THE LEGALITY OF STATE PROTECTIONIST LAWS AGAINST LEGAL PROCESS OUTSOURCING

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INTRODUCTION

Outsourcing immediately conjures negative connotations of American workers losing jobs to workers in India for example. This stereotype is so engrained in our society that states, the federal government, and others continuously fight against outsourcing in order to save American jobs. As the world becomes "flatter," companies and firms are looking for ways to decrease costs by outsourcing business processes and knowledge processes to become more competitive in the global market.[1]

Outsourcing is the process of farming out work to third parties where it is cheaper than performing the work in-house.[2] Companies may outsource domestically, also known as domestic outsourcing, or they may outsource work to third parties in another country, also known as offshoring outsourcing. Offshoring outsourcing is a subset of outsourcing, but the two terms are often incorrectly used interchangeably. The controversy surrounding offshoring arises from domestic employee layoffs that occur when companies transfer work offshore.

States have introduced and passed a myriad of legislation aimed at restricting outsourcing by, for example, banning state contracts on overseas work and instituting in-state contract preferences.[3] The federal government has also enacted protectionist legislation with the Thomas-Voinovich Amendment. This Amendment prohibits government organizations from hiring foreign contractors for jobs that have not been previously performed by government employees outside the United States.[4] There has even been a lawsuit seeking a court order against all foreign legal outsourcing providers.[5]

Businesses have been outsourcing manufacturing, engineering,

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1. THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (1st ed. 2005).

2. Stephanie Overby, *Outsourcing Definition and Solutions*, CIO.COM, *available at* http://www.cio.com/article/40380/Outsourcing_Definition_and_Solutions?page=8&taxonomyId=3195 (last visited Jan. 6, 2012); Donna Ghelfi, *The 'Outsourcing Offshore' Conundrum: An Intellectual Property Perspective*, WIPO.INT 1, *available at* http://www.wipo.int/export/sites/www/sme/en/documents/pdf/outsourcing.pdf (last visited Nov. 7, 2012).

3. Shannon Klinger & M. Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, THE NAT'L FOUND. FOR AM. POLICY 4-5 (Apr. 2004), *available at* http://www nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf.

4. Lee A. Patterson, III, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 RICH. J. GLOBAL L. & BUS. 177, 200 (2008).

5. *See* Brief for Defendant, *Newman McIntosh & Hennessey v. Bush*, No. 08-00787 (CKK), 2008 WL 3883444 (D.D.C. Aug. 14, 2008), *available at* http://www.sddglobal.com/Acumen_SDDGlobal.pdf.

information technology, call centers, and other areas for many years. Today, technological "enablers" are now facilitating the automation and outsourcing of legal "processes," allowing lawyers to "do less process and more practice."[6] Further fueling the fire is Legal Process Outsourcing ("LPO"), one of the latest trends in outsourcing, where firms or companies outsource their legal work to domestic or offshore third parties. LPO terminology is used interchangeably to mean either the actual process of outsourcing legal services or the actual vendors who provide these services. With its new trend of legal outsourcing, LPO brings a whole new era of protectionist measures.

In parallel with the growing popularity of outsourcing, there has also been an equally increasing sentiment against it, which has led to a variety of state and federal efforts to curb its practice.

This Note specifically examines why state efforts against LPO will likely not pass constitutional muster. Part I analyzes the history and background of LPO, as well as its risks and benefits. Part II offers examples of how both state and the federal government have successfully and unsuccessfully attempted to regulate LPO through legislative proposals and statutes. Part II also looks at other non-legislative attempts to restrict outsourcing. Finally, Part III uses a state's regulation of LPO as an example of why state protectionist regulations against LPO will likely be held unconstitutional when analyzed under the doctrine of preemption, the Dormant Foreign Affairs Clause, or the Dormant Foreign Commerce Clause (all of which independently act as a separate basis for finding state protectionist regulations against LPOs to be unconstitutional).

I. HISTORY AND BACKGROUND OF LPO

A. Evolution of Outsourcing

Companies outsource many types of work that ranges from low-value repetitive work, like assembly, to more complex processes that require advanced research and analytical skills.[7] The most mature type of outsourcing is business process outsourcing, or BPO, which is divided into two categories: back office outsourcing, which includes internal business functions like payroll processing; and front office outsourcing, which includes customer-related services like support.[8] Information

6. *See* Kaleb A. Sieh, *Law 2.0: Intelligent Architecture for Transactional Law*, THE SILICON FLATIRONS ROUNDTABLE SERIES ON ENTREPRENEURSHIP, INNOVATION, AND PUB. POL. REP. NO. 9, Aug. 13, 2010, at 5, 17, *available at* http://www.silicon-flatirons.org/documents/publications/report/SIEHLaw2.0.pdf.

7. Overby, *supra* note 2.

8. *Id.*

technology outsourcing, or ITO, falls under the front office outsourcing category of BPO.[9] ITO grew dramatically in the 1990s as companies faced the "Y2K problem" and needed to retrofit their software, which failed to recognize dates with a four-digit year.[10] In order to save on the huge expense of re-writing software, companies outsourced this task to Indian programmers and software professionals who could quickly and more cost-efficiently complete the task.[11]

With the success of BPO, companies began to outsource more complex processes. These processes which required greater expertise and skills are known as knowledge process outsourcing, or KPO.[12] KPO is the outsourcing of work, such as data mining or patent research, that requires advanced research and analytical skills.[13] Legal process outsourcing, or LPO, is a subset of KPO and is the process of outsourcing legal services.[14] LPO can refer to the process of outsourcing legal services or to the vendors that provide these services.

The combination of technology enablers, use of temporary and contract workers, and domestic outsourcing to specialty agencies formed a fortuitous scenario for the rapid growth of offshoring legal services to LPOs around the world.[15] The onset of cloud computing with increased broadband, larger and cheaper storage, and faster and cheaper processing all allowed law firms to become more decentralized and distributed.[16] These technology enablers facilitated legal services to be: (1) automated, where possible; (2) modular and compartmentalized, so clients could choose their business needs in an *à la carte* manner; (3) decentralized, so that legal services could be provided at a distance to accommodate clients and firms that were far from each other; and (4) outsourced, due to advances in telecommunications and document control technology.[17] In addition to technology enablers, law firms and clients also began to rely more on both temporary and contract workers, as well as on outsourcing legal work domestically to specialized agencies such as e-discovery agencies. So began the growth of the LPO industry.

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9. *Id.*

10. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 130 (Spring 2011).

11. *Id.*

12. *Id.* at 131.

13. *Id.*

14. Abdul Latheef Naha, *It's India for Legal Services*, THE HINDU (Nov. 26, 2007), *available at* http://www hindu.com/edu/2007/11/26/stories/2007112650610300 htm.

15. *See* Robertson, *supra* note 10, at 130-31.

16. Sieh, *supra* note 6, at 21.

17. *Id.*, at 4.

B. Growth of LPO Industry

With hard economic times, companies cut back on legal staff. This helped the LPO industry grow steadily to an estimated $400 million in revenue in 2010.[18] With continuing rapid industry expansion, the LPO industry is projected to grow to $2.4 billion by 2012, which is still just a small fraction of the world's $200 billion a year legal market.[19] However, companies are not the only ones contributing to the LPO industry; law firms are also contributing to this trend. In firms with 250 or more lawyers, 8% outsourced legal work in 2010, and 11% will do so in 2011,[20] yielding a 37% growth rate of outsourcing firms. With continuing economic pressures to drive costs down, companies will continue to look for cheaper solutions to their legal needs.

