Venturing Where Others Have Failed with Anti-Cuba Law: Florida Fights the Constitutional Battle Massachusetts Lost

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VENTURING WHERE OTHERS HAVE FAILED WITH ANTI-CUBA LAW: FLORIDA FIGHTS THE CONSTITUTIONAL BATTLE MASSACHUSETTS LOST

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I. INTRODUCTION

In 1996, Massachusetts enacted a law banning the state government from conducting business with companies associated with the country of Burma.1 The law took aim at Burma based on the country’s human rights

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violations and forced labor issues. Less than five years after its enactment, the Supreme Court of the United States found the law unconstitutional, as it violated the Supremacy Clause. Namely, the Court found the law unconstitutional because of congressional intent to grant the President “discretion . . . to develop a comprehensive, multilateral strategy” in dealing with the government of Burma.

In 2012, Governor of Florida, Rick Scott, signed a bill amending a law very similar to the Burma law in Massachusetts, but instead taking aim at the nation of Cuba. Florida’s Cuba Amendment (“Cuba Amendment”) remains very controversial and generated international scrutiny even before it was passed. The Cuba Amendment has similar provisions to the Massachusetts Burma Law (“Massachusetts law”) and “prohibits the State of Florida from awarding public contracts in excess of one million dollars to companies who have ‘business operations’ in Cuba.” “Business operations’ [are] defined as ‘engaging in commerce in any form . . . .’” A Brazilian construction conglomerate with billions of dollars hinging on the legal fate of the Cuba Amendment has already filed suit in federal court. A federal judge has issued a preliminary injunction against the law being enforced, allowing Odebrecht Construction, Inc. (“Odebrecht”) to resume work on projects in Mi-

2. HARRISON INST. FOR PUB. LAW, GEORGETOWN UNIV. LAW CENTER, DEFENDING THE MASSACHUSETTS BURMA LAW 3 (2000).
4. Crosby, 530 U.S. at 388.
8. Odebrecht Constr., Inc., 2012 WL 2524261, at *2 (quoting FLA. STAT. § 287.135(b)).
The Cuba Amendment implicates many of the same constitutional problems that afflicted the Massachusetts law, and the federal court issuing the injunction has expressed serious doubts as to the Florida law’s validity.11

The Cuba Amendment is not universally opposed, however, seeing that the law was approved by an almost unanimous majority of Florida’s Legislature and also received support from many Cuban-American lawmakers in Miami-Dade County,12 perhaps a sign of the almost fifty-year strife between the many Cuban exiles in Florida and Communist Cuba. Florida has a history of antagonism toward the rogue island nation, and has tried to enforce legislation like the Cuba Amendment in the past.13 However, courts in Florida have refused to uphold many of the anti-Cuba laws regardless of the political sensitivity surrounding the issue in the Sunshine State.14 The Cuba Amendment seems to be headed in the same direction.

This article will first discuss the Massachusetts law, including an analysis of the constitutional issues raised and the Supreme Court’s ruling.15 The second section will provide a brief history of Florida’s relationship with Cuba regarding various anti-Cuba laws and bills from Florida.16 This section will also note several federal laws directed at the nation of Cuba.17 The final section will focus on the recently signed Cuba Amendment and any constitutional issues that go with it.18 This section will also discuss recent litigation in federal court concerning the Cuba Amendment, compare and contrast the Massachusetts law with the Cuba Amendment, as well as discuss the reasoning of the Supreme Court decision that found the Massachusetts law unconstitutional.19 This discussion will be in an attempt to predict a result, should


12. See Mazzei, Fla.’s Trading Partners Warn of Backlash if Gov. Scott Signs New Anti-Cuba Legislation, supra note 6; see also Caputo & Mazzei, supra note 5.


15. See infra Part II.


17. See infra Part III.A.2.

18. See infra Part III.B.

19. See infra Part III.B.
the Cuba Amendment ascend to the Eleventh Circuit Court of Appeals and ultimately to the Supreme Court.

II. MASSACHUSETTS AND BURMA (MYANMAR)

Massachusetts has a history of economic boycotts.20 During the American Revolution, the colony of Massachusetts played a key role in “support[ing] the boycott of British goods.”21 Burma—which also gained its independence from Great Britain—maintained a parliamentary democracy from 1948 until 1962.22 From 1962 to 1988, the Burma Socialist Programme Party controlled the country and violence against demonstrators in the late 1980s continued into the 1990s.23 Massachusetts, and about twenty-two other states, enacted similar legislation.24 Although the Massachusetts law was the only one to make it to the Supreme Court, its invalidation by the Court meant the same for all similar state laws relating to Burma at the time.25

A. The Massachusetts Law

1. History

Despite being found unconstitutional, the Massachusetts law was not without good cause, seeing that Burma’s violations of human rights and systematic political oppression were especially egregious during the late twentieth century.26 According to one study, “forced labor account[ed] for [seven percent] of [the country]’s economy” and almost six million people were forced to work against their will during the 1990s.27 Burma’s military also engaged in the practice of portering, whereby porters were required to advance ahead of soldiers in an attempt to detonate land mines or shield soldiers from enemy fire.28 Millions were also relocated against their will and put in concentration camps where conditions were abysmal.29

