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Anti-Offshoring Legislation: The New Wave of Protectionism- The Backlash Against Foreign Outsourcing of American Service Jobs

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ANTI-OFFSHORING LEGISLATION: THE NEW WAVE OF PROTECTIONISM

THE BACKLASH AGAINST FOREIGN OUTSOURCING OF AMERICAN SERVICE JOBS

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> *"Time and again through our history, we have discovered that attempting merely to preserve the comfortable features of the present, rather than reaching for new levels of prosperity, is a sure path to stagnation."*[1]

I. INTRODUCTION

Since the end of the Cold War, liberal economics and free-market capitalism have come to dominate the structure of the international system. Globalization has concomitantly emerged as the overarching arrangement linking nation-states, multinational corporations, and individuals together in support of a shared objective: increased economic prosperity. However, as is common to the development of any new political or economic system, there are those who are disadvantaged by the changes and who feel that the conversion is not in their best interests. Globalization has endured the protests of many such dissenters and has weathered them due, in large part, to the steadfast support of the world's capitalist powers. Recently, however, globalization and one of its more contemporary derivatives, foreign outsourcing (or "offshoring"), have come under attack from within. Enduring this latest condemnation will be decidedly more challenging since the loudest protests are originating in the country that is widely viewed as the champion of globalization and free-market economics: the United States.

Over the past three years, a tremendous divide has opened in the U.S. between those who support offshoring and those who are

[1] Federal Reserve Board Chairman Alan Greenspan, Remarks at the Boston College Finance Conference 2004 (Mar. 12, 2004), http://www.federalreserve.gov/boarddocs/speeches/2004/20040312/default.htm (last visited May 12, 2004) [hereinafter Greenspan's Remarks to BC].

staunchly opposed.[2] Economists pointing to the considerable long-term benefits of outsourcing abroad tend to fall in one camp, while those who have recently become unemployed and are often tragically caught in the short-term turbulence to which foreign outsourcing has contributed stand in unwavering disagreement.[3] In this election season, offshoring is sure to become a fiercely debated issue as both parties race to appear the most sympathetic to the growing ranks of unemployed voters. White House economist Gregory Mankiw, presenting the Economic Report of the President to Congress, praised outsourcing abroad as a "new form of trade" that would benefit the United States as much as trade in traditional goods.[4] Incumbent President George Bush, meanwhile, scrambled to distance himself from Mankiw by publicly bemoaning the fact that Americans were looking for work while many jobs have been moved overseas.[5] Democratic presidential contender, Senator John Kerry, has followed a similar tactic and has recently introduced anti-outsourcing legislation in the Senate.[6] The debate has even sparked a "revolution" overseas in India, one of America's largest offshoring partners, as voters ousted the leader of India's economic liberalization movement, Prime Minister Atal Behari Vajpayee, this past spring.[7]

Section II of this paper will present a backdrop for the offshoring debate and will explore the issues that have made outsourcing abroad such a hotly contested topic. Section III will focus on investigating the wide variety of protectionist measures that have been introduced in legislatures across the U.S. Lastly, section IV will survey the possible implications of these protectionist bills on the U.S. economy and the global market.

II. THE EMERGENCE OF THE OFFSHORING DEBATE

Outsourcing as a business tool is by no means a novel concept. As competition within the market changes, companies have increas-

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2 Federal Reserve Board Chairman Alan Greenspan, Remarks at the Greater Omaha Chamber of Commerce 2004 Annual Meeting (Feb. 20, 2004), http://www.federalreserve.gov/boarddocs/speeches/2004/200402202/default.htm (last visited May 12, 2004) [hereinafter Greenspan's Remarks to Omaha].

3 *See* Greenspan's Remarks to BC, *supra* note 1.

4 *The Economic Report of the President: Testimony Before the J. Economic Comm.*, 108th Cong. (2004) (statement of N. Gregory Mankiw, Chairman, Council of Economic Advisors) [hereinafter Mankiw's Testimony].

5 *See, e.g.*, Alan Murray, *Despite the Outcry, Mankiw Was Right About Outsourcing*, WALL ST. J., Feb. 17, 2004, at A4, *available at* 2004 WL-WSJ 56920189.

6 *See* S. 1873, 108th Cong. (2003); S. 2090, 108th Cong. (2004).

7 *See* Saritha Rai, *Shares Plunge 11% in India on Jitters Over Election*, N.Y. TIMES, May 18, 2004, at W1, *available at* 2004 WL 77633525.

ingly found that they only have time to focus on what they do best.[8] As industries evolve, organizations within them often find they are no longer able to afford the time or financial resources necessary to concentrate on every aspect of their business and so they outsource noncore processes, such as data entry or staffing call centers, to third party suppliers.[9] In more recent times, however, companies have begun to turn to overseas service providers for their outsourcing needs. For decades, manufacturers have turned to foreign markets for a source of cheap, readily-available labor. Shoe and clothing manufacturers sent much of their assembly processes to low-wage Asian countries while the automobile industry looked to Mexico for more inexpensive labor. Over time, Americans have become largely accustomed to this exportation of blue-collar manufacturing jobs, but the most recent wave of offshoring has given rise to renewed protests.

For the first time, white-collar service jobs are being outsourced abroad in significant numbers. Due in large measure to the "digital revolution and the dramatic fall in international telecommunication costs, white-collar jobs that once were insulated from global competition can now be performed in low-wage nations like India for as little as one-tenth of the cost of U.S. labor."[10] To more fully comprehend how offshoring has become such an attractive option to many U.S. businesses, one must first understand the basic foundations of globalization upon which the theories of offshoring rest.

A. *The House That Globalization Built*

> Globalization involves the inexorable integration of markets, nation-states, and technologies to a degree never witnessed before - in a way that is enabling individuals, corporations, and nation-states to reach around the world farther, faster, deeper, and cheaper than ever before, and in a way that is also producing a powerful backlash from those brutalized and left behind by this new system.[11]

The rise of globalization as the reigning international system, coupled with the explosive proliferation of the digital revolution, has created a world in which money wields the power of a sovereign. Ad-

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[8] PETER BENDOR-SAMUEL, TURNING LEAD INTO GOLD: THE DEMYSTIFICATION OF OUTSOURCING 20 (Executive Excellence 2000).

