.net/researchactivities/globalsourcing.

[2] *See, e.g.*, S.B. 389 (Wisc. 2004) (providing that, with certain limited exceptions, "the department and its agents may purchase contractual services only if those services are performed within the United States"); S.B. 501 (Conn. 2004); H.B. 1281 (Ga. 2004).

[3] *See, e.g.*, H.B. 1116 (S.D. 2004).

[4] *See, e.g.* H.B. 1458 (Md. 2004) (requiring a net loss of one employee); S.B. 04-169 (Colo. 2004) (requiring a net loss of 100 employees); H.B. 4645 (W. Va. 2004) (requiring a net loss of 100 employees).

[5] U.S. Const. art. I, 6 8, cl. 3.

[6] *See American Ins. Ass'n. v. Garamendi,* __ U.S. __, 123 S. Ct. 2374, 2386 (2003) ("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 the country's dealings with foreign nations'" that inspired the Constitution's allocation of the foreign relations power to the Federal Government in the first place.); *Nat'l Foreign Trade Council v. Natsios,* 181 F.3d 38, 49 (1st Cir. 1999) ("The Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government."), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

[7] *American Ins. Assn. v. Garamendi*, __ U.S. __, 123 S. Ct. 2374 (State law conflicted with Federal foreign policy as evidenced in executive agreements and other Executive Branch expressions and was therefore preempted).

[8] *Id.*

[9] *Zschernig v. Miller*, 389 U.S. 429 (1968).

[10] *Id.* at 434-35, 440.

[11] *Natsios*, 181 F.3d at 38, 53, 55 (Massachusetts Burma Law, which restricted the ability of Massachusetts agencies from purchasing goods or services from companies that do business with Burma, was "an impermissible intrusion into the foreign affairs power of the national government" under *Zschernig*; the law had "more than an incidental or indirect effect on foreign relations" due to the "combination of factors" listed above).

[12] "Outsourcing is a reality in the 21st century global environment. . . . Outsourcing invariably does result in the loss of jobs and we have to do a better job in the United States, a good job in the United States, of creating opportunity in the United States to provide more jobs so that those who have lost jobs will have opportunities in the future." Secretary

of State Colin L. Powell, Remarks at the Joint Press Availability with India's Minister of External Affairs Yaswant Sinha (March, 16, 2004), *available at* http://www.state.gov/secretary/rm/30445.htm.

[13] *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 80 Cal. Rptr. 800, 803 (1969) (quoting *United States v. Pink*, 315 U.S. 203, 232 (1942)) (holding that California's Buy American Act is an unconstitutional intrusion into the federal foreign affairs power).

[14] *Id.*at 805.

[15] *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (affirming grant of injunction against enforcement of Pennsylvania's Alien Registration Act).

[16] The Supreme Court has reserved ruling on the question of whether State Buy American laws that affect foreign commerce run afoul of the Commerce Clause. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, n.9 (1980). For a discussion of constitutional rulings on State Buy American laws, *see Natsios,* 181 F.3d at 56.

[17] *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (law applied to all foreign steel; no evidence of selective application).

[18] *See Bethlehem Steel Corp. v. Board of Commissioners,* 80 Cal. Rptr. at 802 (invalidating the California Buy American Act as "an unconstitutional encroachment upon the federal government's exclusive power over foreign affairs").

[19]U.S. Const. art. I, 6 8, cl. 3.

[20] *See Natsios,* 181 F.3d at 61 (The Commerce Clause "'has long been understood, as well, to provide "protection from state legislation inimical to the national commerce [even] where Congress has not acted….."'" (quoting *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310 (1994)).

[21] *Natsios,* 181 F.3d at 68.

[22] *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979) ("When construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required.").

[23] *Antilles Cement Corp. v. Calderon,* 288 F. Supp. 2d 187, 195, (D.P.R. 2003) (Commonwealth statutes prohibiting the use of non-Puerto Rican cement in construction projects funded by the Commonwealth or by the United States, and requiring corresponding warning label on foreign cement bags, violated the Foreign Dormant Commerce Clause).

[24] *Kraft General Foods, Inc. v. Iowa Dept't of Revenue & Fin.*, 505 U.S. 71, 79 (1992) (Iowa statute that treated dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries facially discriminated against foreign commerce and therefore violated the Foreign Commerce Clause).

[25] 441 U.S. at 450-51 (California ad valorem property tax is unconstitutional under the Commerce Clause as applied to cargo containers of Japanese shipping companies that are based, registered, and subjected to property tax in Japan, and are used exclusively in foreign commerce, since tax results in multiple taxation of instrumentalities of foreign commerce and is inconsistent with Congress' power to regulate commerce with foreign nations).