20. See HARRISON INST. FOR PUB. LAW, supra note 2, at 2.
21. Id.
23. Id. at 1298–1300.
24. Id. at 1295–96.
25. Id. at 1296.
26. See id. at 1296, 1299–1300.
27. HARRISON INST. FOR PUB. LAW, supra note 2, at 3.
28. Id.
29. Id.
The call for states and governments to take action came initially from within Burma when Daw Aung San Suu Kyi, a political activist and winner of the Nobel Peace Prize, encouraged bans on economic investment in the country. Suu Kyi famously said, in 1996, “[p]rofits from business enterprises will merely go towards enriching a small, already very privileged elite. Companies [that trade in Burma] only serve to prolong the agony of my country by encouraging the present military regime to persevere in its intransigence.” The Massachusetts Legislature decided to heed this calling.

2. Implementation and Federal Competition

Initially, the anti-Burma law was successful in that it seemed to effectively draw American companies away from the troubled country. Broadly stated, the Massachusetts law “generally bar[red] state entities from buying goods or services from any person—defined to include a business organization—identified on a ‘restricted purchase list’ of those doing business with Burma.” The restricted purchase list had about 346 companies by the time the initial lawsuit was filed. The law made exceptions for persons or businesses in Burma related to the press, suppliers of telecommunications goods, and medical or health suppliers. Under the law, all state contracts were void if entered into with a company listed as having contact with Burma. The law applied to “companies already in Burma” as well as “existing contracts or contracts that may be renewed.”

The same year the Massachusetts law was passed, Congress enacted a federal statute that looked very similar. The many overlaps between the two laws were largely responsible for the Massachusetts law being found invalid.
unconstitutional under the Supremacy Clause.40 The federal statute “restricted aid to the government of Burma, . . . required federal representatives of ‘international financial institutions’ to vote against proposed financial assistance to Burma, . . . prohibited the issuance of visas to Burmese government officials, . . . [and] gave discretion to the Executive Office in determining when the sanctions may be lifted.”41 The main difference between the federal statute and the Massachusetts law was that the federal statute primarily targeted new money going to Burma and not necessarily contracts in effect at the time.42 The federal statute took on “a more political [and] less economic”43 tone, directing the President to “develop ‘a comprehensive, multilateral strategy to . . . improve human rights . . . in Burma.’”44 The President was also to work with neighboring countries and groups such as the Association of Southeast Asian Nations (ASEAN) in order to work towards a solution.45 This federal law would become the topic of several lawsuits brought against Massachusetts on constitutional grounds.46

B. Court Decisions

The Massachusetts state law resulted in a series of court opinions, starting in federal court in Massachusetts and ending in the Supreme Court.47 The following section will provide a general discussion of these cases.

1. United States District Court, District of Massachusetts

The legal action against the Massachusetts law occurred in the United States District Court for the District of Massachusetts.48 The suit started when the National Foreign Trade Council (NFTC) sued the two state offi-
cials charged with administering the Massachusetts law at issue, however, this article will refer to the defendant as the State of Massachusetts. In its opinion, the court noted that there were amicus briefs filed in support of the NFTC that came from around the world.

Initially, Massachusetts defended the law on the basis that a state can intrude into foreign affairs, so long as the result is indirect. Massachusetts also argued that the law did not create a direct contact between the state and the Nation of Myanmar and that important state interests embodied in the First and Tenth Amendments justify the statute; and the foreign affairs' doctrine is itself "vague," and therefore the court should leave to the legislative branch the issue of whether to invalidate the Massachusetts law and similar state procurement statutes.

While trying to analogize the Massachusetts law with other state statutes that were sustained, the state cited case law from federal courts that held in that manner. However, the district court distinguished these cases in that the statutes involved, unlike the Massachusetts law, "did not single out a particular foreign country for particular treatment." The district court also noted that not all "Buy American" statutes are necessarily constitutional.

The court acknowledged that the Massachusetts law did not fashion any direct contact with Burma, but that this was irrelevant for purposes of the law’s constitutionality. Referring to the Supreme Court of the United States
States’ decision in Zschernig v. Miller\(^{57}\)—also cited in the most recent opinion regarding Florida’s Cuba Amendment mentioned later\(^{58}\)—the district court explained that only a substantive impact is necessary.\(^{59}\) The court also stated the principle that the nobility of the state law bears no effect on foreign affairs infringement analysis.\(^{60}\)

The NFTC also argued that the Massachusetts law was preempted and violated the Foreign Commerce Clause.\(^{61}\) However, the district court refused to address either of these issues directly, as neither would have any consequential effect on the court’s ultimate decision.\(^{62}\) The district court did note that in order for a state law to be preempted by federal legislation, there must be intent on behalf of Congress to regulate in the area that the state law affects.\(^{63}\) The court only stated that because the NFTC argued that Congress impliedly intended to exercise its authority in the area, the NFTC had a higher burden than if arguing express preemption.\(^{64}\) The court also refused to address the Foreign Commerce Clause issue and the possible market participant exception, and finally held that the law was unconstitutional because of its “infringement [on the] federal government’s . . . foreign affairs” authority.\(^{65}\)