Although LPOs exist all over the world, including in countries such as Israel, South Africa, and the Philippines, India seems to be the most prevalent location.[21] LPOs in India charge $10 to $25 an hour for low-end work, while law firms charge about $250 to $400 an hour for work performed by an associate.[22] In addition, India is well suited for LPOs because the legal education is based on common law and is primarily conducted in English.[23]

A sampling of a few LPO websites shows that, as advertised, LPO services range from low-value work to high-value work. Low-value work can be defined as (1) work that has low financial value (meaning that it will not be the type of work that will bring in the "megabucks" for the company); (2) work that has a low probability of leading to problems; and (3) work that is not sophisticated or complex to even value (which could also mean the work is "mind-numbingly repetitive and boring").[24] For example, Pangea3, one of the top LPO providers, offers the following: corporate legal services; e-discovery and litigation support; patent and intellectual property litigation; legal research; business; and

18. Heather Timmons, *Where Lawyers Find Work*, N.Y. TIMES, June 3, 2011, at B1.

19. *Id.*

20. Thomas S. Clay & Eric A. Seeger, *2011 Law Firms in Transition, An Altman Weil Flash Survey*, ALTMAN WEIL, INC. 7 (May 2011), *available at* http://www.altmanweil.com/dir_images/upload/docs/SummaryAnalysis2011LawFirmsinTransitionSurvey.pdf.

21. *See Legal Process Outsourcing: New Threat or New Opportunity*, THE COMPLETE LAW., http://www.thecompletelawyer.com/legal-process-outsourcing-new-threat-or-new-opportunity html (last visited Nov. 7, 2012).

22. Cynthia Cotts & Liane Kufchock, *Jones Day, Kirkland Send Work to India to Cut Costs (Update2)*, BLOOMBERG (Aug. 21, 2007, 16:49), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBo8DnfekWZQ.

23. *Id.*

24. Susan Moon, *Moonlighting: Low-Value Work (or, How to Catch Up on Glee)*, ABOVE THE L. (Nov. 23, 2011, 4:01 PM), http://abovethelaw.com/2011/11/moonlighting-low-value-work-or-how-to-catch-up-on-glee/.

competitive intelligence.[25] Many LPO providers like Pangea3, a Thomson Reuters business,[26] have offices in both the United States and India for better client management.[27]

C. Risks and Benefits of LPOs

Despite the controversial nature of outsourcing (due to the sensitive implication that a job outsourced is a job lost in the United States),[28] companies continue to outsource because it can be beneficial to their bottom line. Often, work is sent offshore to developing countries like India and China, where wages are lower than in the United States.[29] Although savings may be a motivating driver for companies to outsource, other benefits of LPO include: increased efficiency; taking advantage of time difference and working 24/7 on a project for a quick turnaround; access to resources and expertise without keeping a large payroll; ability to focus on core competencies and high value work; and many more.[30]

The benefits of outsourcing do not always outweigh the widespread criticisms of LPO. In addition to the negative stigma of outsourcing, LPO critics also claim that the quality of work decreases when the work is outsourced.[31] Also, there might be confidentiality and security concerns associated with sending data to a potentially unstable environment.[32] Furthermore, there is no recourse if an Indian or non-American lawyer violates ethical rules because they are not American attorneys and have no professional responsibilities to uphold American ethical rules.[33] Since a LPO vendor may offer services to other clients with opposing interests, there might also be difficulties in avoiding

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25. PANGEA 3, http://www.pangea3.com/ (last visited Nov. 7, 2012) (according to Pangea3's website, Pangea3 is named as one of the top LPO providers in the ValueNotes survey of LPO providers. In addition, Pangea3 was voted Best LPO, *Reader Rankings 2011*, N.Y.L.J., *available at* http://www nylj.com/nylawyer/adgifs/decisions/091311%20 rankings.pdf).

26. On November 18, 2010, Thomson Reuters acquired Pangea3. Press release, Thompson Reuters, Thompson Reuters acquires Pangea3 (Nov. 18, 2010), *available at* http://thomsonreuters.com/content/press_room/legal/318316.

27. *See* PANGEA 3, *supra* note *25* (Pangea3 is headquartered in New York City and on June 3, 2011, opened up a Dallas office).

28. *See* Robert Reich, *The Jobs Picture Still Looks Bleak*, WALL ST. J., (Apr. 12, 2010), *available at* http://online.wsj.com/article/SB10001424052702304222504575173780671015468 html (noting that "[t]hose who have lost their jobs to foreign outsourcing . . . are unlikely ever to get them back.").

29. Ghelfi, *supra* note 2, at 1.

30. Overby, *supra* note 2.

31. *Legal Process Outsourcing*, *supra* note 21.

32. *Id.* (noting security concerns were heightened by the 2010 Mumbai terror attacks).

33. *Id.*

conflicts of interest.[34] Some critics even claim that outsourcing legal work is considered an unauthorized practice of law.[35] Other issues associated with LPO include the need for an export license when transferring U.S. data abroad, especially if dealing with trade secrets or patent applications.[36] Companies also have to worry about data protection, privacy issues, third party consent, client consent, as well as political risks and stability.[37]

Proponents of LPO refute the critics' views that the quality of the work and the security of the data transferred are at risk. They claim that the quality of work depends heavily on how well the outsourcer attorney supervises the LPO work, which rings true regardless of whether the work were to be done in the United States by a junior associate, a contract lawyer, an outside vendor, or by LPO lawyers in India.[38] With regard to data security and confidentiality, proponents of LPO argue that there is already precedence from the software industry with ITO work that shows the robustness of similar standards already in place in India.[39]

In Formal Opinion 08-451, the American Bar Association ("ABA") formally condones the practice of outsourcing.[40] The ABA ethics opinion allows a lawyer to "outsource legal or non-legal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1."[41] Similar to the ABA, various city and state bar associations require in-house and law firm lawyers to maintain the ethical duties of not aiding a non-lawyer in the unauthorized practice of law; supervising the work and competently representing the client when outsourcing overseas; checking for conflicts of interest; and obtaining advance client consent to outsource overseas.[42]

II. VARIOUS STATE AND FEDERAL ATTEMPTS AT RESTRICTING AND REGULATING OUTSOURCING

Despite the general economic benefits of outsourcing, proposed

34. *Id.*

35. *Id.*

36. Bierce & Kenerson, P.C., *E-Discovery and Legal Process Outsourcing: ESIM Process Design and Choices between Outsourcing vs. Insourcing*, OUTSOURCING-LAW.COM, (Posted Dec. 21, 2009), http://www.outsourcing-law.com/2009/12/e-discovery-and-legal-process-outsourcing-esim-process-design-and-choices-between-outsourcing-vs-insourcing/.

37. *Id.*

38. *Legal Process Outsourcing*, *supra* note 21.

39. *Id.*

40. *See* ABA Comm. On Prof'l Ethics & Grievances, Formal Op. 08-451 (Aug. 5, 2008), *available at* http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf.