[26] *See, e.g., id.* at 453 (when state tax creates "asymmetry" in international maritime taxation operating to Japan's disadvantage, "[t]he risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole").

[27] *Id.* at 453 n.18.

[28] See William J. Zeile, Bureau of Economic Analysis, *U.S. Affiliates of Foreign Companies: Operations in 2001,* Survey of Current Business, Aug. 2003, at 38, 45, *available at* http://www.bea.doc.gov/bea/ARTICLES/2003/08August/0803USAAffiliates.pdf.

[29] *Inc. Village of Rockville Centre v. Town of Hempstead,* 196 F.3d 395, 399 (2d Cir. 1999) (inter-municipal agreements concerning solid waste disposal did not violate dormant Commerce Clause).

[30] *Id.*

[31] *Antilles Cement*, 288 F. Supp. 2d at 194, 197 (declining to so extend the exception, finding that "the risks to foreign commerce are too great").

[32] *South-Central Timber Develop., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (Alaska's requirement that timber taken from state lands be processed in the state prior to expert violated the Commerce Clause; discussing market participant doctrine). *See also Reeves,* 447 U.S. at 437 (State as market participant); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 208, 216 (1983) (State as market participant).

[33] *Trojan Techs.*, 916 F.2d 903 (State acting as market participant; statute did not violate the Commerce Clause).

[34] *Natsios,* 181 F.3d at 66 (citation omitted).

[35] *See, e.g.,* S.B. 991 (N.C. 2003); H.B. 4434 (S.C. 2004).

[36] *See, e.g.,* H.B. 1116 (S.D. 2004); H.B. 2768 (Wash. 2004).

[37] Some state legislatures have introduced outsourcing bills contemporaneous with passing resolutions establishing committees to study the extent and effects of outsourcing in the state. See, e.g., S.C.R. 76 (W. Va. 2004); H.C.R. 4419 (Wash. 2004). This timing raises questions about how informed the outsourcing bills are given this contemporaneous introduction of studies and prohibitions on outsourcing.

[38] *See, e.g.,* H.B. 3186 (Wash. 2004); S.B. 400 (Conn. 2004).

[39] *See, e.g.,* H.B. 04-1289 (Colo. 2004); S.B. 395 (Conn. 2004).

[40] *See, e.g.*, S.B. 991 (N.C. 2003); H.B. 4434 (S.C. 2004).

[41] *See, e.g.,* H.B. 2351 (Wash. 2004).

[42] Letter from Congressman Edward J. Markey (Mass.) to Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, *et al.* 3 (Feb. 23, 2004), *at* http:// www.house.gov/markey/ issues/Iss_privacy_ltr040223f.pdf; Craig Linder, Bill to Guard Offshored Data Said to Have GOP Backing, Am. Banker, Mar. 12, 2004, at 3 (quoting Senator Bill Nelson (Fla.); "'As this global economy expands, we simply cannot tolerate the outsourcing of Americans' privacy.'").

[43] The full text of the GPA is available at http:// www.wto.prg/english/docs_e/legal_e/gpr-94_e.pdf.

[44] *See* 15 U.S.C. 66 1681 et seq.

[45] It is important to note that while HIPAA expressly provides that its provisions supersede any contrary provisions of state law, HIPAA does not preempt state laws that impose stricter standards for the protection of confidential information. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 6 264 (c), 110 Stat. 1936, 2033-34 (set out as note to 42 U.S.C. 6 1320d-2). State laws also control to the extent they are necessary to prevent fraud and abuse, to ensure appropriate regulation of insurance and health plans, for state reporting on health care delivery or costs, or to address controlled substances. Id. 6 262 (codified at 42 U.S.C. 6 1320d-7(a)(2)). Whether a particular state statute banning the outsourcing of medical information would be deemed to be stricter than HIPAA's provisions and thus not preempted is beyond the scope of this article and would necessitate a thorough review of the legislative history of both the state statute and HIPAA.

[46] *See* 15 U.S.C. 66 6801-6827.