2. First Circuit Court of Appeals Decision

In National Foreign Trade Council v. Natsios,\(^{66}\) the First Circuit Court of Appeals affirmed the district court’s decision to hold for the law’s challengers.\(^{67}\) The NFTC—the plaintiff nonprofit organization comprised of companies involved in international business—filed suit in the federal trial court of Massachusetts and was granted summary judgment in its initial suit against Massachusetts.\(^{68}\)

\(^{57}\) 389 U.S. 429 (1968).
\(^{59}\) Baker, 26 F. Supp. 2d at 292 (citing Zschernig, 389 U.S. at 434).
\(^{60}\) Id. (citing United States v. Pink, 315 U.S. 203, 233–34 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937)).
\(^{61}\) Id. at 293; see also U.S. CONST. art. I, § 8, cl. 3; Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 449 (1979).
\(^{62}\) Baker, 26 F. Supp. 2d at 293.
\(^{63}\) Id. (citing Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 67 (1st Cir. 1997)).
\(^{64}\) Id. at 293 (citing Philip Morris Inc., 122 F.3d at 79).
\(^{65}\) Id.
\(^{66}\) 181 F.3d 38 (1st Cir.), cert. granted, 528 U.S. 1018 (1999).
\(^{68}\) Natsios, 181 F.3d at 48–49.
Upon granting review, the First Circuit first analyzed the Massachusetts law and its constitutionality under the federal government’s foreign affairs power, which was the basis for the lower federal court finding for the NFTC. The court rejected many of the state’s arguments, including that the First and Tenth Amendments protected the law. Generally, the court found that foreign affairs are to be handled by the federal government and that the Massachusetts Burma law was in violation of this principle of federalism. Namely, that the state law crossed a line into what should be the federal government’s jurisdiction of power by passing a law dealing with a foreign country in that the state law had more than an “incidental or indirect effect in [that] foreign countr[y].”

The second area of the court’s focus was on Congress’s Commerce Clause power. The court rejected the state’s argument that the Burma law was a constitutional exercise of power under the market participant exception of the Commerce Clause. The First Circuit reasoned that the state was regulating because it was “impos[ing] on companies with which it does business conditions that appl[ied] to activities not even remotely connected to such companies’ interactions with Massachusetts.” The court also refused to rule that the market participant exception even applied to the Foreign Commerce Clause, as the Supreme Court has not yet resolved this issue.

The third and final analysis dealt with whether the Massachusetts law was preempted by the federal statute. The court rejected the argument that the law was impliedly authorized and not preempted simply because Congress knew of the state law and never specifically preempted it. Instead, the court found that federal sanctions preempted the state law.

69. Id. at 50–52 (construing Zschernig v. Miller, 389 U.S. 429 (1968)).
70. Id. at 51 (quoting Baker, 26 F. Supp. 2d at 291); see also Zschernig, 389 U.S. at 434–35.
71. Natsios, 181 F.3d at 60–61.
72. Id. at 49, 77 (citing Missouri v. Holland, 252 U.S. 416, 434 (1920)).
73. Id. at 52 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)).
76. Natsios, 181 F.3d at 63.
77. Id. at 65.
78. See id. at 71.
79. Id.
80. Id. at 77.
Preemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs. The test which should be applied is set forth in *Hines*... [holding] that “[n]o state can add to or take from the force and effect of [a] treaty or statute.” 81

Therefore, because Massachusetts enacted a law regulating trade with Burma at the same time that federal sanctions did the same, but to a lesser extent, the state law was preempted. 82 Perhaps, what is most notable about the First Circuit’s decision is its breadth, when compared to the narrow district court and later Supreme Court decisions. 83 Ultimately, the court refused to uphold the law under the principle that it was the federal government’s, and not Massachusetts’s job to dictate the nation’s foreign policy agenda. 84

3. Supreme Court of the United States Decision

In 2000, the Massachusetts law advanced to the Supreme Court in *Crosby v. National Foreign Trade Council*, 85 where the Court unanimously held to strike it down. 86 Massachusetts appealed the First Circuit’s decision on the three grounds the court considered. 87 The Supreme Court granted certiorari to clarify legal issues afflicting several other states as well. 88

Justice David Souter began his opinion by stating a maxim of American constitutionalism: “Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional [a]ct . . . .” 89 Justice Souter continued by noting that this primarily occurs when Congress intends to “occupy the field” or when it is impossible for actors to comply with a federal statute and a state law.