41. *Id.*

42. Bierce & Kenerson, P.C., *supra* note 36; *see also* N.Y.C. Assn. B. Comm. Prof. Jud. Eth., Formal Op. 2006-3 (Aug. 2006), 2006 WL 2389364.

state and federal protectionist legislation over the past ten years has attempted to restrict outsourcing. Additionally, there is at least one example of an individual's attempt to thwart outsourcing with a lawsuit seeking a court order against all LPOs.

The protectionist era against outsourcing began in 2004 as a direct result of the presidential election campaign. Safekeeping jobs in America was the hot topic of the 2004 United States Presidential election after more than two million jobs were lost following President George W. Bush's first term in office.[43] In his 2004 Presidential campaign Iowa caucuses victory speech, Democratic candidate Senator John Kerry (D-MA) declared, "[w]e are not going to give one benefit or one reward to any Benedict Arnold company or CEO who take the jobs and money overseas and stick you with the bill. That's over."[44] Hence, Senator Kerry may have helped initiate the snowball effect of a strong protectionist sentiment in the United States.

A. State Protectionist Actions

The urgency of safekeeping jobs in the United States resulted in the steady increase of state protectionist bills starting in 2004. In 2003, there were only four states with protectionist bills pending; by 2004, there were more than two hundred bills in over forty states, with five state bills that became law.[45] The most restrictive anti-outsourcing legislation in the nation became law in New Jersey in 2005, prohibiting state contract work from being performed outside the United States.[46]

States also looked beyond legislative actions to enact protectionist measures. For example, in 2010, Ohio Governor Ted Strickland issued an executive order prohibiting the expenditure of public funds for

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43. Martin Khor, *Job Outsourcing: Victim of US Elections*, THIRD WORLD NETWORK (Mar. 8, 2004), http://www.twnside.org.sg/title2/gtrends8 htm.

44. *See Kerry on the Benedict Arnolds*, WASH. TIMES (May 16, 2004), http://www.washingtontimes.com/news/2004/may/16/20040516-102448-2933r/; s*ee also* Erick Hellweg, *Bush and Kerry agree: Offshore is bad*, CNN MONEY (Feb. 24, 2004), http://money.cnn.com/2004/02/25/technology/techinvestor/hellweg/; *see also Benedict Arnold*, WIKIPEDIA http://en.wikipedia.org/wiki/Benedict_Arnold (Benedict Arnold was a general during the American Revolutionary War who switched sides and defected to the British Army. His name quickly became associated in the United States for treason or betrayal); *see also* John Fund, *John Kerry – A One-Man 'Benedict Arnold' Corporation*, WALL ST. J. (July 27, 2010),
http://online.wsj.com/article/SB10001424052748703700904575391253913078636 html
(In 2010, John Kerry was himself accused of being a "one-man 'Benedict Arnold' corporation when he chose to build his $7M yacht in New Zealand rather than in the United States to save on employment costs and payroll taxes. In addition, by berthing his yacht in Rhode Island versus in his home state of Massachusetts, Kerry is also saving over $500,000 a year in taxes).

45. Patterson, *supra* note 10, at 17-18.

46. NFAP Policy Brief, *Anti-Outsourcing Efforts Down But Not Out*, NAT'L FOUND. FOR AM. POLICY 1, 4 (April 2007), http://www nfap.com/pdf/0407OutsourcingBrief.pdf.

services provided offshore.[47] This order was in response to the spending of federal stimulus money in the hiring of a service provider who outsourced jobs outside the United States.[48] Ironically, Governor Strickland, a strong critic of offshore vendors, wooed an offshore Indian IT company in 2007 with $19 million in tax credits and other incentives to build its North American Delivery Center in Milford, Ohio.[49]

Prior state legislation and actions have only recently focused on the prohibition of legal outsourcing. In 2011, Connecticut's protectionist bill specifically targeted legal outsourcing when Connecticut State Representative Patricia Dillon introduced House Bill HB-5083 ("Connecticut LPO Bill"), which was designed to prohibit the "outsourcing of the drafting, review or analysis of legal documents."[50] The Connecticut LPO Bill stated:

> That section 51-88 of the general statutes be amended to provide that the practice of law includes (1) drafting, reviewing or analyzing legal documents for clients in this state, and (2) researching and analyzing the law of this state and advising clients in this state of the status of such law, and that any person who has not been admitted as an attorney in this state who performs such activities commits the offense of the unauthorized practice of law.[51]

This Bill failed after the Joint Committee on Judiciary took no further action by the end of the 2011 session.[52] This Connecticut LPO Bill will be revisited in more detail in Part III of the Note, serving as an example of a state protectionist action that may not meet constitutional muster.

B. Federal Protectionist Actions

1. Legislative Actions

Although this Note focuses on the legality of state protectionist

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47. Governor Executive Order 2010-09S (Aug. 6, 2010), *available at* http://www.tedstrickland.com/8-6-10-governor-issues-executive-order-prohibiting-use-of-public-funds-for-outsourcing/.

48. *Id.*

49. Patrick Thibodeau, *Ohio Bans Offshoring As It Gives Tax Relief to Outsourcing Firm*, COMPUTER WORLD (Sep. 7, 2010), http://www.computerworld.com/s/article/9183570/Ohio_bans_offshoring_as_it_gives_tax_relief_to_outsourcing_firm_.

50. H.B. 5083, Gen. Assemb., Reg. Sess. (Conn. 2011), *available at* http://www.cga.ct.gov/2011/TOB/H/2011HB-05083-R00-HB htm.

51. *Id.*

52. *See How a Bill Becomes a Law in Connecticut*, http://www.cga.ct.gov/html/bill.pdf (last visited Nov. 7, 2012).

actions, this section on federal protectionist actions is included to demonstrate the overall sentiment against outsourcing. In May 2004, then-Senator Hillary Clinton (D-NY) introduced the SAFE-ID Act in the Senate, which would "regulate the transmission of personally identifiable information to foreign affiliates and subcontractors."[53] That same year, Massachusetts Congressman Edward Markey (D-MA) introduced the Personal Data Offshoring Protection Act, which would have prohibited the transfer of personal information to anyone outside the United States, without notice and consent.[54] Although neither the SAFE-ID Act nor the Personal Data Offshoring Protection Act passed,[55] the proposed legislation accurately represents the protectionist sentiment against outsourcing.

In 2004, Senators Craig Thomas (R-WY) and George Voinovich (R-OH) attached the Thomas-Voinovich amendment to a Senate appropriations bill to prohibit the government from outsourcing work to foreign contractors unless the job function had previously been performed by government employees offshore.[56] The amendment states:

> An activity or function of an executive agency that is converted to contractor performance under Office of Management and Budget Circular A-76 may not be performed by the contractor at a location outside the United States except to the extent that such activity or function was previously performed by Federal Government employees outside the United States.[57]

This temporary amendment only applied to jobs using 2004 appropriations. Senator Christopher Dodd's (D-CT) amendment, the Dodd Amendment,[58] would have expanded and made the Thomas-Voinovich Amendment permanent, but it never became law.[59]

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53. *See* Act of May 20, 2004, S. 2471, 108th Cong. (2nd Sess. 2004), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108s2471is/pdf/BILLS-108s2471is.pdf; *see also* Patterson, *supra* note 44, at 198.

54. Patterson, *supra* note 10, at 198; *see also* Personal Data Offshoring Protection Act of 2004, H.R. 4366, 108th Cong. (2004).