[9] *See id.*

[10] MARTIN N. BAILY & DIANA FARRELL, MCKINSEY GLOBAL INST., EXPLODING THE MYTHS ABOUT OFFSHORING 1 (Apr. 2004), http://www.mckinsey.com/knowledge/mgi/reports/exploding_myths.asp.

[11] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 7-8 (Farrar, Straus, and Giroux 1999).

vances in technology have provided companies with the means to conduct business securely and instantaneously in nearly any country in the world from virtually any other. Technology and the digital revolution have effectively "miniaturized" the globe, reducing communication costs and delays to almost nothing. As a result, with access to electricity and a phone line, a business could operate nearly as successfully from the heart of Siberia as it could were it located in downtown Manhattan.

Free-market capitalism has spread to every corner of the globe and has laid roots in virtually every country in the world.[12] This new system brings with it its own set of rules that revolve around opening, deregulating, and privatizing all of the world's economies; the driving idea is that the more market forces are allowed to rule and the more open to free trade and competition an economy is allowed to be, the more efficient and flourishing it will become.[13] In the span of a few decades, globalization has managed to increase the size of the world's economy by nearly four hundred percent and has exposed previously inaccessible markets to the concept of free trade.[14]

The contemporary backlash against the forces of globalization is best distinguished by the current protests against the offshoring of white-collar service jobs found in back-end processing, call centers, accounting, and low-level programming. One of the most defining features of globalization sparking this new debate is that, unlike any prior international arrangement, globalization radically shifts the balance of advantage from those who have traditionally wielded the power to new challengers.[15] The incumbent powers were once able to protect their own economies by imposing insurmountable tariffs or by hiding behind the "lofty barriers" of the high cost of capital, the difficulty in acquiring new technology, and the importance of both to competing in the global marketplace.[16] However, globalization has shattered these obstacles to free competition and has effectively leveled the playing field for all competitors. As a result, a smaller, low-wage country, such as India, may find itself able to comfortably com-

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[12] *See id.* at 8.

[13] *See id.*

[14] *See* WORLD TRADE ORG., WORLD MERCHANDISE EXPORTS/IMPORTS BY REGION AND SELECTED ECONOMY: 1980-03 (2003), http://www.wto.org/english/res_e/statis_e/webpub_e.xls (last updated Apr. 2004) (adding total exports for 1980 to the total imports for the same year and comparing the result to the same figures from 2003 shows a 400% increase).

[15] John Micklethwait & Adrian Woolridge, *Why the Globalization Backlash is Stupid*, *in* INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES 503 (Robert J. Art & Robert Jervis, eds., 6th ed. 2003).

[16] *Id.*

pete with a hegemonic power like the United States in certain industries.

The new, more balanced market introduced by globalization has recently forced traditional economic superpowers to undergo internal corrections as smaller countries begin to compete in earnest. The debate over offshoring has emerged directly from one such correction. American companies have realized that on average, for every dollar of corporate spending that is shifted offshore, fifty-eight cents can be saved.[17] A workforce reallocation often follows such a shift in capital spending and thus the blame for the 2.3 million American jobs lost over the past three years has been widely attributed to foreign outsourcing.[18] By establishing a system of open markets and rapidly spreading technology around the world, globalization has not only made offshoring feasible, but has made it an economic reality.

B. The Development of Service-Oriented Offshoring

Over the years, businesses have found that by divesting themselves of any non-essential or extraneous processes, they are able to improve the level of service they provide, cut costs, and free up time and capital to concentrate on the more consequential aspects of their business.[19] These processes may be less central to a company's end product, but are still vital to the continued operation of the business. Processes such as data entry or storage, low-level computer programming, accounting, staffing call centers and the like are all important to the daily operation of a company, but are not generally particular to any specific business – punching keys on a keyboard or adding up figures on a balance sheet tend to vary little from company to company. The individuals performing these tasks are often categorized as "white-collar workers" and this label applies to nearly every employee performing tasks less labor-intensive than traditional blue-collar manufacturing jobs. Essentially, any non-manual laborer, general office worker, can be considered a "white-collar worker."

Through experience, businesses have come to realize that these "non-core" tasks can be farmed out to third party providers as a tradable service.[20] By outsourcing these menial tasks to a third party, a company is able to free up time and money that it can invest in more worthwhile or creative pursuits. Ideas, rather than materials or physical labor, have been the greatest contributors to the U.S. economy

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[17] BAILY & FARRELL, *supra* note 10, at 2.

[18] *See, e.g.*, Craig Karmin, *"Offshoring" Can Generate Jobs in the U.S.*, WALL ST. J., at B1, *available at* 2004 WL-WSJ 56922940.

[19] BENDOR-SAMUEL, *supra* note 8, at 20.

[20] *Id.*

during the past half-century, and outsourcing allows companies to shift their focus back onto these thoughts and ideas.[21]

Outsourcing occurs when a company "transfers the ownership of a business process to a supplier."[22] The most important element in this explanation is the concept of transfer of control. In an outsourcing relationship, the buyer does not tell the supplier how to perform the contracted task, but instead focuses on the results it wishes to obtain.[23] A company might elect to outsource certain operations for a number of reasons: to reduce operating costs, to improve company focus, to improve upon output quality, to free internal resources for other purposes, to reduce cycle time, or simply to engage an outside agent of change.[24] The prime motivation behind outsourcing *abroad* is that it drastically reduces labor costs.[25] Additionally, many of the jobs that have been offshored are seen as undesirable or of lower prestige in the U.S. whereas in the countries to which they are sourced, they are viewed as highly desirable and attractive.[26]

With the advent of the digital revolution and globalization, the potential for offshoring grew tremendously. Today, the criteria for successful offshoring merely includes the "requirement that the function can either be digitized or handled by telephone, and that the appropriate skills are available . . . at the offshoring center."[27] Businesses and consumers alike have found that offshoring can lead to dramatically lowered costs, which can lead to an increase in supply and a corresponding decrease in price. As an example, a technician in India may be able to read an MRI at a fraction of what it would cost to have a medical technician in the U.S. do the job. By transferring that job to India an American technician may lose his job, but lower prices for this life-saving technology are virtually assured and many more sick people will benefit as a result.[28]