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81. *Natsios*, 181 F.3d at 73 (alterations in original) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941)).
82. *Id.* at 75.
84. *Natsios*, 181 F.3d at 77.
86. *Id.* at 371–72, 388.
87. *Id.* at 371.
88. *Id.* at 371–72.
89. *Id.* at 372 (citations omitted).
law concurrently.\footnote{Crosby, 530 U.S. at 372–73 (citing California v. Arc Am. Corp., 490 U.S. 93, 101 (1989); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).} With the Massachusetts law in place, a barrier was placed before the federal government and its goals.\footnote{See Khorasanee, supra note 22, at 1307.} In fact, the Court’s decision to strike down the Massachusetts law rested solely on the basis that the state law was preempted.\footnote{See id. Compare Act of June 25, 1996, ch. 130, 1996 M A S S. A C T S 239, 241 (codified at M A S S. G E N. L A W S §§ 7:22G–7:22M, 40 F 1/2 (1997)), declared unconstitutional by Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000), with § 570(c), 110 Stat. at 3009-166.} Specifically, the Massachusetts law adversely affected the President’s discretion, went further in its terms than the federal law, and contrasted with Congress’s intent for the President to be diplomatic in dealing with Burma.\footnote{Crosby, 530 U.S. at 376–77 (citing Ch. 130, 1996 M A S S. A C T S at 242).}

Justice Souter first analyzed the degree of discretion that the federal law afforded the President.\footnote{Id. at 376.} The federal law gave the President broad discretion to end any United States sanctions on Burma if and when human rights and political reforms took place there.\footnote{Id. at 375 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).} Most importantly in this regard, the Court noted Congress’s intent that the President may “waive, temporarily or permanently, any sanction.”\footnote{Id. at 376.} The principle that the President has the most latitude to maneuver when Congress explicitly authorizes his actions has been firmly established by the Court.\footnote{Id. at 377.} By way of the federal law, Congress gave the President the “authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result.”\footnote{Id. at 376.} The Massachusetts law would act as a roadblock by implementing state sanctions against Burma, different from those imposed by the federal government.\footnote{Id. at 375 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).} Perhaps most notably, the Massachusetts law did not provide for a termination provision unlike the federal law.\footnote{Id. at 376.} Therefore, enforcement of the Massachusetts law would effectively diminish the President’s discretion as intended by Congress.\footnote{Id. at 377.}
Next, the Court focused on the conflicting scopes of the two laws. Justice Souter noted that the federal law was limited to “United States persons, . . . immediate sanctions, . . . [only] ‘new investment’ . . . and [did not apply to] . . . contracts to sell or purchase goods, services, or technology.” On the contrary, the Massachusetts law applied to “individuals and conduct that Congress . . . [specifically] exempted or excluded from sanctions.” However, it should be noted that the Massachusetts law operated by employing indirect economic sanctions through limiting business contracts while the federal law’s implementation was more direct by way of the executive. Justice Souter noted not only that the Massachusetts law was broader than the federal law, but also emphasized how broad in fact it was, seeing that foreign companies would be subjected to the Massachusetts law’s provisions. Because of the Massachusetts law’s broad provisions and the inability for many entities to comply with the federal law at the same time, the federal law preempted the Massachusetts law.

Lastly, the Court reasoned that the Massachusetts law was preempted by federal legislation because of its effect on “the President’s capacity . . . for effective diplomacy.” Congress not only intended that the President have discretion in dealing with Burma, but also that he act as the sole representative of the United States on the world stage in dealing with Burma. No-where is there evidence that Congress intended that the President’s voice be “obscured by state or local action.” The President’s inability to work undisturbed with other countries was evidenced when many United States allies formally protested the Massachusetts law.

102. See id. at 377–78.
104. Id. at 378.
105. Crosby, 530 U.S. at 378; see Ch. 130, 1996 MASS. ACTS at 241.
106. Crosby, 530 U.S. at 379; Ch. 130, 1996 MASS. ACTS at 239–241; § 570(b), (f)(2), 110 Stat. at 3009-166 to 3009-167.
108. Id. at 381.
109. See id. at 380–81 (citing U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. II, § 3; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).
110. Id. at 381.
The most notable of these were the European Union (EU), members of ASEAN, and Japan.\textsuperscript{112} Japan and the EU also filed formal complaints with the World Trade Organization, although these complaints were dropped after action in the United States District Court.\textsuperscript{113} Actions taken by these allies made it clear that the Massachusetts law could not exist side by side with the Federal Act.\textsuperscript{114} “In this case, repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress’s diplomatic objectives.”\textsuperscript{115} In his conclusion, Justice Souter noted that failure to expressly state that a federal law is preemption cannot be implied.\textsuperscript{116}

It has been noted that the Court’s opinion was very narrow, especially in comparison to the district court’s opinion.\textsuperscript{117} The fact that the opinion can be read so narrowly has led some to argue that states are free to enact legislation similar to the Massachusetts law so long as there is no congressional act imposing similar or competing sanctions.\textsuperscript{118} It has also been said that the Crosby decision is unlikely to prevent other states from passing similar laws,\textsuperscript{119} and the recent amendment in the State of Florida is evidence of this proposition.\textsuperscript{120}

