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Crosby as Way-Station

By
Peter Spiro*

I would like to set out a bit of the factual and doctrinal backdrop for the Massachusetts Burma case. Then, I'll undertake a brief description of the *Crosby* decision itself, a narrow ruling that will leave many students of the issue unsatisfied. Unfortunately, the court does not write for academics, although it's obviously important to look closely at its pronouncements. And then, finally, I would like to look at the implications of the decision for this sort of activity on the part of state and local governments for the future.

I.

THE FACTUAL UNDERPINNINGS OF *CROSBY V. NATIONAL FOREIGN TRADE COUNCIL*

Until the mid-1980s, there were very few instances in which state and local governments sought directly and intentionally to influence events beyond American shores. In this respect, the anti-apartheid movement represented a very significant innovation in the strategic playbook of activists seeking to push international agendas. Faced with resistance by the federal government on the issue of sanctions against the apartheid regime in South Africa, the anti-apartheid movement turned to state and local governments to use the investment and procurement muscle of those governments against South Africa. There were two basic models of anti-apartheid legislation at the state and local level: the "divestment measures," those under which state and local governments divested their pension fund holdings of companies doing business in South Africa; and then more effectively, the "selective purchasing measures," under which state and local governments prohibited a company doing business in South Africa from competing for huge state and local government procurement dollars. There were several companies which did pull out of South Africa for fear of losing contracts with state and local governments. By the early 1990s, the anti-apartheid movement had more than one hundred state and local governments that had adopted such measures. Many think that these measures were an important element in the downfall of apartheid itself.

II.

CROSBY'S DOCTRINAL CONTEXT

That is an important factual element in the backdrop to the Burma law. The doctrinal context implicates three strands of Supreme Court decisions.

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First—the broadest and most controversial—was the “dormant foreign affairs power,” articulated only most recently in 1968 in the case of *Zschernig v. Miller*.¹ There, the Supreme Court struck down a state probate law because it had more than “an indirect or incidental effect” on foreign relations. This probate law denied reciprocity for inheritance in certain East Bloc nations, and had been implemented by state court judges with all sorts of derogatory political characterizations. The Court in *Zschernig* set a fairly low threshold for striking down state and local actions implicating foreign relations.

The second doctrinal strand is the “dormant foreign commerce clause,” the best articulation of which appears in the 1979 *Japan Line*² decision. There, the Court found it a paramount requirement that the nation “speak with one voice when regulating commercial relations with foreign governments.”³ In *Japan Line*, the Court struck down a state tax which fell more heavily on foreign corporations and which had excited some opposition from foreign governments. This was actually the first articulation of the “one voice test,” which has been used as a shorthand, or mantra, to characterize the exclusivity principle of the federal government over foreign relations.

Finally, the third doctrinal strand is that of preemption. In contrast to dormant powers, it works from affirmative federal action, as is true with preemption doctrine in general. Here, however, at least in one incarnation, it functions with a vengeance in the form of “field preemption,” so that if the federal government steps in just a little bit, it occupies the field and all state regulations must fall. The best example of this is *Hines v. Davidowitz*,⁴ in which the Court struck down a state law regulating the registration of aliens even though it paralleled a federal measure. Under this doctrine, even if a state law is ostensibly consistent with the federal regulation, it is preempted by the federal action.

I think all three of these doctrines have in common a functional underpinning, namely, the specter of the severe externalities of state-level action in the international context, at least in the traditional world of hostile nation-states. The dangers of states undertaking independent action on the international level were too great to be tolerated to any extent. States would have structural reasons for not taking into consideration national interests on the international plane, which would systematically result, if tolerated, in exciting foreign offense and retaliation not just against the single acting state, but against the nation as a whole. The context in which the doctrine developed was one in which the international relations posed grave dangers to the nation, potentially even its survival, especially as against the Cold War backdrop. In that context, one could not tolerate what would otherwise be constitutionally protected action on the part of the states. That, I think, is the functional underpinning for this doctrine, which antedated the Cold War, but reached its zenith during that sensitive period.

1. 389 U.S. 429 (1968).

2. *Japan Line, Ltd. v. L.A. County*, 441 U.S. 434 (1979).