C. The New Debate: Offshoring, White-Collar Jobs, and an Election Year

It is precisely this loss of American jobs that has sparked the debate surrounding the current practice of offshoring. This discussion is particularly difficult, especially for politicians in an election year,

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[21] *See* Alan Greenspan's Remarks to BC, *supra* note 1.
[22] *See* BENDOR-SAMUEL, *supra* note 8, at 25.
[23] *See id.*
[24] *Id.* at 35-6.
[25] MCKINSEY GLOBAL INST., OFFSHORING: IS IT A WIN-WIN GAME? 1 (2003), http://www.mckinsey.com/knowledge/mgi/reports/offshore.asp.
[26] *See id.*
[27] *Id.* at 2, 5.
[28] *See* BAILY & FARRELL, *supra* note 10, at 3.

since the pain is felt quickly and prominently, while the benefits are more long-range and nebulous in nature.[29] Those who are against offshoring need only point to the millions of unemployed Americans, many of whom have been out of work for six months or more, to make their strongest argument. On the other hand, those in support of foreign outsourcing must convince those people that the hardship is only temporary and that the net gain will be worth any impermanent difficulties. Economists tend to support offshoring and often find themselves coming to rhetorical blows with labor unions and other advocates of the unemployed or those faced with the very real prospect of losing their jobs. "Framing the debate in economic terms can be tricky, because while economic theory offers tidy equations that lead to win-win situations, there are losers in the real world. Workers who see their jobs shipped overseas are hurt, even while companies and the economy as a whole may see benefits."[30]

i. "Buy American"—Offshoring and the Domestic Job Market Square-Off

Those who are firmly opposed to the practice of foreign outsourcing rely most heavily upon what they see as a dangerous shift in the domestic labor market. American job losses stand as the cornerstone of their argument and according to some estimates, their voice grows louder by some 100,000 each year as more white-collar jobs migrate overseas.[31] Some researchers have forecasted that as many as 3.3 million American jobs, representing $136 billion in wages, could be shipped offshore by 2015.[32] To date, however, the actual number of white-collar jobs lost in the U.S. to foreign outsourcing is less than 300,000, or about 0.2% of the total domestic job market.[33] At first blush, the statistics supporting this argument seem fairly damaging and seem to indicate that the American job market is indeed threatened by this new offshoring phenomenon. However, the government does not currently keep a record of jobs leaving the country and the research that is so often cited to show job migration overseas is continuously under fire as being unrepresentative.[34] Additionally,

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[29] *See* Timothy Aeppel, *Offshoring Face-Off: Moving Jobs Overseas Can Cut a Company's Costs, But is it Bad for the U.S. Economy? Two Economists Debate the Issue*, WALL ST. J., May 10, 2004, at R6, *available at* 2004 WL-WSJ 56928485.
[30] *Id.*
[31] *See* Jon E. Hilsenrath, *Behind Outsourcing Debate: Surprisingly Few Hard Numbers*, WALL ST. J., Apr. 12, 2004, at A2, *available at* 2004 WL-WSJ 56925640.
[32] *Id. at 47.*
[33] *Id.*
[34] *See id.*; *see generally* S. 2090, 108th Cong. (2004)(requiring the Department of Labor to provide an annual report of number of jobs affected and the location of where they are being transferred).

there is a notable misconception underlying this line of reasoning: those who point to offshoring as the cause of American job losses are assuming that globalization has produced a zero-sum situation.[35] The contention is framed by the idea that if jobs are migrating overseas, they are lost to American workers, but this argument fails to take into account the creation of new or different jobs in the U.S. that might balance any losses to offshoring.

The benefits of offshoring to the U.S. economy are also called into question by its detractors. They argue that shifting capital and technology to foreign markets can only serve as a drain upon the domestic economy.[36] Essentially, this belief is predicated upon the notion that if companies send their resources overseas, the capital that remains at home will be spread more thinly and either unemployment or falling productivity will result.[37] This argument, however, is also flawed by its reliance on the notion that the new economic order is zero-sum. To the contrary, it is argued that globalization has produced an increasing-sum global market; free-trade can improve the fortunes of everyone by leading to a more efficient use of capital and resources.[38] The success of the United States in the world economy is not dependant upon the failure of all other countries. In the globalized marketplace, there is room for everyone to profit.

As flawed as these arguments may be, they do have some merit in the short-term. New job creation is currently lagging, but this is more a consequence of increased productivity than offshoring.[39] To protect American jobs in the immediate future, the United States could erect barriers to foreign trade and discourage offshoring by U.S. companies, thus slowing the pace of competition. This might allow more Americans to find employment, but any gains would be fleeting, as the United States would surely lose its footing on the international economic stage.[40] Carriage-makers were replaced by auto assemblers and farmers by factory workers; the same thing is likely to happen again as white-collar jobs move offshore.[41] "Opportunities to redeploy labor and investment capital to generate opportunities in higher-value-added occupations will appear."[42] Short-term hardships are assured as offshoring continues to gain acceptance in the business world, but on the whole and in the long-term, the rewards should offset any growing pains.

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35 Micklethwait & Woolridge, *supra* note 15, at 507.
36 *See* Aeppel, *supra* note 29.
37 *See id.*
38 *See* Micklethwait & Woolridge, *supra* note 15, at 508.
39 *See* Greenspan's Remarks to BC, *supra* note 1.
40 *See, e.g., id.*
41 BAILY & FARRELL, *supra* note 10, at 4.
42 *Id.*

ii. The Big Picture—Economics, Offshoring, and the Long-Term

Champions of the recent surge in offshoring include many notable economists. Gregory Mankiw, the White House's chief economic advisor, has made it clear he is in favor of foreign outsourcing. "A burgeoning trade in services provides an important outlet for U.S. expertise," Mankiw told Congress when delivering the Economic Report of the President, "the ability to buy less expensive goods and services from new producers has made household budgets go further, while the ability of firms to distribute their production around the world has cut costs and thus prices to consumers."[43] Mankiw further opined that if a good or service can be produced at lower cost in another country, it makes sense to import it rather than produce it domestically.[44] Mankiw's view that offshoring is a new form of trade that will benefit the U.S. is joined by Federal Reserve Chairman Alan Greenspan who has observed that "our economy is best served by full and vigorous engagement in the global economy."[45]