\section*{III. Florida}

\subsection*{A. Florida and Cuba}

Florida and the nation of Cuba have had a contentious relationship evidenced by the Florida Legislature’s zeal for enacting many laws affecting

\begin{itemize}
\item \textsuperscript{112} Crosby, 530 U.S. at 382 (citing Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 47 (1st Cir.), cert. granted, 528 U.S. 1018 (1999)).
\item \textsuperscript{113} Id. at 383 & n.19; Natsios, 181 F.3d at 47.
\item \textsuperscript{114} See Crosby, 530 U.S. at 383 (citing Brief for the European Communities and Their Member States et al. as Amici Curiae in Support of Respondent, supra note 111, at *7).
\item \textsuperscript{115} Id. at 386.
\item \textsuperscript{116} Id. at 387–88 (citing Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941)).
\item \textsuperscript{119} Denning & McCall, supra note 92, at 754; see also Crosby, 530 U.S. at 371–72.
\item \textsuperscript{120} See FLA. STAT. § 287.135 (2012); see also Odebrecht Constr., Inc. v. Prasad, No. 12-cv-22072-KMM, 2012 WL 2524261, at *1 (S.D. Fla. June 29, 2012).
\end{itemize}
travel and the use of taxpayer money. Congress has also behaved similarly. This section will focus on Florida and federal legislation related to Cuba.

1. State Action

Florida has consistently implemented legislation affecting Cuba, much of which has been upheld. This becomes clear when one looks at the number of court opinions in federal courts over the past decade. In *Faculty Senate of Florida International University v. Winn*, the Eleventh Circuit held that a state law directing universities not to use state funds for travel to Cuba was constitutional and not preempted by federal law. In *Faculty Senate of Florida International University*, the court distinguished the case from *Crosby* by reasoning that the Florida law at issue only placed restrictions on taxpayer dollars and not on individuals or companies trying to travel or trade. The court concluded that states have a reasonable amount of discretion in deciding how to spend taxpayer money in education programs.

In 2008, a federal judge for the United States District Court for the Southern District of Florida issued an order enjoining a state representative from enforcing a Florida law affecting businesses providing travel to Cuba. The court reasoned that because the federal government had demonstrated intent to occupy the field, the Florida law was likely preempted. Eight years earlier, the same court issued a preliminary injunction barring enforcement of a law very similar to the Cuba Amendment, which is a main

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122. See id. at *2–4.

123. See *Odebrecht Constr., Inc.*, 2012 WL 2524261, at *2 n.3 (citing *Faculty Senate of Fla. Int’l Univ.*, 616 F.3d at 1207; *ABC Charters, Inc.*, 591 F. Supp. 2d at 1280; *Miami Light Project*, 97 F. Supp. 2d at 1176).

124. See id.


126. Id. at 1207–08, 1212.


128. Id. at 1208, 1210–11.


130. Id. at 1304.
focus of this article. The law was signed by Governor Scott in 2012 and is the most recent anti-Cuba legislation from Florida.132

2. Federal Action

The federal government has also been fairly active in enacting legislation imposing sanctions on Cuba.133 Many of these regulations are highly relevant to the recent litigation regarding the Cuba Amendment, and are discussed by the federal court in Florida, where litigation recently occurred.134 The Cuban Assets Control Regulations—passed in 1963—are a set of federal regulations that generally limit exports, imports, and travel by United States persons and entities to Cuba.135 Almost thirty years later, the federal government enacted the Cuban Democracy Act (CDA) as a reaction to Cuba’s “consistent disregard for internationally accepted standards of human rights and . . . democratic values.”136 The CDA provided significant discretion to the President, allowing him “to waive the sanctions imposed by the CDA should [he] determine that the Cuban government has taken action consistent with the promotion of democracy as specifically delineated by the CDA.”137

In 1996, the federal government passed another act “after the Cuban government downed two private planes [with] anti-Castro Cuban-Americans [onboard].”138 The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 contains four titles authorizing the President and others to take certain action.139 The first title authorizes “the President to oppose Cubal’s

131. Miami Light Project v. Miami-Dade Cnty., 97 F. Supp. 2d 1174, 1176 (S.D. Fla. 2000). The law at issue in this case contained several restrictions including prohibiting the county of Miami-Dade from entering into business contracts with companies that had done business with Cuba. Id.; see also Fla. Stat. § 287.135(2) (2012).
134. See Odebrecht Constr., Inc., 2012 WL 2524261, at *5; see also Fla. Stat. § 287.135.
135. 31 C.F.R. §§ 515.201–208, .560. This federal law generally places limitations on persons inside the United States and their ability to transact for credit, gold or silver, or import merchandise that has been made in Cuba, been transported through Cuba, or made from material produced or grown in Cuba. 31 C.F.R. §§ 515.201–208.
membership [in] various international organizations and institutions.” The second title authorizes the President to consult with Congress and provide assistance in the event a democratic government is established in Cuba. The third title creates a right of action against people who traffic property confiscated from United States citizens or businesses by the Cuban government. The final title excludes from the United States . . . any alien who “traffics in confiscated property, a claim to which is owned by a United States national,” or any “corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national.”