55. *See* S. 2471: SAFE-ID ACT, http://www.govtrack.us/congress/bill.xpd?bill=s108-2471; *see also* H.R. 4366: PERSONAL DATA OFFSHORING PROT. ACT OF 2004, http://www.govtrack.us/congress/bill xpd?bill=h108-4366.

56. *See* Patterson, *supra* note 10, at 200.

57. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 647, 118 Stat. 362 (2004).

58. *See* S. 1185: UNITED STATES WORKERS PROTECTION ACT OF 2005, http://www.govtrack.us/congress/bill xpd?bill=s109-1185.

59. Patterson, *supra* note 10, at 201; William Pomeranz, *United States: A Legislative Status Report on Outsourcing*, MONDAQ (Jan. 25, 2006), http://www mondaq.com/unitedstates/article.asp?articleid=37312.

2. Executive Actions

Outsourcing continues to be a sensitive topic, and the momentum of the pendulum still swings toward protectionist measures. On January 11, 2012, President Obama announced at the "Insourcing American Jobs" forum[60] a proposal to include $12 million to the 2013 budget to "add staffing to a federal program that seeks to attract new businesses to the U.S."[61] This proposal offers financial incentives (in the form of tax breaks) to companies who help boost economic recovery by bringing jobs back to the United States.[62] By offering these financial incentives, President Obama hopes to have the next generation of manufacturing jobs "taking root"[63] in the United States. Additionally, Obama pleads, "[my] message to business leaders today is simple: ask yourselves what you can do to bring jobs back to the country that made our success possible. And I'm going to do everything in my power to help you do it. We're going to have to seize the moment."[64] With unemployment rates hovering at approximately 8%,[65] it is unlikely these protectionist sentiments will swing in the opposite direction anytime soon. But, the rebalancing of companies' offshore versus onshore strategies today is evidently driven by sound business and technological reasons, and not necessarily by protectionist sentiments.[66]

C. Private Lawsuit Against Outsourcing

In addition to state and federal actions taken from both the legislative and executive branches, in a most interesting attempt at stopping LPO, a United States law firm, Newman McIntosh & Hennessey ("NMH"), brought a suit against LPO Acumen Legal Services, along with President George W. Bush, in the United States

60. Matt Compton, *President Obama at the Insourcing American Jobs Forum*, THE WHITE HOUSE BLOG (Jan. 11, 2012 5:02 PM), http://www.whitehouse.gov/blog/2012/01/11/president-obama-insourcing-american-jobs-forum.

61. Richard Wolf, *Obama to propose tax breaks for 'insourcing' jobs*, USA TODAY (Jan. 11, 2012), http://content.usatoday.com/communities/theoval/post/2012/01/obama-to-propose-tax-breaks-for-insourcing-jobs/1.

62. *Id.*

63. *Id.*

64. *Read President Obama's prepared State of the Union remarks*, LATIMES.COM http://articles.latimes.com/2012/jan/24/news/la-pn-obama-state-of-the-union-remarks-20120124/2 (Jan. 24, 2012))).)

65. UNEMPLOYMENT RATE – SEASONALLY ADJUSTED, http://www.google.com/publicdata/explore?ds=z1ebjpgk2654c1_&met_y=unemployment_rate&idim=country:US&fdim_y=seasonality:S&dl=en&hl=en&q=unemployment+rate (last visited Feb. 24, 2012).

66. *See* Paul McDougall, *Obama's Insourcing Call Falls on Deft Ears*, INFORMATIONWEEK (Jan. 13, 2012, 1:15 PM), http://www.informationweek.com/news/global-cio/outsourcing/232400349?pgno=1.

District Court for the District of Columbia.[67] NMH claimed that the United States government is "intercepting all or most of the data presumably sent by unidentified U.S. lawyers to mostly unidentified foreign legal outsourcing providers, as part of an anti-terrorism campaign."[68] NMH eventually withdrew the suit after the court refused to allow it to amend the complaint to expand the case into a class action.[69] Although NMH asserts that it withdrew the case due to the dissolution of the firm, it got a taste of the quality of work LPO providers are capable of producing.[70] Ironically, a team of Indian LPO lawyers from SDD Global Solutions, with assistance from Acumen Legal Services, drafted the successful motion to dismiss.[71]

The lead attorney for NMH, John Hennessey, later joined Beins Goldberg & Hennessey and continued his crusade to bring "policy lawsuits"[72] against outsourcing with class action suits. Hennessey sought suits against companies such as American Express and Bank of America, claiming that sending financial information electronically to call centers abroad is not protected against U.S. government collection because Fourth Amendment protections are not extended internationally.[73] Although these "policy lawsuits"[74] will likely be dismissed, withdrawn, or settled, they still fulfill the purpose of influencing policy concerns and drawing out public fear against outsourcing.

III. THE LEGALITY OF PROTECTIONIST ACTIONS

A. State Protectionist Actions Against LPO Would Likely be Held Unconstitutional

With the onset of negative sentiment against outsourcing, both state and federal legislatures have introduced bills to thwart outsourcing. Unlike federal actions, state protectionist actions would likely be

67. Russell Smith, *Acumen Fights Back*, LAW WITHOUT BORDERS (Aug. 15, 2008), http://lawwithoutborders.typepad.com/legaloutsourcing/2008/08/acumen-fights-back html.

68. Brief for Defendant, *supra* note 5, at 15.

69. Russell Smith, *Lawsuit Against Legal Process Outsourcing, Newman McIntosh & Hennessey v. Bush, is Withdrawn*, LAW WITHOUT BORDERS (Aug. 29, 2008), http://lawwithoutborders.typepad.com/legaloutsourcing/2008/08/anti-outsourcing-lawsuit-newman-mcintosh-hennessey-vs-bush-is-withdrawn html.

70. *Id.*

71. *Id.*

72. *Id.* (referring to a comment by Joseph Hennessey to Smith); Jeremy Byellin, *American Express Sued Over Outsourced Call Centers and Data Privacy*, WESTLAW INSIDER (June 17, 2011), http://westlawinsider.com/top-legal-news/american-express-sued-over-outsourced-call-centers-and-data-privacy (definition of "policy lawsuits").

73. *See* Smith, *supra* note 69; Zoe Tillman, *Bank of America Sued for Outsourcing Customer Calls Overseas*, CORPORATE COUNSEL (Aug. 8, 2011).

74. Byellin, *supra* note 72.

unconstitutional under the doctrines of Preemption, the Foreign Affairs Power, or the Dormant Foreign Commerce Clause. This Note uses Connecticut's proposed LPO bill as an example to demonstrate why state protectionist actions would likely be unconstitutional. Had Connecticut LPO Bill, HB-5083, which prohibited "outsourcing of the drafting, review or analysis of legal documents,"[75] been passed into a state law, it would likely not have survived a federal constitutional challenge under Preemption, the Foreign Affairs Power, or the Dormant Foreign Commerce Clause. The Connecticut LPO Bill could also be analyzed as an unlawful restraint of trade, economic liberties, or potential violation of federal trade agreements, but these approaches are outside the scope of this Note.

