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De“baiting” Interstate Commerce, Down East Style

by Robert H. Abrams

State of Maine
v.
Robert Taylor
(Docket No. 85-62)
Argued March 24, 1986

ISSUES

The state of Maine, by statute, bans interstate importation of live baitfish. The principal question in this case is whether the statutory import embargo can survive federal constitutional scrutiny under the Commerce Clause. A secondary question concerns the proper standard of review to be applied by a federal appellate court when it considers the rectitude of a lower court decision.

FACTS

Factually, *Maine v. Taylor* is relatively easy to understand. Maine law (12 Me. Rev. Stat. Ann. section 76113) forbids the importation into the state of “any live fish, including smelts, which are commonly used for baitfishing in inland waters.” The federal Lacey Act Amendments of 1981 (16 U.S.C.A. sections 3371 and 3372) deem violation of state fish and game laws, like the Maine live bait law, a violation of federal law. In 1983, Robert Taylor was indicted on two counts by a federal grand jury for violating the Lacey Act Amendments incorporating the Maine live bait law and for conspiring to do so.

Taylor, a businessman in Argyle, Maine, is a live bait dealer. Responding to his inability to meet customer demands for golden shiners from his own Maine bait farm, Taylor in 1981 imported 158,000 golden shiners (a live baitfish) from out-of-state sources. The shipment was intercepted at the Maine border. The previously mentioned federal indictment was handed down and Taylor entered a conditional guilty plea, reserving the right to contest the constitutionality of the underlying Maine statute as a violation of the Commerce Clause. If the Maine law is found invalid, the indictment will likewise fall and be dismissed; if the Maine law is upheld,

Taylor will stand convicted of violating the federal law that incorporates the Maine baitfish import ban.

The procedural posture of the case is more difficult to recount than is the factual setting. When Taylor challenged the indictment by attacking the constitutionality of the Maine statute, the federal court, as required by statute, informed the Maine Attorney General of the challenge to Maine law. Maine intervened in the case, as permitted by federal statute, for the limited purpose of defending the law from Taylor’s constitutional attack.

The federal prosecution thereafter moved through several stages. First, the federal magistrate assigned to the case, D. Brock Hornby, heard extensive evidence regarding the purposes served by the Maine law and alternatives by which Maine could protect itself against the evils it sought to avoid through the baitfish import ban. Hornby found the state’s evidence persuasive that imported baitfish introduced serious diseases not otherwise present in Maine’s indigenous baitfish population and risked introduction into the Maine ecology of numerous exotic species. He further found that baitfish inspection techniques, either on import or at the place of breeding, were not sufficiently validated and could not protect Maine’s important interest in protecting its baitfish population and ecology against the perils posed by importation. In legal terms, he found that Maine had carried its burden in demonstrating that the admittedly discriminatory (against interstate commerce) statute was the only feasible means of protecting an important state interest.

The United States District Court for the District of Maine upheld the magistrate’s recommended ruling (585 F. Supp. 393 (1984)), and Taylor appealed. The First Circuit Court of Appeals reversed the district court (752 F. 2d 757 (1985)). The circuit court indicated that it was less certain of the purpose of the statute than was the court below. Economic protectionism, rather than ecologic protectionism, was suggested as possibly being the statute’s true purpose. Nevertheless, the circuit court opinion did not decide that issue; it held instead that the Maine baitfish import ban was unconstitutional because there were less restrictive means available to Maine by which it could accomplish valid resource protective concerns.

At this point the case took a final, rather picayune procedural turn. Maine, not surprisingly, wanted to appeal the invalidation of its baitfish law. The United States, as the prosecuting authority in the case, was of

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the opinion that the case was not of broad significance and did not itself wish to seek United States Supreme Court review of the case. The United States took this view despite its agreement with Maine's view that the law was valid. Usually, only the United States can seek review of federal court decisions dismissing its prosecutions. Here, however, because Maine's law was truly the law in issue, the United States supported Maine's right to appeal under the general statute (28 U.S.C. section 1254(2)) governing appeals from the circuit courts to the United States Supreme Court of cases invalidating state laws as repugnant to the United States Constitution. There is only a remote possibility that this procedural aspect of the case will surface as an important issue in the case, but it is worth noting that the invocation by Maine of section 1254(2) in this setting is a bit novel.

BACKGROUND AND SIGNIFICANCE

It is hard to measure the significance of this case without first reading the United States Supreme Court's opinion that ultimately decides it. Legally, the area of interstate product import bans appears to be well-settled. Laws like Maine's that are facially discriminatory against interstate commerce must meet a very high burden of justification, both as the legitimacy and importance of purposes and as to the lack of alternative less burdensome to commerce. If the Supreme Court leaves this basic doctrine unaltered, the decision may center on the latitude enjoyed by the circuit court of appeals when it reviews a district court determination that a state, like Maine, has met its high burden of proof on these issues. Such an opinion will be enlightening to lower court and appellate judges, but not of vast significance.

If, instead, the Supreme Court in deciding this case focuses extensively on the constitutional merits, the case is of broader (but still not overwhelming) interest and importance. State efforts to protect local resources from threats posed by non-local parasites, diseases and exotic species are vital to the well-being of major industries. This much is apparent in episodes like California and Florida attempting to restrict the spread of Med fly infestation. If *Maine v. Taylor* becomes a primer on how to litigate challenges to such laws, it will shape much subsequent litigation. The case holds some seeds for this possibility. Maine's law is at once a plainly rational response to an articulated ecologic danger and a plainly protectionist measure that shields Maine baitfish pro-

ducers from out-of-state competition. Learning what arguments succeed in persuading the Supreme Court to adopt one or the other view of such a statute is valuable to future litigators on both sides of Commerce Clause cases.

ARGUMENTS

For the State of Maine (Counsel, Cabanne Howard, State House, Augusta, ME 04333; telephone (207) 289-3661)

1. The Supreme Court has jurisdiction of Maine's appeal in this case.
2. The factual determinations of the magistrate, adopted by the district court, were not clearly erroneous and were therefore not open to redetermination by the circuit court of appeals.
3. The Maine baitfish import ban serves vital state ecologic interests which cannot be adequately protected by alternative means.
4. The incorporation of state fish and game laws by the federal Lacey Act Amendments lessens the stringency of Commerce Clause scrutiny to be applied in the review of such state laws when subjected to constitutional challenge.

For Robert J. Taylor (Counsel of Record, E. Paul Eggert, 5 Milk Street, Box 427, Portland, ME 04112; telephone (207) 775-3101)

1. The state of Maine may not properly invoke United States Supreme Court jurisdiction under 28 U.S.C. section 1254(2) to appeal dismissal of a federal criminal appeal.
2. Maine's baitfish import ban violates the Commerce Clause because strict scrutiny reveals its purposes include economic protection of local interests against interstate competition.
3. Maine's baitfish import ban violates the Commerce Clause because there are alternative means by which Maine can protect its ecology from the dangers associated with baitfish importation.

For the United States (Supporting Maine) (Counsel, Donald A. Carr, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

1. The United States joined in all of Maine's arguments save that based on the Lacey Act Amendments of 1981.