The third section was initially controversial on the world stage because it affects foreign countries. However, this situation was diffused when President Clinton exercised the section’s waiver provision that is to be used whenever “the President determine[s] ‘the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.’” To date, every successive President has invoked the waiver provision meaning that section three has never legally been in effect.

The final piece of federal legislation at issue in recent litigation relating to Cuba, and that this article will briefly mention, is the Trade Sanctions Reform and Export Enhancement Act of 2000. This Act actually loosened sanctions on Cuba relating to agriculture, medicine, and medical devices. Specifically, this law makes exceptions so that agricultural products and medical devices may be free of sanctions limiting their “provision or use.” The Obama Administration has also lowered restrictions, allowing religious
individuals to travel to Cuba from the United States; perhaps an indication of sanctions becoming more and more lenient.

B. The Florida Law

The next part of this article will proceed by discussing the Cuba Amendment in more specificity while focusing on the most recent federal court order barring its enforcement because of the law’s questionable constitutionality. This discussion will include comparisons and analogies to the Massachusetts law and relevant constitutional issues raised by the Crosby decision. There will also be a brief analysis of the political aspect of the Cuba Amendment.

1. Odebrecht Construction, Inc. v. Prasad

The plaintiff in this recent legal suit argued that the Cuba Amendment is unconstitutional for many of the same reasons the Massachusetts law was found unconstitutional. Odebrecht Construction, the plaintiff, is a contractor headquartered in Coral Gables with a parent company in Brazil. Odebrecht was founded in 1990 and has a close history with the State of Florida and local governments throughout. Perhaps the most recent relationship is the plaintiff’s contract with Broward County to refurbish Fort Lauderdale International Airport, a contract worth over two hundred million dollars.

The plaintiff’s parent company, Odebrecht S.A., is headquartered in Brazil and conducts business on almost every continent. It is actually another company owned by parent Odebrecht S.A., COI Overseas, that has given rise to the current controversy for the Coral Gables based subsidiary. COI Overseas Ltd. is currently contracting with Cuba and working on the Port of Mariel. As signs of the project’s significance to Brazil, a major

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152. Id. at *1 (quoting Amended Complaint at 6, Odebrecht Constr., Inc. v. Prasad, No. 12-cv-22072-KMM, 2012 WL 2524261 (S.D. Fla. June 29, 2012), ECF No. 4).

153. Id.

154. Id.

155. Odebrecht Constr., Inc., 2012 WL 2524261, at *1 (citing Amended Complaint, supra note 152, at 6).

156. Id.

157. Id.
bank in the country is providing financing and “President Dilma Rousseff [recently] traveled to the Port of Mariel to view [its] progress.”

The defendant in the suit was the Secretary of the Florida Department of Transportation, Ananth Prasad, as it is his duty to administer the Cuba Amendment. However, this discussion will refer generally to the State of Florida as the defendant.

In the opinion following the order granting a preliminary injunction, the court analyzed the plaintiff’s likelihood of success in its argument that the law is unconstitutional. Judge K. Michael Moore of the United States District Court for the Southern District of Florida discussed the Supremacy Clause and whether the Cuba Amendment is preempted by federal legislation. In the opinion following the order, Judge Moore noted the Massachusetts law, discussed earlier, and the reasons a unanimous Supreme Court found the law unconstitutional—namely, that the Massachusetts law interfered with the President’s discretion, was broader in scope than the federal law, and conflicted with a directive issued to the President by Congress. Judge Moore went on to state that “the Cuba Amendment suffers from the same shortcomings and . . . is likely unconstitutional.”

a. Preemption

The first reason Judge Moore doubted the constitutionality of the Cuba Amendment is it directly interferes with Presidential discretion under the CDA and is likely preempted. As the sole representative of the United States on the world stage, the President has the discretion to waive sanctions placed on Cuba by way of the CDA, should Cuba go through a political reform and construct a democratic government. Judge Moore also noted the controversial aspect of the Libertad Act and the fact that every President has waived enforcement of the right of action provision; thereby evidencing congressional intent not to punish foreign entities with business contracts in

158. Id.
159. Id. at *2.
161. Id. at *4–7.
163. Id. at *5.
Cuba. Alternatively, the Cuba Amendment forces businesses “to choose between doing business with Florida [or] Cuba.”

Next, Judge Moore noted that the Cuba Amendment goes further than federal sanctions on Cuba because of the fact that companies located in the United States suffer merely because of the relationships maintained by their corporate owners. The Cuba Amendment also imposes greater penalties than federal legislation in that offenders may be required to pay civil fines and are banned from making a bid to the State of Florida for three years after violating the law.

Lastly, “the Cuba Amendment interferes with the President’s directive under the Libertad Act” to work at establishing a democratic government in Cuba. Judge Moore, quoting Justice Souter in Crosby, stated that the President should be able to work on the world stage and use his power to “‘bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.’” Judge Moore characterized this effect as a diminishment in the President’s bargaining power in the realm of foreign policy.