The arguments in support of offshoring are largely focused on long-term projections but are often difficult to make in the face of a visceral opposition, which points to unemployed Americans around the country. While the immediate job market may appear bleak and threatened by foreign outsourcing, it is important to note that over the past twenty years U.S. manufacturing employment has fallen by two million jobs, but *net* employment has increased by 43 million.[46] Over the same period, manufacturing output has increased, meaning that factories today are more productive than ever.[47] Companies, forced to make due with less during a recessive economy, have become more productive and have found ways to boost output with fewer workers.[48] These highly productive businesses no longer need additional labor and so would not add jobs to the market should offshoring halt. In the long-term, higher productivity will do more for the economy than high job growth by encouraging innovation and creating more higher-value-added jobs. Waiting a short while for full employment will be well worth it if the result is rising living standards.[49] Further, many of the jobs that have been outsourced to India or other low-wage countries are only viable in their current environs and would not exist in the United States.[50] "That half a million people are now employed in In-

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43 Mankiw's Testimony, *supra* note 4.

44 *Id.*

45 Greenspan's Remarks to BC, *supra* note 1.

46 BAILY & FARRELL, *supra* note 10, at 4.

47 *See id.*

48 *See* Murray, *supra* note 5.

49 *See id.*

50 *See* BAILY & FARRELL, *supra* note 10, at 7.

dia's outsourcing industry does not mean that there could be 500,000 more jobs in the United States. Without offshoring, companies would scale back or stop offering services."[51]

Supporters of foreign outsourcing can also rely upon evidence indicating that the latest wave of offshoring is a boon to the receiving countries and is likewise highly profitable to the U.S. economy. The offshoring of white-collar jobs has successfully incorporated countries like India into the global market and has made them viable participants in multinational production chains.[52] Foreign outsourcing is no longer seen as exploitation, as it once was with the offshoring of manufacturing labor, but is now rather viewed as the generator of thousands of jobs per month.[53] Studies have found that for every dollar of corporate spending that is offshored, the U.S. gains as much as $1.14 in return.[54] Additionally, countries like India that provide outsourcing services become consumers in the global markets in which they are new suppliers. It is estimated that for every dollar of corporate spending moved offshore, these new suppliers buy five cents worth of goods and services from the United States.[55] Prior to 1991, capital flows to India consisted primarily of grants of aid.[56] By 2000, the new offshoring industry and its ability to quickly reintegrate India into the world economy had propelled India to twelfth among nations in terms of gross national income, and the largest capital flows were foreign direct investments.[57] In 2001, the U.S. imported 9.076 billion dollars worth of goods and services from India and exported 3.425 billion dollars to India.[58] It is unlikely that this beneficial trade flow would exist in the absence of offshoring.

iii. Courting Voters, Presidential Candidates Choose Sides on the Thorny Offshoring Issue

As the 2004 campaign season draws to a close, the presidential candidates, Republican incumbent George W. Bush and Democratic challenger John F. Kerry, have both staked out their positions in the offshoring debate. One of the major issues in this election, overshad-

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51 *Id.*
52 *See* Emily Parker, *'Animal Spirits' in India*, WALL ST. J., Jan. 15, 2004, at A14, *available at* 2004 WL-WSJ 56917199.
53 *Id.*
54 BAILY & FARRELL, *supra* note 10, at 1-2.
55 *Id.* at 3.
56 *See* Charles Collyns, *Recent Experience with a Surge in Capital Inflows*, *in* INDIA: ECONOMIC REFORM AND GROWTH 41, (Int'l Monetary Fund, 1995).
57 *See* T.N. SRINIVASAN & SURESH D. TENDULKAR, INST. FOR INT'L ECON., REINTEGRATING INDIA WITH THE WORLD ECONOMY (2003).
58 India – U.S. Trade Statistics, Indian Embassy, *at* http://www.indianembassy.org/indusrel/2002/trade/India_u_s_trade.htm (last visited May 11, 2004).

owed perhaps only by the war in Iraq, is the current and future state of the economy. Joblessness has become a major concern among voters nationwide. Many Americans view offshoring and outsourcing as a major cause of unemployment in the United States; polls have indicated that as many as sixty-nine percent of Americans believe that offshoring damages the economy of the United States.[59] In response, the candidates have made public their stances on what to many is a decisive issue in this election.

Senator Kerry has been outspoken about his desire to curtail foreign outsourcing and has been fairly critical about offshoring as a business practice.[60] During the primary season, Kerry rather famously derided American CEOs who moved jobs overseas, calling them "Benedict Arnolds."[61] Additionally, Kerry has attacked the offshoring issue by proposing tax credits for domestic hiring, has put forth legislation requiring mandatory notification by companies moving jobs overseas, and has recommended major changes to the tax system that he says "entice business expansion abroad."[62] The candidate further proclaims that he believes "that U.S. and federal contracts where possible should be performed by American workers;" that he supports "'Buy American' guidelines for defense and homeland security" and the "consumer's 'Right to Know' where call center calls they receive are originating."[63]

President Bush has taken on the seemingly more difficult task of advocating continued offshoring while at the same time sympathizing with those voters who have lost their jobs to foreign outsourcing. Bush, as one might expect from a prominent Republican candidate, has "consistently defended the right of U.S. companies to outsource business processes to call centers in India, or anywhere else."[64] On this issue, Bush has seemingly taken a more long-range view and has often suggested that education, not protectionist legisla-

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59 Louis Aguilar, *State May Stop Outsourcing*, DETROIT NEWS, July 6, 2004, at A1, *available at* 2004 WL 80980274. *See also* Edward Luce, *Booming Bangalore Will be Backing Bush in November*, FINANCIAL TIMES, Sept. 22, 2004, *available at* 2004 WL 93031311; *Results of AP Poll, at* http://www.pollingreport.com/trade.htm (last visited Sept. 24, 2004), *available at* 2004 WL 93031311.

60 *See, e.g.*, Edward Luce, *Booming Bangalore Will be Backing Bush in November*, FINANCIAL TIMES, Sept. 22, 2004.

61 David Armstrong, *Business on His Mind: Corporate Interests Will be at the Forefront During the Final Weeks of the Presidential Campaign*, SAN FRAN. CHRONICLE, Aug. 31, 2004, at F1, available at 2004 WL 58606577.