3. *Id.* at 449.

4. 312 U.S. 52 (1941).

That is the doctrinal context, with the South African laws as an innovation clearly implicating all three strands of this doctrine. The courts never got a whack at the anti-apartheid laws. Nobody was willing to bring a challenge against the divestment laws for fear of appearing pro-South Africa. The only decision to result from the episode was a state supreme court decision⁵ upholding a divestment measure. But there were no federal court cases and the Supreme Court did not consider the issue.

In the wake of the anti-apartheid example, human rights advocates did, in fact, use it as a model. It was a successful strategy for advancing other causes, and one found other examples, involving Northern Ireland, Nigeria, Indonesia, Cuba, and Tibet, of human rights activists succeeding in winning the adoption of similar measures at the state and local level through the late 1980s and into the 1990s. But none garnered any great success until the Burma campaign, which by early 2000 counted measures in four states and twenty-six municipalities.

There was one intervening doctrinal development of significance here. In its 1994 decision in the *Barclays Bank*⁶ case, the Court upheld a California tax that had excited significant opposition from foreign governments. The decision marked an apparent retreat from the one voice approach in a context in which state-level action had provoked such opposition.

III.

THE CROSBY DECISION

The question in *Crosby*, or what everybody was looking for, was whether the Court would extend *Barclays* beyond the foreign commerce clause context to beat a retreat from the *Zschernig* case and the dormant foreign affairs power. The Court ducked that challenge. It found the Massachusetts law infirm, but on the narrowest of grounds. There was no dormant power ruling in *Crosby*—it was not even a field preemption case. Rather, the court struck down the Massachusetts law under garden-variety preemption analysis. In other words, it used the same approach in *Crosby*, at least ostensibly, as it would, for example, with a garden-variety bankruptcy or tax provision in terms of looking at whether the state law is acceptable in the face of intervening federal legislation. The Court found the state law to be an obstacle to the accomplishment of the purpose of Congress' full objectives under a 1996 federal measure⁷ imposing certain sanctions against Burma and clearing the way for others. So one did have a piece of federal legislation here and it was on the basis of that legislation that the Court found the Massachusetts law to have been preempted.

There are three provisions in the federal Burma law warranting a closer look. First, the federal measure provided the President with flexible and effective authority over economic sanctions against Burma, allowing the President to

5. *Bd. of Trs. of Employees' Ret. Sys. of Baltimore v. Mayor and City Council of Baltimore*, 317 Md. 72 (1989).

6. *Barclays Bank Plc. v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

7. 50 U.S.C. § 1701 (2002). The law concerns the exercise of presidential authority to deal with an unusual and extraordinary threat during a national emergency. *Id.*

impose certain sanctions or to waive other ones. The Court found it implausible that Congress would compromise presidential effectiveness by accepting state-level action differently calibrated than those federal sanctions. Second, the federal measure limited economic pressures to a different range of activities and actors than did the Massachusetts measure. For instance, the federal law only prohibited new investment in Burma, whereas the Massachusetts law impacted those who already had operations in Burma. The federal measure only purported to regulate United States entities, whereas the Massachusetts law was not so restricted. The Court found this to undermine congressional calibration of economic force.

The third provision of the federal Burma law which the Court found at odds with the Massachusetts law directed the President to develop "a comprehensive multilateral strategy to bring democracy to and improve human rights practices . . . in Burma."⁸ Here, Congress had directed the President to undertake this multilateral strategy. The Court found the state law to compromise the capacity of the President under this provision to speak for the nation with one voice when dealing with foreign governments. Here, *Crosby* resonates the *Zschernig* and *Japan Line* cases in using this one voice articulation. Nonetheless, this was only a constitutional resonance and not a constitutional ruling, insofar as the ruling did hinge on the statutory direction to the President to undertake this multilateral strategy. Thus, even though we have echoes in this case of broader dormant powers in the foreign relations area, by its own terms the decision does not hold up as anything of constitutional significance. *Crosby* emerges as a very narrow ruling, explicitly ducking the *Zschernig*, foreign commerce, and field preemption issues. It leaves the status of one voice doctrine largely unresolved.