The Connecticut LPO Bill defined what constitutes the practice of law and then concluded that any person, who has not been admitted as an attorney in Connecticut and practices law as defined in the bill, would be committing "the offense of unauthorized practice of law."[76] The practice of law includes "drafting, reviewing or analyzing legal documents for clients in [Connecticut]."[77] It also defined the unauthorized practice of law to include "researching and analyzing the law of [Connecticut] and advising clients in this state of the status of such law, and that any person who has not been admitted as an attorney in this state who performs such activities commits the offense of the unauthorized practice of law."[78]

The plain meaning of the bill might imply that in-state paralegals and out-of-state lawyers might be engaged in the unauthorized practice of law if they are "researching and analyzing the law of this state." Paralegals frequently draft, review, or analyze legal documents and would thus be engaged in the unauthorized practice of law under such interpretation. Under a strict and literal interpretation of the bill, even a lawyer at the same firm who might be collaborating on a case applying and interpreting Connecticut law would also be engaged in the unauthorized practice of law if she was not admitted as an attorney in Connecticut.

The underlying purpose of the Connecticut LPO Bill was really to protect legal jobs in Connecticut. According to the Statement of Purpose, the bill was designed "[t]o provide that outsourcing of legal document review to non-attorneys constitutes the unauthorized practice of law."[79] The Connecticut Law Tribune reported that State Representative Patricia

75. H.B. 5083, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011), *available at* http://www.cga.ct.gov/2011/TOB/H/2011HB-05083-R00-HB htm.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Dillon introduced the bill to prohibit companies from offshoring the drafting, reviewing, or analyzing of legal documents to workers overseas.[80] When a state action attempts to regulate workers overseas, it impacts the United States's foreign policy. State regulations in the area of foreign policy may be preempted because foreign policy is an area wholly occupied by the federal government.[81] Additionally, when state regulations restrict the outsourcing of legal jobs overseas, the state runs the risk of "intruding on the federal foreign affairs power and violating the U.S. Constitution's Foreign Commerce Clause."[82]

1. Preemption

State protectionist actions against LPOs would likely be preempted because a state would be regulating foreign policy. The Supremacy Clause provides that the Constitution, and the laws and treaties stemming from it, are the supreme law of the land.[83] The Supreme Court has held that when there is a conflict between a state and federal law, the state law is invalidated because the federal law is supreme.[84] Even a state regulation designed to protect the state's vital interest must yield because "under the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'"[85] The Supreme Court defined preemption to "be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[86] Implied preemption may either be field preemption, where "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or conflict preemption, where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[87]

Although there are no clear criteria used to decide when Congress's intent is sufficient to determine that federal law should exclusively

80. *See* Christian Nolan, *Conn. Bill Would Regulate Offshoring Document Review*, CONN. L. TRIB. (Jan. 19, 2011) (Lexis Nexis doc-id# 1202478394479#), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202478394479&Conn_Bill_Would_Regulate_Offshoring_Document_Review&slreturn=1.

81. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 402 (3d ed. 2006).

82. Klinger & Sykes, *supra* note 3, at 4.

83. U.S. CONST. art. VI, cl. 2.

84. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

85. *Id.*

86. *Id.* at 98 (internal quotation marks omitted).

87. *Id.* (citations omitted) (internal quotation marks omitted).

dominate the field, the Supreme Court has often found field preemption in the field of foreign policy and immigration. For example, in *Hines v. Davidowitz*, the Supreme Court struck down a Pennsylvania law requiring aliens to register once a year with the state, pay $1 as an annual registration fee, carry the state-issued registration card at all times, show the card whenever demanded by any police officer or any agent of the Department of Labor, and even exhibit it as a condition precedent to register a motor vehicle or obtain a driver's license.[88] The Court held that the Pennsylvania law was invalid because "whatever power a state may have [in regulating aliens] is subordinate to supreme national law."[89] In addition, the Supreme Court also determined that Congress, by its action, had also foreclosed the enforcement of Pennsylvania's alien registration law because in passing the Alien Registration Act of 1940, "it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system."[90]

Interestingly, the dissent in *Hines* noted that the Court found preemption of Pennsylvania's law even though Congress had not included express language of preemption. The state alien registration law did not "preclude or even interfere with compliance with the act of Congress," and its enforcement involves "no more inconsistency, no more inconvenience to the individual, and no more embarrassment to either government than do any of the laws." [91] The dissent also noted the absence of express preemptive language in the federal statute and contended that if Congress had wanted to preempt state alien registration, it would have included such language in the statute.[92] Tension still exists on whether preemption should apply without such express language in the statute because the Court has held both ways.[93]

The notion that a state law that is complementary to federal law may still be preempted shows both the difficulty in determining what laws could be preempted and the broad reach of the preemption doctrine. Under this broad notion of field preemption, the Connecticut LPO Bill would likely be preempted because foreign policy is an area where Congress has dominated the field. But how does LPO relate to foreign

88. Hines v. Davidowitz, 312 U.S. 52, 59 (1941); Aliens who failed to register would be subjected to fines, imprisonment, or both. *Id.*at 59-60.

89. *Id.* at 68.

90. *Id.* at 74.

91. *Id.* at 81 (Stone, J., dissenting).

92. *Id.* at 79.

93. *Compare id.* (majority opinion),96, *and* Toll v. Moreno, 458 US 1, 17 (1982) (finding preemption because state regulation is impermissible if it imposes additional burdens not contemplated by Congress), *with* De Canas v. Bica, 424 U.S. 351, 361-62 (1976) (holding that there was not preemption because although power to regulate immigration is exclusively a federal power, Congress intended for states to regulate employment of illegal aliens.)

policy? On its face, the Connecticut LPO Bill just described actions that are considered the practice of law, and provided that any person not admitted in Connecticut is engaged in the unauthorized practice of law. At first glance, the proposed Bill says nothing about foreign policy. But there is a protectionist element to the Bill because Representative Dillon is concerned that outsourcing is taking jobs away from recent law school grads.[94] Prohibiting companies and firms from outsourcing overseas is foreign policy because it hinders the federal government from setting uniform policies in dealing with foreign nations and "for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[95] As in *Hines*, the Connecticut LPO Bill and other state protectionist actions would also likely be preempted.

2. Dormant Foreign Affairs Power

The Connecticut LPO Bill, and other potentially similar state protectionist actions, would also likely constitute an intrusion by the state into the field of foreign affairs, which the Constitution entrusts to the President and Congress. The Constitution does not actually grant general foreign affairs power, but assigns certain enumerated powers relating to foreign affairs to Congress, and to the President.[96]

Specifically, as part of the general foreign affairs power, the Constitution grants Congress the power: (1) "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States"[97]; (2) "[to] regulate Commerce with foreign Nations"[98]; (3)"[t]o establish an uniform Rule of Naturalization"[99]; and (4) "[to] define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[100] The Constitution also prohibits, without Congressional consent, any Person holding Office from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[101] In addition, "Congress shall have Power to declare the Punishment of Treason."[102]

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94. *See* Nolan, *supra* note 80.

95. *Hines*, 312 U.S. at 63 (internal quotation marks omitted).

96. Matthew Shaefer, *Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 221 (2011).; Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999) (listing the specific foreign affairs powers the Constitution grants to Congress and the President).

97. U.S. CONST. art. I, § 8, cl. 1.

98. *Id.* at cl. 3.

99. *Id.* at cl. 4.

100. *Id.* at cl. 111011.