62 Jonathan Weisman, *Some GOP Leaders Say Bush Too Weak on Outsourcing*, PITT. POST-GAZETTE, Apr. 4, 2004, at A9, available at 2004 WL 57959129.

63 John Kerry for President Campaign, *A Plan for Free and Fair Trade, at* http://www.johnkerry.com/issues/economy/trade.hmtl (last visited Sept. 20, 2004).

64 Luce, *supra* note 60.

tion, is the key to dealing with the current offshoring dilemma.[65] His administration has said that the response to offshoring should be threefold: "Level the playing field for trade by using retaliatory tools sanctioned by trade accords; create business conditions to allow U.S. workers to compete; and ensure U.S. workers have the skills to compete through education and job training initiatives."[66]

III. THE NEW WAVE OF PROTECTIONISM

Despite Chairman Greenspan's warning that the loss of jobs which the U.S. has faced for the last three years is "attributable largely to rapid declines in the demand for industrial goods and to outsized gains in productivity that have caused effective supply to outstrip demand," legislators across the country are introducing "protectionist" measures designed to stop foreign outsourcing.[67] Currently, a total of thirty-five states have introduced legislation that would negatively impact offshoring and both the U.S. House of Representatives and the U.S. Senate are presenting similar measures. Even though leading economists and federal advisors have strongly cautioned against instituting any protectionist measures for fear that they will make matters worse rather than better or spur foreign economic retaliation, lawmakers, perhaps responding to the clamors of an increasingly unemployed constituency, have drafted protectionist measures in droves.[68] This legislation tends to fall into five broad categories and this section will endeavor to explore each of those categories at both the state and federal levels.

A. *Category I: Limitations on Awards of Government Contracts*

By far the most popular model for anti-offshoring legislators to follow, limitations on awards of government contracts have provided the basic substance for bills introduced in thirty-three states and in both the House and Senate.[69] Bills falling into this category tend to

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[65] *See generally*, George W. Bush Reelection Campaign, *A Plan for Creating Opportunity for America's Workers*, *at* http://www.georgebush.com/agenda/chapter.aspx?ID=1 (last visited Sept. 20, 2004).

[66] Weisman, *supra* note 62.

[67] Greenspan's Remarks to Omaha, *supra* note 2.

[68] *See* Greenspan's Remarks to Omaha, *supra* note 2; Mankiw's Testimony, *supra* note 4.

[69] *See* S. 2094, 108th Cong. (2004); H.R. 3134, 108th Cong. (2004); H.R. 769, 2004 Reg. Sess. (Ala. 2004); G.A. 3069, 2003-2004 Reg. Sess. (Calif. 2004); S. 170, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004); S. 579, Gen. Assem., Jan. Sess. (Conn. 2004); H.R. 1533, 106th Reg. Sess. (Fla. 2004); H.R. 1357, 147th Gen. Assem. Reg. Sess. (Ga. 2004); H.R. 598, 57th Leg., 2d Reg. Sess. (Idaho 2004); S. 6613, 93d Gen. Assem. (Ill. 2004); H.R. 1381, 113th Gen. Assem., 2d Reg. Sess (Ind. 2004); H.R.

either present a strict ban on government contractors performing work outside the U.S. or they establish some sort of preference system for government agencies to follow when awarding contracts. For example, Vermont's General Assembly introduced a bill addressing offshoring that is indicative of the type of legislation drafted to completely ban use of offshoring by government contractors. Section 1 of the Act provides Vermont's rationale for drafting such a ban and is typical of the sentiment expressed in many state legislatures across the country:

> The General Assembly finds that the state regularly awards contracts for services that are vital to Vermont residents, and that a disturbing trend is developing nationally in which contractors and subcontractors under service contracts awarded by state governments employ persons in foreign countries to perform these vital services. The General Assembly further finds that persons performing these service contracts in foreign countries are generally paid wages that are significantly below the minimum wage in this state, and that this trend of awarding service contracts to be performed outside the United States is threatening to the jobs and livelihood of Vermonters and all Americans.[70]

The main text of the bill then states that "an agency of state government may not award a procurement contract for services to be rendered by a contractor or subcontractor from a site that is outside the United States."[71] A similar bill introduced in the Georgia Senate provides that "no state agency shall contract with a private provider or vendor for the provision of services if any such service will be performed outside the geographical boundaries of the United States."[72]

2400, 80th Gen. Assem., 2d Reg. Sess. (Iowa 2004); S. 538, 80th Leg., Reg. Sess. (Kan. 2004); S. 278, 2004 Reg. Sess. (Ky. 2004); H.R. 380, 2004 Reg. Sess. (La. 2004); H.R. 183, 418th Gen. Assem. Reg. Sess. (Md. 2004); S. 1109, 92d Leg., Reg. Sess. (Mich. 2004); S. 1792, 83d Reg. Sess. (Minn. 2004); H.R. 1293, 2004 Leg. Sess. (Miss. 2004); H.R. 1474, 92d Gen. Assem., 2d Reg. Sess. (Mo. 2004); H.R. 1223, 98th Leg., 2d Reg. Sess. (Neb. 2004); S. 494, 211th Leg. Sess. (N.J. 2004); S. 416, 46th Leg., 2d Reg. Sess. (N.M. 2004); G.A. 10347, 227th Ann. Leg. Sess. (N.Y. 2004); S. 991, 2003 Leg., Gen. Assem. Sess. (N.C. 2003); S. 228, 125th Gen. Assem. Reg. Sess. (Ohio 2004); H.R. 586, 187th Gen. Assem. Reg. Sess. (Pa. 2004); S. 2943, 2003-2004 Leg. Sess. (R.I. 2004); H.R. 4434, 115th Gen. Assem. Sess. (S.C. 2004); H.R. 1116, 2004 Reg. Sess. (S.D. 2004); S. 2344, 103d Gen. Assem. Sess. (Tenn. 2004); G.A. 702, Adjourned Sess. of the 2003-2004 Biennium (Vt. 2004); G.A. 315, 2004 Leg. Sess. (Va. 2004); H.R. 3187, 58th Reg. Sess., 2d Sess. (Wash. 2004); S. 389, 96th Leg. 2004 Reg. Sess. (Wis. 2004).