IV.

THE FUTURE OF STATE-LEVEL ACTIONS

A. *The Potential Role of Savings Clauses in Sanctions Regimes*

In the wake of *Crosby*, where do such state-level actions stand? I think there are two possibilities. One is that this is just a bump in the road. Congress could in effect negate the *Crosby* ruling by adopting boilerplate savings clauses in future sanctions regimes, indicating a lack of preemptive effect for such regimes. This is a preemption analysis; it hinges on congressional intent. If Congress does not want to have these laws preempted with respect to future sanctions regimes, it can just say so explicitly, and then *Crosby* would not apply. I actually think that, to the extent such savings clauses became boilerplate, they would have constitutional significance on their own, as evidence of a change in constitutional norms with respect to such activity on the part of state and local governments, *Crosby's* constitutional echoes notwithstanding.

At the same time, it is quite clear that these state measures do complicate federal foreign policy making. Folks from the State Department are always

8. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 369 (2000).

jumping up and down about state sanctions initiatives; they care enough about them now, for example, to testify against the consideration of such measures in front of state legislators. But I think it is also possible that in the face of globalization, those complications are now tolerable. Here I would make an argument that such activity is sustainable in the face of globalization, and that it would be a good thing if Congress came back with some sort of boilerplate savings clauses to the effect that such activity is not preempted. To get back to the functional underpinnings of the old rule, one voice was driven by a concern about the externalities of state-level action. If a state acting on its own excited retaliation from another country, that retaliation would be against the entire nation as a whole, having potentially serious consequences. But in the face of globalization, other countries now understand that when Massachusetts acts, it is acting on its own, and it is not something that Washington is responsible for.

At the same time, economic globalization gives other countries the opportunity to retaliate discretely against an acting sub-national entity. If *Crosby* had upheld the Massachusetts law, I think it is quite possible that other countries would have come back to Massachusetts (as they had been intimating) and said, "Okay, you want to impose these sanctions against us, we have a lot of companies that we have located in Massachusetts and maybe they would be just as happy in New Jersey or Connecticut." These investments represent a lot of jobs, as do export sales of Massachusetts' products in European and Japanese markets. Perhaps Massachusetts would have changed its tune if it had faced significant concrete losses as a result of its sanctions regime. That, I think, is the argument for tolerating such state-level activity. It is also a context in which *Crosby* emerges as an ephemeral decision, over the long run.

B. *Globalization: An Impediment to Independent State Action?*

The other possibility here is that Congress will not come back with savings clauses indicating a lack of preemptive effect for future sanction regimes. But neither will this necessarily evidence a reaffirmation of federal exclusivity over foreign policy making. Rather, I think it may be consistent with, or be a part of, the continued diminishment of the power of governmental authorities in general in the wake of globalization, at all levels of government. Economic globalization has forced nation-states to accept increasingly entrenched free trade regimes. It is not as if what Massachusetts was doing was something that the U.S. could have done in its stead. Although I am not a trade expert—so I cannot conclusively say that for the U.S. to have adopted Massachusetts-type laws, they would have been inconsistent with the world trade regime—it is clear that things are moving in a direction that such activity at the national level would be intolerable, as at the sub-national level. In this sense, the failure of moves in the wake of *Crosby* to affirm the power of states to undertake these kind of sanctions will not indicate a confirmation of Washington's power, but, rather, an aspect of the new global regime under which governments in general cannot undertake such activity. I think that is where this would have ended up even if *Crosby* had

affirmed the Massachusetts law. Massachusetts would have ended up dropping these sanctions because of the economic pressures of the new global regime.

From that, I will conclude with one broader lesson from this issue: These doctrines are contingent on the structure of international society, and to the extent that globalization represents a dramatic restructuring of that society, we have to reexamine and conform our doctrines of constitutional law with this new global context, especially in the foreign relations law area where we are dealing directly with issues of international society. In this sense, the old rules that applied to these issues were contingent on a different international context. Now that the international contexts have changed, I think we should and will see a corresponding shift in our own constitutional doctrine to reflect those changes at the international level.⁹

9. For an elaboration of the themes presented in these remarks, see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).