[47] *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (FACT), (codified at 15 U.S.C. 6 1681, *et seq.*). FACT makes permanent the existing FCRA provision that prevents states from going beyond the FCRA requirement that a company must give the consumer the opportunity to opt out of the sharing of consumer report information with affiliates. (Consumer report information includes both information from consumer reporting agencies and financial information about the consumer that does not reflect a company's own transactions and experiences with the consumer). Several states, most prominently California, had enacted or were in the process of enacting legislation that would have further restricted information-sharing. Many of those state provisions will now be permanently preempted by the amended FCRA. FACT also makes permanent the preemption of state laws in the other areas covered by the existing FCRA preemption provision including: responsibilities of credit bureaus and users of credit reports; credit and insurance solicitations based on credit bureau prescreening; notices of adverse

action; responsibilities of companies that furnish information to credit bureaus; timing requirements for consumer reporting agencies investigating disputes; and prohibitions against the reporting of obsolete information by consumer reporting agencies. Finally, FACT generally preempts state legislation regarding the specific subject matter of the federal provision.

[48] Diana J.P. McKenzie & Benjamin D. Kern, *Privacy and Outsourcing: Selected Regulatory Topics, in The Outsourcing Revolution 2003: Protecting Critical Business Functions*, 595, 609 (2003), WL 767 PLI/Pat 595.

[49] *See* 15 U.S.C. 6 6802(b)(2).

[50] House Enrolled Act No. 1080 (Ind. 2004).

[51] *See, e.g.,* S.B. 04-169 (Colo. 2004); H.B. 1458 (Md. 2004).

[52] U.S. Const. art. I, 6 8, cl. 3.

[53] "As in the context of cases alleging violations of the dormant Interstate Commerce Clause, the concern in these Foreign Commerce Clause cases is not with an actual conflict between state and federal law, but rather with the policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when the Federal Government has remained silent." *Wardair Can., Inc. v. Fla. Dep't. of Revenue*, 447 U.S. 1, 8 (1986) (quoting *Japan Line*, 441 U.S. at 449).

[54] *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Connecticut beer-price affirmation statute violated the Commerce Clause).

[55] *Id.* at 336-37.

[56] *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) (Florida statute prohibiting out-of-state banks, holding companies, and trust companies from owning or controlling certain businesses within Florida violated the Commerce Clause).

[57] *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970) (order enforcing State law that would compel cantaloupe grower to build packing facilities in the state that would cost approximately $200,000 constituted an unlawful burden on interstate commerce).

[58] *Lewis, 447 U.S. at 44; see also W.C.M. Window Co. v. Bernardi,* 730 F.2d 486, 493 (7th Cir. 1984) ("But one thing is clear: a state may not erect a tariff wall protecting its industries from the competition of industries in other states and in foreign countries merely to promote the economic welfare of its own citizens.") (Illinois Preference to Citizens on Public Works Projects Act violated the Commerce Clause).

[59] *Healy*, 491 U.S. at 336.

[60] U.S. Const. art. IV, 6 2, cl. 1. This provision does not protect corporations, see W.C.M. *Window*

Co., 730 F.2d at 492, but the analysis focuses on employment as it affects individuals.

[61] U.S. Const. amend. XIV, 6 1.

[62] *Toomer v. Witsell,* 334 U.S. 385, 398 (1948).

[63] *See, e.g., Connecticut ex rel. Blumenthal v. Crotty,* 346 F.3d 84, 95 (2d Cir. 2003) ("[A] wholesale bar has never been required in order to implicate the Privileges and Immunities Clause."); *see also United Bldg. & Const. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984) ("It is discrimination against out-of-state residents on matters of fundamental concern which triggers the [Privileges and Immunities] Clause....").

[64] *Crotty,* 346 F.3d at 94 (citation omitted) (State statute restricting access of nonresident holders of New York commercial lobstering permits from designated area of New York waters violated the Privileges and Immunities Clause).

[65] *Id.*

[66] *Id.*

[67] *Id.* at 97.

[68] *Camden*, 465 U.S. at 222 (quoting Toomer, 334 U.S. at 398).

[69] *Toomer,* 334 U.S. at 396.

[70] *A.L. Blades & Sons. v. Yerusalim,* 121 F.3d 865, 871 (3d Cir. 1997) (citation omitted) (Commonwealth law that contractors hire only in-state laborers and mechanics on commonwealth-funded public works projects violated the Privileges and Immunities Clause). The Third Circuit applied these principles in analyzing a state law under the Privileges and Immunities clause, reasoning: "The employment in our case is *directly* with the governmental entity — there is no intervening private employment as there was in *White,* where the contractors and subcontractors were under contract to the City of Boston, but the individual employees were under contract to the contractors and subcontractors. The *Camden* court recognized this distinction when it concluded that [t]he opportunity to seek employment with such *private employers* is "sufficiently basic to the livelihood of the Nation," . . . as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city.'" *Salem Blue Collar Workers Ass'n v. City of Salem,* 33 F.3d 265, 270 (3d Cir. 1994) (ruling that the public/private distinction has not been abandoned and holding that direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause); *see also United Building & Construction Trades Council of Camden County and Vicinity v. Camden,* 465 U.S. at 221 (municipal ordinance, approved by state Treasury Department, requiring that at least 40% of employees of contractors and subcontractors working on city construction projects be city residents discriminated against protected privilege;

remanded due to impossibility of evaluating city's justification for the ordinance).