70 H.R. 702, 2003-2004 Adjourned Sess. (Vt. 2004).

71 *Id.*

72 S. 473, 147th Gen. Assem. Reg. Sess. (Ga. 2004).

The United States Workers Protection Act of 2004, introduced in both the House and the Senate, prohibits federal contract work from being performed overseas unless it is deemed by the President to be in the national security interest of the U.S.[73] Similarly, the American Manufacturing Jobs Retention Act of 2003 requires that any contractor performing services for a U.S. agency must employ at least fifty percent of its workers in the United States.[74] Comparable measures have been introduced in state legislatures throughout the country.

The other type of legislation falling under this categorical heading establishes a system awarding preference to contractors who certify that they will perform all of their work in-state or in-country. Virginia has introduced a measure to give preference to "goods produced in the United States, or to goods or nonprofessional services provided by U.S.-based firms or corporations, so long as the bid price of such firm or corporation is not more than 20 percent greater" than the low bid of a foreign corporation.[75] Legislation has also been presented in Virginia that would prohibit the state from entering into a contract for services unless the contract provides that "only citizens of the United States, legal resident aliens, and individuals with a valid visa will perform the services under the contract."[76] Additionally, Virginia has seen legislation that would require state agencies to "give consideration to the beneficial effect of the award [of a contract in excess of $500,000] on Virginia's economy."[77] Florida has proposed a similar measure which would require a state contractor to agree "as a provision in the contract, to use only residents of [Florida] as the providers of the service."[78] A host of other states have followed suit and introduced related legislation.

B. Category II: Mandatory Offshoring Disclosures

Six states and the U.S. Senate have introduced legislation that would make it mandatory for companies to make disclosures about any activities, such as conducting lay-offs or outsourcing production, that relate to offshoring.[79] A bill introduced in the Ohio House would require any employer that "eliminates employment positions in [Ohio]

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[73] S. 2094, 108th Cong. (2004); H.R. 3820, 108th Cong. (2004).
[74] H.R. 3134, 108th Cong. (2003).
[75] S. 151, 2004 Leg. Sess. (Va. 2004).
[76] H.R. 1010, 2004 Leg. Sess. (Va. 2004).
[77] H.R. 315, 2004 Leg. Sess. (Va. 2004).
[78] H.R. 1533, 106th Reg. Sess. (Fla. 2004).
[79] *See* S. 2090, 108th Cong. (2004); S. 337, 2004 Reg. Sess. (Ala. 2004); S. 1453, 2003-2004 Reg. Sess. (Calif. 2004); S. 602, Gen. Assem., Jan. Sess. (Conn. 2004); S. 2932, 106th Reg. Sess. (Fla. 2004); H.R. 2440, 83d Reg. Sess. (Minn. 2004); H.R. 459, 125th Gen. Assem. Reg. Sess. (Ohio 2004).

and relocates those employment positions outside of the United States" to provide those employees losing their jobs with written notice of the relocation.[80] A measure was introduced in the Connecticut House that would require companies with a net job loss of one hundred or more to submit to the state's Department of Economic and Community Development a statement including the number of jobs the company cut in Connecticut and relocated outside the United States; this bill would also allow a citizen who believes he has lost his job as a result of outsourcing to report the loss to the state for record-keeping purposes.[81]

At the federal level, the Jobs for America Act of 2004 would amend the Workers Adjustment and Retraining Notification Act (WARN) to require companies to disclose and report to the Department of Labor, affected workers, and state agencies responsible for unemployment assistance, any plans to lay off fifteen or more American workers and send those jobs overseas.[82] The Act would also require that affected employees be given three months notice and it would direct the Department of Labor to compile statistics on offshoring.[83]

C. Category III: Identification of Call Center Locations

In an effort to directly address the latest wave of offshoring, states and the federal government have taken steps to discourage continued foreign-outsourcing of white-collar jobs. The most common of these measures is legislation aimed at alerting consumers to the fact that their calls to and from call centers may be handled by operators overseas. Sixteen states have introduced legislation that would require a call center employee to disclose his physical location and the U.S. Senate has followed suit.[84]

A bill introduced in the Mississippi House typifies this category: it requires any person making telephone solicitations to a consumer in Mississippi to "announce clearly, at the beginning of each

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80 H.R. 459, 125th Gen. Assem. Reg. Sess. (Ohio 2004).

81 H.R. 5660, Gen. Assem., Jan. Sess. (Conn. 2004).

82 S. 2090, 108th Cong. (2004)

83 *Id.*

84 *See* S. 1873, 108th Cong. (2003); S. 484, 2004 Reg. Sess. (Ala. 2004); H.R. 2581, 46th Leg., 2d Reg. Sess. (Ariz. 2004); G.A. 1289, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004); S. 400, Gen. Assem., Jan. Sess. (Conn. 2004); H.R. 1218, 147th Gen. Assem. Reg. Sess. (Ga. 2004); H.R. 1922, 22d Leg. Sess. (Haw. 2004); H.R. 2810, 80th Leg., Reg. Sess. (Kan. 2004); H.R. 885, 2004 Leg. Sess. (Miss. 2004); H.R. 1497, 92nd Gen. Assem., 2d Reg. Sess. (Mo. 2004); S. 370, 211th Leg. (N.J. 2004); S. 991, 2003 Leg., Gen. Assem Sess. (N.C. 2003); H.R. 4434, 115th Gen. Assem. Sess. (S.C. 2004); H.R. 2340, 103d Gen. Assem. Sess. (Tenn. 2004); H.R. 3186, 58th Reg. Sess., 2d Sess. (Wash. 2004); H.R. 4584, 79th Leg. Sess. (W.Va. 2004); S. 538, 96th Leg., 04 Reg. Sess. (Wis. 2004).

call, his or her name, the company he or she represents, the geographical location from which the call is placed, and the purpose of the call."[85] Likewise, a bill presented in Georgia would require that employees at inbound call centers, within thirty seconds of receiving a customer's call, disclose his or her name, the name of the employer, and the city, state, and country in which the call center is located.[86] Bills introduced in Hawaii and Colorado represent a strain of legislation that would require call center employees to disclose their location only if the consumer makes the request for such information.[87] Interestingly, only one state, New Jersey, has included email in its legislation aimed at discouraging the use of overseas call centers.[88]