Judge Moore next criticized Florida’s counterarguments starting with the first that the Cuba Amendment is not preempted because federal law does not prohibit any of its terms. However, this is contrary to Crosby where Justice Souter noted that “‘[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.’” This is one of the reasons that the Massachusetts law was preempted. Florida’s argument that the President lacks broad discretion to adjust Cuba sanctions was re-
jected as flatly wrong by Judge Moore, who noted that for years Presidents have exercised considerable discretion in this area. Finally, Judge Moore stated that Florida is wrong in arguing that the case is not ripe in that no complaint has been lodged with the World Trade Organization, because the court need not wait for such a complaint in order to invoke a preliminary injunction against a law that is likely preempted.

In his analysis, Judge Moore discussed the various ways in which the Cuba Amendment clashes with federal law. Responding to Florida’s argument that there is no conflict, Judge Moore clearly stated that “[f]ederal law regulates all aspects of commerce with Cuba, including but not limited to the importation and exportation of various goods and services, travel between the United States and Cuba, and private rights of action against the Cuban government.” This demonstrates a clear congressional intent to occupy the field, and therefore, casts serious doubt on the constitutionality of the Cuba Amendment. In Faculty Senate of Florida International University mentioned earlier, the Eleventh Circuit found that a Florida law limiting state money from being used by state universities for travel to Cuba was not preempted. Judge Moore distinguished this case by noting that the law at issue in Faculty Senate of Florida International University did not prohibit trading by anyone, while the Cuba Amendment obviously is intended to reduce trade.

b. Federal Foreign Affairs Power

Judge Moore’s order next discussed the Cuba Amendment in light of the federal government’s foreign affairs power. The American system of governance necessitates that the federal government reign over all foreign affairs so that the states themselves do not become involved in foreign affairs potentially at the expense of other states. Judge Moore noted Zschernig,
where the Supreme Court held that state laws that interfere with the federal government’s foreign affairs power may cause “‘disruption or embarrassment.’”185 The Zschernig court also noted that a state law must have more than an “‘incidental or indirect effect in foreign countries’” in order to cross the line into the federal government’s jurisdiction.186 The test a court must employ to determine whether a state law has this effect was formulated in the familiar Natsios opinion.187 These factors include the state law’s intent, effects on purchasing power, effects on other states’ decisions to implement similar legislation, international reaction, and the difference when compared to federal law.188

However, Judge Moore declined to apply this test and instead merely stated that it was enough that the Cuba Amendment is probably unconstitutional in that it clashes with Zschernig because of the impact on foreign countries that trade with Cuba and Florida, such as Brazil and Canada.189 Thus far, several countries have already voiced concern over the Cuba Amendment because of how it affects them.190 It is for these reasons that Judge Moore believed the Cuba Amendment unconstitutionally delved into the federal government’s foreign affairs power.191 Although not addressed directly by the Supreme Court, the First Circuit employed similar reasoning when examining the Massachusetts law under the federal government’s foreign affairs power.192

c. Commerce Clause

The final constitutional analysis undertaken by Judge Moore related to the Commerce Clause located in Article I of the Constitution.193 The federal government has the power “to ‘regulate Commerce with foreign [n]ations’” and the Supreme Court has acknowledged a negative implication, namely the

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188. Id.
189. See Odebrecht Constr., Inc., 2012 WL 2524261, at *8; see also Zschernig, 389 U.S. at 434–35; Natsios, 181 F.3d at 53.
190. Mazzei, Miami Federal Judge Blocks New Florida Anti-Cuba Law, supra note 10. Canada and Brazil are two of Florida’s largest trading partners. Id.
192. See Natsios, 181 F.3d at 49.
193. Odebrecht Constr., Inc., 2012 WL 2524261, at *9; see also U.S. CONST. art. I, § 8, cl. 3.
Dormant Commerce Clause. Judge Moore noted the importance of the Commerce Clause in that when conducting trade with foreign nations “‘the people of the United States act through a single government.’” Quoting Japan Line, Ltd. v. County of Los Angeles, Judge Moore stated “the Supreme Court held that a state law violates the Foreign Commerce Clause when it ‘impair[s] federal uniformity in an area where federal uniformity is essential,’ and ‘prevents this Nation from “speaking with one voice” in regulating foreign trade.’” Judge Moore stated this to express that the Foreign Commerce Clause is a greater power for the federal government than the Interstate Commerce Clause. The Court in Japan Line, Ltd. noted that a state law will violate the Foreign Commerce Clause if it clashes with a federal law and causes the United States to be heard speaking with more than “‘one voice’” in dealing with foreign policy.

Next, Judge Moore stated the reasons that the Cuba Amendment possibly violates the Foreign Commerce Clause. Describing the law as facially discriminatory because the law discriminates against entities doing business with Cuba by its very terms, Judge Moore noted how international companies and countries that conduct legitimate business with Cuba are prohibited by Florida from doing business with it. The effect on the federal government’s power to conduct foreign economic activity is obvious according to Judge Moore, who drew parallels between the Cuba Amendment and the Massachusetts law in that they both “impede[] the federal government’s ability to speak with one voice in regulating foreign trade.” Further, Judge Moore expressed that there is no justification for the Cuba Amendment because the regulatory mechanism of the federal government is already in effect.