101. U.S. CONST. art. I, § 9, cl. 8.

102. U.S. CONST. art. III, § 3, cl. 2.

The enumerated federal affairs powers granted to the President are even fewer in number than those granted to Congress. "The President shall be Commander in Chief"[103] and, with the advice and consent of the Senate, the President has the power "to make Treaties" and to "appoint Ambassadors."[104] In addition, the President "shall receive Ambassadors and other public Ministers."[105]

State protectionist actions that impinge on foreign affairs are likely to be invalid, even in the absence of a relevant federal policy. States may not attempt to regulate foreign affairs under the Dormant Foreign Affairs Clause. In determining whether a state has exceeded the threshold level of involvement allowed in foreign affairs, the Supreme Court established a boundary of permissible foreign affairs activity in *Zschernig v. Miller*.[106] The Court invalidated an Oregon statute that stated conditions in which an alien not residing in the United States could take property by succession or testament because it impaired "the effective exercise of the Nation's foreign policy."[107] The test the Court adopted to determine whether the state law unconstitutionally encroached on the boundary of permissible foreign affairs activity consists of two elements: (1) whether the state statute had more than "some incidental or indirect effect in foreign countries"[108] and (2) whether it has "great potential for disruption or embarrassment."[109]

The First Circuit created a five-factor test to analyze the first element of the foreign affairs encroachment test. In *National Foreign Trade Council v. Natsios*, the First Circuit struck down Massachusetts's Burma Law which restricted state purchases from companies doing business in Burma.[110] The First Circuit relied on five factors to determine whether the state statute had attempted to regulate foreign affairs.[111] Specifically, a state statute has "more than an incidental or indirect effect on foreign relations" when: (1) "the design and intent of the law is 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 state law may well be magnified" and result in similar statutes in other states; (4) the state law has resulted in serious protests from other nations; and (5) the state law diverges from the federal law, "raising the

103. U.S. CONST. art. II, § 2, cl. 1.
104. U.S. CONST. art. II, § 2, cl. 2.
105. U.S. CONST. art. II, § 3.
106. 389 U.S. 429 (1968).
107. *Id.*at 440-41.
108. *Id.* at 434.
109. *Id.* at 435.
110. 181 F.3d 38 (1st Cir. 1999).
111. *Id.* at 53.

prospect of embarrassment for the country."[112] Applying the five factors, the First Circuit held that the Massachusetts Burma Law was unconstitutional for encroaching on the federal government's exclusive foreign relations power because the state law restricted Massachusetts and its agencies to purchase goods and services from companies that do business with Burma.[113]

The Connecticut LPO Bill would have likely met the "some incidental or indirect effect in foreign countries" element of the encroachment test as laid out under the First Circuit's analysis in *Natsios*. First, the intent and effect of the Connecticut LPO Bill was specifically to prevent offshoring, and thus would affect the affairs of a foreign country. Following the hypothetical successful adoption of this Bill, other states would likely follow suit for protectionist purposes. In addition, the proliferation of anti-offshoring bills would likely stir protests from those nations affected by such ban. Finally, this would result in the prospect of embarrassment for the United States because of all the negative publicity it would attract, especially if there were treaties already in existence with those nations. However, the First Circuit acknowledged that "even in absence of a treaty, a State's policy may disturb foreign relations."[114]

The second element of the foreign affairs encroachment test is whether the state law has a "great potential for disruption or embarrassment."[115] The Connecticut LPO Bill would cause great disruption because Connecticut companies and firms would not be allowed to outsource legal work. Companies and firms would likely find ways to circumvent Connecticut's protectionist law and find ways to outsource from another state. In addition, this would result in negative world-wide public relations and cause embarrassment for the United States.

Consequently, because the Connecticut LPO Bill would have met both elements of the foreign affairs encroachment test, the Connecticut Bill would likely have crossed the threshold level of involvement allowed in foreign affairs and ultimately would be held unconstitutional under the Dormant Foreign Affairs Clause.

3. Dormant Foreign Commerce Clause

In addition to violating the Dormant Foreign Affairs Clause, the Connecticut LPO Bill and other potentially similar state protectionist actions would likely also be held unconstitutional under the Dormant

112. *Id.*
113. *Id.*
114. *Id.* (quoting *Zschernig*, 389 U.S. at 441).
115. *Zschernig*, 389 U.S. at 435.

Foreign Commerce Clause. The Foreign Commerce Clause establishes Congress's ability "[t]o regulate commerce with foreign nations."[116] Although not expressly in the Constitution, the Dormant Foreign Commerce Clause restricts states from enacting protectionist policies and prohibits a state's "excessive interference in foreign affairs."[117]

Under the Dormant Foreign Commerce Clause, a state law is unconstitutional if (1) it facially discriminates against foreign companies or foreign commerce; (2) it impedes the federal government's ability to speak with "one voice in foreign affairs," and (3) it amounts to an attempt to regulate conduct outside the state, and outside the country's borders.[118] The First Circuit in *Natsios* found the Massachusetts Burma Law to be unconstitutional under this three-factor analysis.[119]

i. Facially Discriminatory Against Foreign Companies or Foreign Commerce

The Connecticut LPO Bill and other potentially similar state protectionist actions would likely be found to be facially discriminatory against foreign companies and foreign commerce. In *Natsios*, Massachusetts argued that the Massachusetts Burma Law was not facially discriminative because the law did not distinguish between foreign and domestic companies. In addition, Massachusetts also argued that the law did not single out a particular foreign state and did not favor in-state business.[120] But the First Circuit rejected both these arguments explaining that a law does not need to be designed to further local economic interests to violate the commerce clause. Additionally, in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*,[121] the Supreme Court explicitly rejected that an in-state interest was necessary because the Court was "not persuaded . . . that such favoritism is an essential element of a violation of the Foreign Commerce Clause . . . As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions."[122]

In contrast, the Connecticut LPO Bill actually had an in-state

116. U.S. CONST. art. I, § 8, cl. 3.

117. *Natsios*, 181 F.3d at 66.

118. *Id.* at 67.

119. *Id.* In this Note, I will refer to this three-factor analysis as the Dormant Foreign Commerce Clause. Although the Court refers only to the Foreign Commerce Clause, it analogizes the Foreign Commerce Clause to the Dormant Domestic Commerce Clause.

120. *Id.*

121. 505 U.S. 71, 81-82 (1992) (holding that it was facially discriminatory and unconstitutional for a state to enact a tax scheme that treated foreign subsidiaries dividends less favorably than dividends from domestic subsidiaries).

122. *Id.* at 79.

interest element and thus would have been facially discriminatory. Even when there is no in-state interest, a state action could still be facially discriminative. Here, the Connecticut LPO Bill specifically targeted offshoring and it was actually designed to further local interests by protecting local jobs. Given the intent of the bill to prevent companies from offshoring, the Connecticut LPO Bill and other potentially similar state protectionist actions against offshoring would be facially discriminative and would be unconstitutional under the Dormant Foreign Commerce Clause. It would be difficult for a state to draft a protectionist bill against offshoring without affecting foreign commerce.

ii. Federal Government's Ability to Speak With "One Voice in Foreign Affairs"

If multiple states were to individually regulate foreign commerce, the federal government would not be able to show a united front to foreign nations. The Supreme Court emphasized the need for the federal government to "speak with one voice when regulating commercial relations with foreign governments."[123] A state law can violate the Dormant Foreign Commerce Clause if the state action "impairs[s] federal uniformity in an area where federal uniformity is essential."[124] Under this principle of federal uniformity, the Connecticut LPO Bill and other potentially similar state protectionist actions would also violate the Dormant Foreign Commerce Clause because the federal government would not be speaking with "one voice"[125] if Connecticut and other states enacted statutes that would prohibit offshoring in different ways. There would be no federal uniformity and it would become difficult to conduct foreign commercial transactions with differing state laws.

iii. Attempt to Regulate Conduct Beyond a State's Borders

Another factor to determine if a state violates the Dormant Foreign Commerce Clause is when a state attempts to regulate conduct outside its borders and beyond the nation's borders. In *Natsios*, the First Circuit found that Massachusetts attempted to regulate conduct beyond its borders by conditioning state procurement decisions based on conduct in Burma.[126] The First Circuit found that the "critical inquiry" is "whether the practical effect of the regulation is to control conduct beyond the

123. Japan Line, Ltd. v. L.A. Cnty., 441 U.S. 434, 449 (1979) (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

124. *Id.* at 448.