The Call Center Consumer's Right to Know Act of 2003, introduced by Senator Kerry, is very similar to its state counterparts.[89] The Act requires that any company using a call center to initiate calls to or receive calls from individuals located in the U.S. must have its employees disclose their physical location at the start of each telephone call.[90]

D. *Category IV: Prohibitions on the Transmission of Information*

At least twelve states have undertaken measures to prohibit companies from transmitting the personal or financial information of their customers abroad. Tennessee legislators introduced a measure that would require a company to obtain the express written permission of a customer before sending any "financial, credit, or identifying" information to a foreign country.[91] Both North Carolina and South Carolina have seen legislation with a nearly identical requirement.[92] In a similar vein, California proposed legislation that would require businesses to comply with very strict privacy requirements when sending an individual's personal information abroad.[93] Much of this legislation is aimed at either blocking the transmission of an individual's medical records to a site overseas or preventing a customer's financial

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[85] H.R. 885, 2004 Leg. Sess. (Miss. 2004).
[86] H.R. 1218, 147th Gen. Assem. Reg. Sess. (Ga. 2004).
[87] H.R. 1922, 22d Leg. Sess. (Haw. 2004) ("Any person who receives a telephone call from, or places a telephone call to, a customer sales call center or a customer service call, upon request, has a right to: (1) know the identification of the city, state, and country where the customer service employee is located."); H.R. 1289, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).
[88] S. 370, 211th Leg. (N.J. 2004).
[89] S. 1873, 108th Cong. (2003).
[90] *Id.*
[91] H.R. 2340, 103d Gen. Assem. Sess. (Tenn. 2004).
[92] S. 991, 2003 Leg., Gen. Assem. Sess. (N.C. 2003); H.R. 4434, 115th Gen. Assem. Sess. (S.C. 2004).
[93] S. 1451, 2003-2004 Reg. Sess. (Calif. 2004).

information from being sent to a foreign country without their express consent.

E. Category V: Restrictions on State Assistance Available to Offshoring Businesses

In an effort to discourage companies from downsizing their U.S.-based workforce and transferring labor overseas, at least five states and Congress have considered legislation that would institute penalties akin to economic sanctions against businesses that have laid off American employees and shifted jobs to a foreign country.[94] For instance, a bill in Washington would require that in order for businesses to qualify for state tax preferences, they must, among other things, have provided a net gain in jobs to the state.[95] In other words, if a Washington company wishes to receive the state tax credit and still take advantage of offshoring, it must create more jobs in-state than it outsources overseas.

The New York Assembly was presented with a proposal that would require any business within the state that outsourced jobs abroad to return any developmental assistance money received from the state.[96] Additionally, any business that had offshored jobs would not be eligible for any economic assistance from the state for five years from the date on which it was determined that the company was offshoring.[97] Similarly, Connecticut introduced a measure that would prevent a company offshoring 100 or more jobs from receiving any state grants or loans for a period of seven years.[98] Designating a company ineligible to receive state money if it participates in offshoring activities is fairly typical of the legislation found in this category.

The United States Workers Protection Act of 2004, discussed above, also includes a provision that would prohibit the dispersal of funds appropriated for financial assistance to a state unless that state has provided a certification that it will not use the funds to procure any goods manufactured or services performed outside of the U.S.[99]

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[94] *See* S. 2094, 108th Cong. (2004); H.R. 3820, 108th Cong. (2004); S. 169, 64th Gen. Assem. Sess., 2d Reg. Sess. (Colo. 2004); H.R. 5660, Gen. Assem., Jan. Sess. (Conn. 2004); G.A. 9567, 227th Ann. Leg. Sess. (N.Y. 2004); H.R. 2762, 58th Reg. Sess., 2d Sess. (Wash. 2004); S. 703, 79th Leg. Sess. (W. Va. 2004).

[95] H.R. 2762. 58th Reg. Sess., 2d Sess. (Wash. 2004).

[96] G.A. 9567, 227th Ann. Leg. Sess. (N.Y. 2004).

[97] *Id.*

[98] H.R. 5660, Gen. Assem., Jan. Sess. (Conn. 2004).

[99] S. 2094, 108th Cong. (2d Sess. 2004).

IV. Analysis of The New Protectionism – Implications for the U.S and the World

As more and more Americans join the growing lines of the unemployed, it becomes easier to cast foreign outsourcing in a negative light. For the past few years, the news media has tended to report offshoring in the same breath as the latest round of layoffs or increased joblessness in the U.S. In the minds of millions of Americans, offshoring has come to be equated with job loss and it is easy to understand why the only aspect of foreign outsourcing that can really be seen is its short-term, negative impact upon the American job market. When the nightly news reports that another 1,000 people have been laid off by Company XYZ due to offshoring, the average viewer sees these jobs as lost. In actuality, XYZ is saving millions of dollars that it can now put to better use at home through research, expansion, or the like. However, even if the savings is just being distributed amongst XYZ's shareholders as dividends, it is going to be infused back into the U.S. economy since the shareholders are likely to reinvest the money. This new and different spending will inevitably create new and different jobs, but these jobs will not be of the same type lost. They will be higher-value-added positions than the ones being replaced and this is how our economy continues to evolve. Alan Greenspan is "confident that new jobs will displace old ones as they always have," but he warns that the "job-turnover process" will not be without pain for those caught on the downside of this "creative destruction."[100] Protectionism is not the answer to the perceived offshoring crisis. Any successful protectionist measures will do little to create jobs and will only serve to encourage foreign retaliation, thus resulting in more jobs lost than saved.[101] The new jobs that will be created will require more education and many of those who have been unemployed by this creative destruction process will need re-education in order to find work. We need then, to "discover the means to enhance the skills of our workforce and to further open markets here and abroad to allow our workers to compete effectively in the global marketplace."[102]

By all measures, offshoring is a successful business practice and the most recent wave of white-collar outsourcing is no exception. Far from being a reversible trend, offshoring is becoming more entrenched in the American business culture as more companies in widely differing industries realize the obvious benefits it can entail. The offshoring of professional services is merely an example of a new type of trade and innovation that keeps U.S. companies at the "leading

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[100] Greenspan's Remarks to BC, *supra* note 1.