198. See id. at *9–10 (citing Japan Line, Ltd., 441 U.S. at 448).
201. Id. at *9.
The State of Florida responded to the initial suit by arguing that the Cuba Amendment is a legitimate exercise of the state’s power under the market participant exception, relying on Supreme Court precedent. Florida argued that as an actor in the market, it could choose not to do business with companies linked to Cuba based on this exception. Judge Moore disagreed and explained that while the exception may be applicable, the Cuba Amendment would not be subject to it for the reason that it markedly affects companies outside of Florida’s market. Because the law has this effect on companies outside of Florida, namely those doing business with Cuba, the Cuba Amendment constitutes Florida regulating downstream activity, which it may not do under the market participant exception. Similarly, a federal court found that the Massachusetts law was unconstitutional under the market participant exception for comparable reasons.

d. **Political Facet**

Florida’s decision to pass the Cuba Amendment also entails a delicate political balancing act with the South Florida Cuban exile community on one hand, and foreign countries and companies with business interests in the state on the other. Odebrecht, the subsidiary of a large Brazilian corporation, could lose hundreds of millions of dollars in business if the courts ultimately uphold the law. The fact that the Cuba Amendment will essentially punish Brazilian company Odebrecht for its ties to Cuba is especially awkward considering the fact that tourists from that country make up one of the largest


206. *Id.*


groups of Florida visitors. Florida Governor Scott even traveled to Brazil in early 2012 to encourage trade. Canada has also complained about the Cuba Amendment because of concerns for Canadian companies that operate in Florida and Cuba. However, the law has garnered considerable support in parts of Florida, such as heavily populated Cuban areas like Hialeah. When the legislation was still being considered, there was very little opposition to Miami lawmakers who favored it.

However, not everyone who is anti-Cuba approves of the law or believes that it will be effective. Generally, pro-business organizations, like the Florida Chamber of Commerce, have criticized the new law. Some believe that the law will help bolster the Cuban government by creating sympathy for a regime that many detest. Despite the law’s controversy, Florida expressed an intent not to retreat and has recently announced that it will be appealing Judge Moore’s order. The State of Florida has expressed interest in having the Eleventh Circuit overrule Judge Moore.

e. Other Concerns

It is worth briefly mentioning some other issues that are raised by the Cuba Amendment. Relating specifically to Odebrecht, but potentially affecting other entities, is the issue of injury. Because of the constitutional bar against states being sued for money damages, Odebrecht would have virtually no way of recovering its substantial losses caused by the law’s enforcement. In fact, the losses to Odebrecht alone would be almost four billion dollars.

214. Id.
215. See id.
216. See id.
217. See, e.g., Andres Oppenheimer, Florida Law Against Cuba May Help Cuba, MIAMI HERALD, May 2, 2012, http://www.miamiherald.com/2012/05/02/v-print/2780050/florida-law-against-cuba-may-help.html. The Dean of Saint Thomas University School of Business called the Cuba Amendment “a black eye on Florida” because of his belief that the law is unconstitutional. Id.
218. Id.
219. See id.
221. See id.
223. See id.
dollars. If the Cuba Amendment is fully enforced, companies doing business with Cuba—as well as the State of Florida—may lose a substantial sum, seeing that contracts that have already been negotiated will have to be abandoned and the state may be forced to contract with companies that cost more.

2. Lessons and Implications from Crosby

One thing to be noted about the Crosby opinion is that it was unanimous. While the members of the Court today are different than in 2000, five of the Justices are still serving. Provided the similarities between the two laws, it seems improbable that any of the five Justices would change their minds. However, it is not impossible that new members could be appointed before and if Odebrecht advances that far.

IV. CONCLUSION

The Massachusetts law and the Florida Cuba Amendment have many common provisions. Both laws have targeted an unpopular regime and attempted to put pressure on that government by way of economic sanctions, whereby the state enacting the legislation refuses to contract with entities associated with the country targeted by the law. While the First Circuit did not hesitate to call the Massachusetts law unconstitutional for a variety of reasons, the Supreme Court was very specific that it was striking it down on the basis that federal law preempted it.

It is uncertain whether the Cuba Amendment will advance to the Supreme Court like the Massachusetts Law. However, if the law does advance

224. Id. at *11 n.13.
225. See, e.g., id. at *11.
226. Denning & McCall, supra note 92, at 750–51.
232. Denning & McCall, supra note 92, at 750–51.
to the Supreme Court, the Court’s opinion in *Crosby* should be a strong indicator of the likely result.233

The future of Cuba’s government is also uncertain, given its aging leader. President Raul Castro recently announced that his government might even be willing to talk with the United States about plans for the future.234 If the two governments formally meet, it would be the first time in fifty years.235 However, given the Obama Administration’s less contentious attitude towards Cuba, it appears that the present time is about as good as any in the past fifty years for the two countries to make amends.236 Of course Florida’s Cuba Amendment has done little to help the two countries move forward, and the state government may pose an obstacle to this occurring.237

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235. *Id.*


237. See *Caputo & Mazzei*, *supra* note 5.