125. *See id.* at 448-49.

126. *Natsios*, 181 F.3d at 69.

boundaries of the State."[127] Because the Massachusetts Burma Law would have regulated conduct outside of Massachusetts and outside the United States, the First Circuit found the Burma law to violate the Foreign Commerce Clause.[128]

The Connecticut LPO Bill would have also regulated conduct outside of Connecticut and outside of the United States. The practical effect of the Connecticut LPO Bill would have been to regulate the places where companies and firms could offshore work. Connecticut would thus be regulating conduct beyond the nation's borders by keeping jobs from going offshore, and instead, keeping them within the state's borders. As with the Massachusetts Burma Law in *Natsios*, the attempt to regulate offshoring conduct has the practical effect of conducting control beyond the nation's border. Courts would have likely struck down the Connecticut LPO Bill and other potentially similar state protectionist actions for attempting to regulate conduct beyond a state's border.

Because all three factors of the Dormant Foreign Commerce Clause test would have been met, the Connecticut LPO Bill or any other potentially similar state protectionist actions likely would have been found to be unconstitutional under the Dormant Foreign Commerce Clause.[129]

4. Market Participant Exception

A state law may sometimes overcome an unconstitutional finding under the Dormant Foreign Commerce Clause with the Market Participant Exception, but here, it would not have worked with the Connecticut LPO Bill. Borrowing from the Dormant Commerce Clause doctrine, the Connecticut LPO Bill could have been saved if one of the two exceptions were to apply (1) if Congress were to directly approve the Bill;[130] or (2) if Connecticut is acting as a market participant.[131] Assuming no Congressional approval of the Connecticut LPO Bill in this hypothetical, Connecticut could attempt to save the law by claiming the Market Participant Exception. Referencing the Dormant Domestic Commerce Clause, Connecticut would argue that "if a State is acting as a

127. *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

128. *Id.*

129. *See Id.* at 69-70.

130. W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652-53 (1981) (holding that with Congress approval, state laws burdening commerce are permissible, even if they would otherwise violate the Dormant Commerce Clause because "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.")

131. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984) (defining the Market Participant Exception to the Dormant Commerce Clause).

market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."[132] This argument raises two interesting questions: (1) does the Market Participant Exception for the Dormant Commerce Clause also apply to the Dormant Foreign Commerce Clause? and (2) if the Market Participant Exception were to apply to the Dormant Foreign Commerce Clause, would Connecticut be acting as a Market Participant?

i. Does the Market Participant Exception Apply to Dormant Foreign Commerce Clause?

The Supreme Court has not fully resolved whether the Market Participant Exception applies to the Dormant Foreign Commerce Clause. Although the Supreme Court has suggested that "state regulations that touch on foreign commerce receive a greater degree of scrutiny than do regulations that affect only domestic commerce,"[133] the circuit courts are split on this issue.[134]

The Supreme Court would likely require an even greater degree of scrutiny in applying the Market Participation Exception to the Dormant Foreign Commerce Clause. In *South-Central Timber*, the Court defined the Market Participation Exception doctrine to mean "that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."[135] In addition, when it comes to foreign commerce, the Court in *Reeves, Inc. v. Stake* noted that that "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."[136] The First Circuit in *Natsios* concluded that "it is unlikely that the Market Participant Exception applies to the Foreign Commerce Clause"[137] because of the inherent risk of state regulation of foreign commerce included the risk of retaliation against the nation and the "weakening of the federal government's ability to speak with one voice in foreign affairs."[138] Furthermore, "[a] foreign government has little inclination to

132. *Natsios*, 181 F.3d at 62 (quoting *S.-Cent. Timber*, 467 U.S. at 93).

133. *Id.* at 66.

134. *Compare Trojan Techs., Inc. v. Pennsylvania*, 916 F.3d 903, 910 (3d Cir. 1990) (applying the market participant exception to Dormant Foreign Commerce Clause by holding that "there can be no commerce clause intrusion even in a foreign commerce context where there is no attempt to regulate"), *with Natsios*, 181 F.3d at 65 (casting skepticism "of whether the market participation exception applies at all (or without a much higher level of scrutiny) to the Foreign Commerce Clause.").

135. *S.-Cent. Timber*, 467 U.S. at 93 (invalidating Alaska law requiring purchasers of state-owned timber to process timber in Alaska before shipping it out of state).

136. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980) (upholding South Dakota's decision to sell cement from a state-owned cement plant only to state residents).

137. *Natsios*, 181 F.3d at 65.

138. *Natsios*, 181 F.3d at 65-66; For a contrasting opinion in favor of the Market

discern whether a burdensome action taken by a political subdivision of the United States was taken under a proprietary or a regulatory guise," and "the potential for the creation of friction between the United States and a foreign nation is not lessened because the state acts as a proprietor instead of a regulator."[139] By applying the Market Exception Doctrine to the Dormant Foreign Commerce Clause, the Court would ignore these additional risks involved when the state law relates to foreign commerce.[140]

Although the Supreme Court has yet to rule on whether the Market Participation Exception applies to the Dormant Foreign Commerce Clause, either way, its decision would not likely save the Connecticut LPO Bill, and other potentially similar state protectionist actions. If the Court were to reject the application of the Market Participation Exception to the Dormant Foreign Commerce Clause, then the Connecticut LPO Bill and other potentially similar state protectionist actions would likely be unconstitutional, as previously analyzed. Even if the Court were to allow the Market Participation Exception to apply, and Connecticut was able to claim that it is a market participant, pursuant to either Preemption or Dormant Foreign Affairs Clause, the Connecticut LPO Bill would have likely still been held unconstitutional. But even in that scenario, the Connecticut LPO Bill would still likely be struck down because Connecticut would not be acting as a market participant.

ii. Connecticut Would Not Be Acting as a Market Participant

The Supreme Court in *South Central Timber* placed a limitation on the Market Participant Exception by requiring that the market be narrowly defined. The Court held that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."[141] This limitation is important because "[u]nless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry."[142]

Participant Exception doctrine in the Dormant Foreign Commerce Clause, *see* Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 260 (2011).

139. *Natsios*, 181 F.3d at 66 (quoting K. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 485 (1987)).

140. *Id.* at 66.

141. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (plurality opinion).

142. *Id.* at 97-98.