[71] *Toomer,* 334 U.S. at 398.

[72] 437 U.S. 518 (1978).

[73] *Id.* at 526 ("no showing was made on this record that nonresidents were 'a peculiar source of the evil' Alaska Hire was enacted to remedy, namely, Alaska's 'uniquely high unemployment'").

[74] *Id.* at 527.

[75] *Id.* at 527-28.

[76] *W.C.M. Window Co.,* 730 F.2d at 497 (referring to *Hicklin and Camden* and holding that the Illinois Preference to Citizens on Public Works Projects Act violated the Privileges and Immunities Clause).

[77] *Id.* at 498.

[78] *Silver v. Garcia,* 592 F. Supp. 495, 499 (D.P.R. 1984) (residency requirements for licensing of insurance consultants violated Privileges and Immunities clause in that no evidence was presented to show that nonresident insurance consultants constituted any source of harm to insurance consumers, nor did the requirement bear a reasonable relationship to the goal of ensuring character or competency), *aff'd,* 760 F.2d 33 (1st Cir. 1985).

[79] 121 F.3d 865 (3[d] Cir. 1997).

[80] *Id.*at 871.

[81] *Id.* at 875.

[82] *Id.* at 875 n.16; *see also Silver,* 592 F. Supp. at 500 ("[A] residency requirement creates an unconstitutional 'protectionist trade barrier for the economic protection of local interests.'"); *Hudson County Bldg. & Constr. Trades Council v. City of Jersey City*, 960 F. Supp. 823, 830 (D.N.J. 1996) (denying summary judgment to city on Privileges and Immunity attack to ordinance requiring businesses receiving economic incentives from the city to make a good faith effort to hire 51% city residents; city demonstrated its problems with unemployment and poverty but failed to show that out-of-state workers are a source of unemployment and poverty within its borders).

[83] U.S. Const. art. IV, 6 1.

[84] *Nevada v. Hall,* 440 U.S. 410, 422 (1979) (citing *Pac. Employers Ins. Co. v. Industr. Accident Comm'n,* 306 U.S. 493 (1939)).

[85] A.B. 9567 (N.Y. 2004); S.B. 6040 (N.Y. 2004).

[86] *See, e.g.,* H.B. 2762 (Wash. 2004).

[87] *See, e.g.*, Charles V. Zehren, "The Trouble With Banning Outsourcing," *Newsday,* February 29, 2004.

[88] The four states are Florida, Michigan, Minnesota, and Missouri.

[89] Craig Linder, "Bill to Guard Offshored Data Said to Have GOP Backing," *American Banker,* March 12, 2004.

[90] *See* Thomas-Voinovich analysis, *infra.*

[91] For example, the proposed American Manufacturing Jobs Retention Act of 2003, H.R. 3134, 108th Cong. (introduced September 17, 2003), requires that certain prospective government contractors employ at least half of their employees in the United States.

[92] *See* Call Center Consumer's Right to Know Act of 2003, S. 1873, 108th Cong. (introduced November 17, 2003) (sponsored by Senator John Kerry (D-Mass.)).

[93] President Bush signed the North American Free Trade Agreement on December 17, 1992. H.R. Rep. No. 103-361 at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2557. Congress approved it through the NAFTA Implementation Act on December 8, 1993. Pub. L. No. 103-182, 107 Stat. 2057 (1993) (hereinafter "NAFTA"). This agreement provides for the liberalization of trade relations between the U.S., Canada, and Mexico.

[94] The United States signed the Uruguay Round Agreements, negotiated under the general auspices of the General Agreement on Tariffs and Trade 1947 (GATT), on April 15, 1994. H.R. Rep. No. 103-826, pt. 1 at 11 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3782. Congress approved it through the Uruguay Round Agreements Act on December 8, 1994. Pub. L. No. 103-465, 108 Stat. 4809 (1994)(hereinafter "Uruguay Round Act"). This agreement provides for the liberalization and expansion of world trade and the development of a framework through which members negotiate international terms of competition.