[101] Greenspan's Remarks to Omaha, *supra* note 2.

[102] *Id.*

edge of competitiveness."[103] The gains the United States will realize from this new form of trade will be no less significant than the gains from trade in physical goods.[104] Protectionist measures may save a few jobs in the short-term, but they will surely stifle innovation and job creation in the long run by unnecessarily tying up capital in wages.[105] Practically speaking, protectionism as a foreign trade policy makes very little sense considering the degree to which the U.S. is enmeshed in the global economy.[106]

The protectionist legislation that has been introduced, limiting the ability of governments to contract with companies utilizing offshoring, will surely have an adverse effect upon both the U.S and the global economy. Government contracts for infrastructure improvements, services, and the like are often exceedingly lucrative and are generally highly sought-after. If an agency is prohibited from contracting with a foreign company or an American company using foreign suppliers or subcontractors, taxpayers will bear the burden and will often be forced to spend more money for a comparable service merely because it is performed entirely within the U.S. Giving preference to domestic contractors will force businesses across the country to reevaluate current practices and either forfeit government contracts or discontinue work abroad; either scenario would weaken the U.S. economy. If American companies cannot work abroad, they will become less competitive and will put even more jobs in danger.[107] Restricting the power of governmental agencies to contract only with U.S. companies, not necessarily the most qualified provider or the lowest bidder, will certainly damage the American economy and will invariably have a negative impact upon the global market as well.

Legislation aimed at forcing businesses to disclose the physical location of their service centers or information about their offshoring practices is designed to bring the emotions of the consumer into the debate. By alerting consumers to the fact that businesses are using overseas facilities, lawmakers are almost certainly hoping that people will make the choice to "buy American," thus forcing businesses to abandon offshoring. Many who oppose foreign outsourcing believe that given the opportunity to choose, the average U.S. consumer would be willing to pay slightly more for a product made within the country, but that remains to be seen. Regardless, legislation of this nature, coupled with the negative news media treatment of foreign outsourcing, creates a public relations obstacle for businesses that wish to util-

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[103] MCKINSEY GLOBAL INST., *supra* note 25, at 7.

[104] Mankiw's Testimony, *supra* note 4.

[105] *See* BAILY & FARRELL, *supra* note 10, at 9.

[106] *See id.*

[107] *See id.* at 11.

ize offshoring. A company that elects to send jobs overseas is now seen as "evil" and somehow "unpatriotic" and so many are choosing to avoid the public relations headache associated with foreign outsourcing all together. The offshoring industry will certainly suffer on a global scale if U.S. companies cannot send work abroad and the American economy will be far less competitive if it is not able to outsource jobs to countries with lower wages.

Prohibitions on the transmittal of personal or financial information to overseas locations are highly effective measures to stifle the burgeoning overseas outsourced service industry. The latest wave of offshoring is almost entirely service oriented and proscriptions such as these would keep American companies from offshoring medical, accounting, financial consulting, or other information-based services overseas. These restrictions would also serve to keep call centers based in the U.S. since foreign call centers would be unable to access most account information and thus unable to perform any useful tasks. This class of legislation is perhaps the most devastating to the offshoring industry since it seems so innocuous but is in reality, very limiting. Any such measures would negatively impact the U.S. economy since they would serve to severely limit the success of any offshoring service enterprise. Similarly, the global markets would suffer if the U.S. was unable to utilize the growing outsourced service industry.

Lastly, the legislation banning state awards of grants, loans, or tax credits to companies that outsource any labor or services would serve primarily to alter the formula businesses use to evaluate the cost-effectiveness of offshoring. Faced with these restrictions, a company would be required to make an "either-or" decision between state aid and the potential benefits of foreign outsourcing. While the effects of this type of legislation might not be as damaging as some of the others, it would still stifle economic growth by making the consequences of offshoring prohibitive to many businesses dependant on tax breaks or state assistance.

Offshoring is not likely to fade into the horizon at any point in the near future. Businesses throughout the United States have been exposed to the obvious benefits posed by foreign outsourcing and will continue to avail themselves of its advantages for as long it remains economical to do so. The digital revolution will only continue to make offshoring a more feasible, less expensive alternative and it will certainly uncover new and different low-wage countries as viable options for the booming offshoring industry to consider. While it is currently the leader in the service-oriented foreign outsourcing field, India will not remain the best or the only offshoring option forever. The elections in India in which Sonia Gandhi's Congress Party and its far-left-leaning allies won a surprising victory over Prime Minister Atal Behari Vajpayee's incumbent government could spell disaster for the offshoring industry in India, but could open the market for a host of new low-wage countries.[108] The general feeling in India is that the parties that are coming into power would drastically slow, if not reverse, the country's liberalization process that began in 1991 and has attracted billions in foreign investment.[109] The fear that India may return to its pre-1991 economic policies has thrown the India stock market into turmoil and given rise to fears stateside that the future of the offshoring industry in India may be in jeopardy.[110] As a result of the political upheaval in India, American companies will certainly be forced to examine the offshoring potential of other low-wage countries, but protectionist legislation could severely limit this enterprise.

Whatever their shape or form, protectionist measures will only serve to alleviate domestic job market issues for the immediate future. Offshoring is a valuable tool for American businesses and lawmakers who should be embracing it as a vehicle for innovation, not deriding it as the U.S. economy's executioner. Indeed, the openness of the United States' economy and the inherent flexibility of its labor market are two of its greatest strengths.[111] The answer to the country's current woes will not be found in a bill limiting America's interaction with the global market. We need instead to enhance the skills of the domestic workforce through educational programs and incentives and we need to further open markets abroad to allow our highly-valued workers to compete in markets around the world.[112] Offshoring is sure to bring substantial benefits to the global economy, but the lion's share will only go to the U.S. if it remains an integral partner in the new service-oriented offshoring trade market.[113]

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108 Rai, *supra*, note 7.

109 *Id.*

110 *Id.*

111 *See* McKinsey Global Inst., *supra* note 25, at 9.

112 *See* Greenspan's Remarks to Omaha, *supra* note 2.

113 *See* McKinsey Global Inst., *supra* note 25, at 15.