The Connecticut LPO Bill would not withstand the narrowly defined market requirement imposed from *South Central Timber* because the Bill itself intended to prohibit all outsourcing of legal documents. This would make Connecticut a market regulator as opposed to a market participant. Connecticut could argue that the Connecticut LPO Bill is similar to the Court's ruling in *White v. Massachusetts Council of Construction Employers, Inc.*, where it upheld a mayoral law that required at least half of the workforce of projects funded partially or entirely by Boston city funds be Boston residents.[143] However, the distinction is that in *White*, the city did not require all contractors in Boston to employ Boston residents, only those projects funded by the city.[144] In contrast, the Connecticut LPO Bill does not restrict only the outsourcing of State-funded legal projects, but rather, of any legal work in the State. Accordingly, even if the market participant exception were to apply to the Dormant Foreign Commerce Clause, the Connecticut LPO Bill would likely not be able to be saved by the Market Participant Exception because the State would be acting like a market regulator, as opposed to a market participant.

Accordingly, regardless of whether it is analyzed under the Preemption Doctrine, the Dormant Foreign Affairs Clause, or the Dormant Foreign Commerce Clause, the Connecticut LPO Bill and other potentially similar state protectionist actions would likely not pass constitutional muster if it had passed into law.

B. Federal Action: If Congress Were to Enact a Bill Regulating LPO

Although the legality of federal protectionist action is outside the scope of this Note, the federal government would likely be able to enact a law prohibiting or curbing the practice of offshoring because Congress has the enumerated powers to govern Foreign Affairs and Foreign Commerce Clause and Preemption doctrine would not apply. But, any action attempted by Congress to regulate offshoring would likely come with backlash from powerful corporations who may rely on offshoring to stay competitive.

CONCLUSION

State protectionist actions against LPO, such as the Connecticut LPO Bill, would likely be unconstitutional under the Preemption Doctrine, the Dormant Foreign Affairs Clause, or the Dormant Foreign Commerce Clause. Despite numerous attempts to curb its practice, or

143. White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 206 (1983).
144. *Id.* at 214.

eliminate it altogether, LPO is here to stay because[145] "the toothpaste is out of tube."[146] Although LPO may withstand legal and ethical attacks, firms and companies using or evaluating LPOs must also remember that the caveat emptor principle applies. In evaluating whether LPO is right for a company or a firm, in the end, a factor that cannot be ignored is that ultimately "you get what you pay for."[147]

As firms and companies continue to look for ways to reduce costs, it is no surprise that despite efforts to curb its practices, LPOs have increased in popularity. The comfort level of using LPOs is partly due to the successful implementations of other forms of outsourcing such as BPOs and other KPOs, along with technology enablers such as increased broadband and faster and cheaper storage. Public backlash against offshoring outsourcing increased when domestic employees saw their jobs moved overseas. However, despite the numerous attempts at curbing the practice of LPO, due to the potential legal challenges in enacting anti-outsourcing laws, LPOs will continue to exist, grow in size, and likely remain a sensitive topic in the legal community.[148]

Since LPOs are here to stay, young attorneys can embrace and adapt to this trend. Although an increasing number of firms outsource projects normally performed by first- and second-year associates, the growth of LPOs has also opened up opportunities for American law school graduates.[149] In this tough job market, the growth of LPO is fueling opportunities for local sales professionals with law degrees, or attorneys to perform outsourced work in local LPO offices.[150] Or, if willing, graduates and attorneys could move to India making a lower salary equivalent to $30,000 to $40,000 in the United States, but taking advantage of the lower cost of living, while accumulating professional and personal experiences living abroad.[151]

Companies who want to take advantage of LPO's better pricing

145. Heather Timmons, *Due Diligence From Afar*, N.Y. TIMES, Aug. 5, 2010 at B1.

146. Russell Smith, *The Toothpaste is Out of the Tube*, LAW WITHOUT BORDERS (Aug. 4, 2010), http://lawwithoutborders.typepad.com/legaloutsourcing/2010/08/the-toothpaste-is-out-of-the-tube-new-york-times-article-shows-how-legal-outsourcing-is-here-to-stay html (Once the toothpaste is squeezed out of a tube, you cannot put it back in. The LPO industry has finally come out of the "tube" and is here to stay. The growth momentum of LPOs has fueled a whole new outsourcing industry and even with the parallel growth of protectionist sentiments, LPOs are becoming a standard necessity in the industry, and are here to stay).

147. *See* Lisa Solomon, *Independent US Contract Lawyer Takes On Foreign LPO*, LEGAL RES. & WRITING PRO BLOG (Oct. 30, 2009), http://legalresearchandwritingpro.com/blog/2009/10/30/independent-us-contract-lawyer-takes-on-foreign-lpo/.

148. *See* Elie Mystal, *Firms Don't Want to Talk About Outsourcing*, ABOVE THE LAW (Jul. 7, 2010), http://abovethelaw.com/2010/07/firms-dont-want-to-talk-about-outsourcing/.

149. L.J. Jackson, *Where Are The Jobs?*, STUDENT LAW. (Nov. 2011), at 25.

150. *Id.*

151. *Id.*

should evaluate whether better pricing equates with better value. Without the proper foundation and management of LPOs, the lower priced LPO option could potentially result in higher overall costs. The perception that the world is "flat"[152] and that outsourcing is an easy way to become more competitive in the global market can be misleading. Embracing the notion that the "World's Still Round,"[153] learning how to bridge cultural nuances when dealing with foreign countries will go a long way toward a successful LPO experience.[154]

Additionally, one can "optimize the process of outsourcing"[155] by simplifying the contract process to ease the management of outsourced tasks. For example, in June 2010, Microsoft announced Wipro as its third LPO providing legal services for its intellectual property and licensing group worldwide.[156] Microsoft is able to successfully partner with LPOs because it had "previously 'templatized' the contracts process, documented it, and applied six sigma techniques to make it more efficient and reduce errors . . . and had reduced the overall level of legal expertise required to manage a large pool of contracts."[157] Microsoft then decided it could better utilize its highly capable contracts staff by offloading the simplified work to a vendor.[158]

With LPOs here to stay, companies and firms who are interested in outsourcing need to assess whether LPO is the right solution for them. Although LPOs cost less, it may not be the better overall value. With the proper foundation, companies and firms may end up with a very successful LPO experience. But those who are not willing to lay the proper foundation and put in the effort required to properly supervise and build a good relationship with the LPO need to be aware that when it comes LPOs you can end up getting exactly what you pay for.

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152. *See generally* FRIEDMAN *supra* note 1.

153. Sandeep Sood, *Yes, The World's Still Round*, FORBES (May 29, 2008), http://www forbes.com/2008/05/25/india-communication-assistant-oped-cx_ss_outsourcing08_0529culture html.

154. *Id.*

155. Klan Ganz, *Stand Up Now: Which LPO Will Not Be Working with Microsoft?*, LEGALLY INDIA (Jun. 18, 2010),) http://www.legallyindia.com/20100618990/Legal-Process-Outsourcing-LPO/stand-up-now-which-lpo-will-not-be-working-with-microsoft.

156. Matthew Weinberger, *Wipro Partners with Microsoft for Legal Process Outsourcing*, THE VAR GUY (Jun. 17, 2010), http://www.thevarguy.com/2010/06/17/wipro-partners-with-microsoft-for-legal-process-outsourcing/.

157. Ganz, *supra* note 155.

158. Ganz, *supra* note 155.