[95] *See* 1994 Uruguay Round Agreement on Government Procurement, April 15, 1994, WTO Agreement, Annex 4(b) (hereinafter "GPA"), *available at* http://www.wto.org/English/docs_e/legal_e/gpr-94_e.pdf. Congress approved the GPA through the Uruguay Round Act on December 8, 1994. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. 66 2501-2582). The GPA was intended to liberalize state and federal provisions that formerly discriminated against multinational suppliers.

[96] GPA art. III(1).

[97] *Id.* at art. III(2).

[98] The thirty-seven states include: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* GPA Appendix I (United States), Annex 2, reprinted in 1 Law & Practice of the World Trade Organization 157 (Joseph F. Dennin et al. eds., 2000). The participation of Colorado, however, has recently been called into question as recently-proposed legislation in Colorado related to outsourcing contains the following provision: "[a]ny consent a state official has given to be

bound by the government procurement rules of an international trade agreement is invalid" and the state does not consider itself to be bound by it. *See* S.B. 04-170 6 24-111.5-102(b)-(c) (Colo. 2004).

[99] *See* WTO Trade Policy Review Body, Trade Policy Review: United States-Report by the Secretariat, WT/TPR/S/56 P 277 (June 1, 1999). Although the commitment of 39 states in whole or in part represents a substantial proportion of subnational procurement in the United States, Canada regarded the sum of U.S. commitments as insufficient, and has refused to extend reciprocal provincial commitments until the U.S. offer is improved. Matthew Schaefer, Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisting the NAFTA, Eyeing the FTAA, 23 Can.-U.S. L.J. 441, 473 (1997).

[100] Such a statement is not intended to ignore the fact that both NAFTA and the GPA provide substantial protections to the states. *See* 19 U.S.C. 66 3312(b)(1)(A)-(B); H.R. Rep. No. 103-361, pt. 1, at 18 (1993). Indeed, while the Agreements themselves assert national responsibility for subnational compliance and impose responsibility for certain obligations directly on subnational governments, the Uruguay Round Act and the accompanying Statement of Administrative Action protected state interests by, among other things, establishing extraordinary procedural barriers to the invalidation of conflicting state laws. See Uruguay Round Act, 19 U.S.C. 66 3512(b)(2) & (c)(1)-(2) (barring any nation other than the United States from challenging U.S. or state action of inaction based on its consistency with the Uruguay Round Agreements); Uruguay Round Agreements Act: Statement of Administrative Action, Sept. 27, 1994, reprinted in Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreement Implementing Bill, Statements of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4327-28 (hereafter "Statement of Adminstrative Action"). The Uruguay Round Act additionally establishes a federal-state consultation process not only to improve state compliance, but also to require that the U.S. Trade Representative take state positions into account, and further tries to maximize state involvement with the dispute resolution proceedings that directly or indirectly affect state interests. See 19 U.S.C. 6 3512(b)(1); Statement of Administrative Action, supra, 1994 U.S.C.C.A.N. at 4050-54.

[101] *See, e.g.* L.B. 1223 (Neb. 2004) (amending Ne.b Rev. Stat. 6 73-506(1)(d)) (state agencies may not award a contract to a contractor or subcontractor who performs the work at a site outside the United States, unless refusing the award would violate specific terms under the World Trade Organization (WTO) Agreement on Government Procurement, to which Nebraska consented).

[102] *See,* Consolidation Appropriations Act of 2004, P.L. 108-199, 118 Stat. 3 6 647 (e) (2004).

[103] *See* White & Case LLP, *The Debate Over Outsourcing in the United States: A Real Threat to Job Growth or an Evolution of Free Trade?*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] The Thomas/Voinovich Amendment arguably violates other GPA provisions as well. For example, GPA Article XVI states that "[e]ntities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets." According to the text of the GPA, "[o]ffsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements." Stated in footnote 7 to Article XVI:1 of the GPA. Whether the Thomas/Voinovich Amendment provisions operate to provide an "offset" is unclear under current WTO practice and jurisprudence. Because the stated purpose of the provision is to encourage the maintenance of domestic jobs, however, and it clearly contains a provision requiring "domestic content," the new regulation may indeed be considered an "offset" and might be prohibited by GPA Article XVI:1.

[108] *See, e.g.*, 149 Cong. Rec. S13103 (daily ed. Oct. 23, 2003) (statement of Sen. Voinovich).