**Constitutional Law I**

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**Supplemental Reading #9: Dormant Commerce Clause**

106 S.Ct. 2440

Supreme Court of the United States

**MAINE, Appellant**

**v.**

**Robert J. TAYLOR …**

No. 85–62.

Argued March 24, 1986. Decided June 23, 1986.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion.

Justice BLACKMUN delivered the opinion of the Court.

Once again, a little fish has caused a commotion. The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing.

Appellee Robert J. Taylor (hereafter Taylor or appellee) operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish, he arranged to have 158,000 live golden shiners delivered to him from outside the State. [Taylor was prosecuted for violating the statute].

Taylor moved to dismiss the indictment on the ground that Maine's import ban unconstitutionally burdens interstate commerce … The District Court found the statute constitutional and denied the motion to dismiss… The Court of Appeals for the First Circuit reversed, agreeing with Taylor that the underlying state statute impermissibly restricts interstate trade…

I

…

II

... Although the [Commerce] Clause … speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade. Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State's border. Still, as both the District Court and the Court of Appeals recognized, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power is by no means absolute, and the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.

In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are clearly excessive in relation to the putative local benefits, statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes v. Oklahoma,* 441 U.S., at 336, that once a state law is shown to discriminate against interstate commerce “either on its face or in practical effect,” the burden falls on the State to demonstrate both that the statute “serves a legitimate local purpose,” and that this purpose could not be served as well by available nondiscriminatory means.

The District Court and the Court of Appeals both reasoned correctly that, since Maine's import ban discriminates on its face against interstate trade, it should be subject to the strict requirements of *Hughes v. Oklahoma,* …

III

The District Court found after an evidentiary hearing that both parts of the *Hughes* test were satisfied, but the Court of Appeals disagreed. We conclude that the Court of Appeals erred …

A

… The prosecution experts testified that live baitfish imported into the State posed two significant threats to Maine's unique and fragile fisheries.   First, Maine's population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.

The prosecution experts further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species. According to their testimony, the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species a physical impossibility.  Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish.  … [N]o scientifically accepted procedures of this sort were available for baitfish.

… [T]he District Court … found that Maine “clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish,” because “substantial uncertainties” surrounded the effects that baitfish parasites would have on the State's unique population of wild fish, and the consequences of introducing nonnative species were similarly unpredictable. Second, the court concluded that less discriminatory means of protecting against these threats were currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised… Although the Court of Appeals did not expressly set aside the District Court's finding of a legitimate local purpose, it noted that several factors “cast doubt” on that finding. First, Maine was apparently the only State to bar all importation of live baitfish. Second, Maine accepted interstate shipments of other freshwater fish, subject to an inspection requirement. Third, “an aura of economic protectionism” surrounded statements made in 1981 by the Maine Department of Inland Fisheries and Wildlife in opposition to a proposal by appellee himself to repeal the ban. Finally, the court noted that parasites and nonnative species could be transported into Maine in shipments of nonbaitfish, and that nothing prevented fish from simply swimming into the State from New Hampshire.

Despite these indications of protectionist intent, the Court of Appeals rested its invalidation of Maine's import ban on a different basis, concluding that Maine had not demonstrated that any legitimate local purpose served by the ban could not be promoted equally well without discriminating so heavily against interstate commerce. Specifically, the court found it “difficult to reconcile” Maine's claim that it could not rely on sampling and inspection with the State's reliance on similar procedures in the case of other freshwater fish.

…

B

Although the proffered justification for any local discrimination against interstate commerce must be subjected to “the strictest scrutiny,” [*Hughes v. Oklahoma,* 441 U.S., at 337,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979135099&pubNum=708&originatingDoc=Ice9a0c9e9c9611d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_708_1737&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1737) the empirical component of that scrutiny, like any other form of factfinding, is the basic responsibility of district courts, rather than appellate courts. As this Court frequently has emphasized, appellate courts are not to decide factual questions *de novo,* reversing any findings they would have made differently. … In light of th[e] testimony [presented below], we cannot say that the District Court clearly erred in concluding that the development of sampling and inspection techniques for baitfish could be expected to take a significant amount of time. …

C

Although the Court of Appeals did not expressly overturn the District Court's finding that Maine's import ban serves a legitimate local purpose, appellee argues as an alternative ground for affirmance that this finding should be rejected. After reviewing the expert testimony presented to the Magistrate, however, we cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and nonnative species could have on Maine's fisheries. Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. …

Nor do we think that much doubt is cast on the legitimacy of Maine's purposes by what the Court of Appeals took to be signs of protectionist intent. Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to “simple economic protectionism consequently have been subject to a “virtually *per se* rule of invalidity.” [*Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139496&pubNum=708&originatingDoc=Ice9a0c9e9c9611d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_708_2535&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2535). But there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a *post hoc* rationalization.  …

IV

… The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, “apart from their origin, to treat [out-of-state baitfish] differently,” [*Philadelphia v. New Jersey,* 437 U.S., at 627.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978139496&pubNum=708&originatingDoc=Ice9a0c9e9c9611d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_708_2537&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2537) The judgment of the Court of Appeals setting aside appellee's conviction is therefore reversed.

Justice STEVENS, dissenting.

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. “When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.” *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 353 (1977).

Like the District Court, the Court concludes that uncertainty about possible ecological effects from the possible presence of parasites and nonnative species in shipments of out-of-state shiners suffices to carry the State's burden of proving a legitimate public purpose. The Court similarly concludes that the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary. It seems clear, however, that the presumption should run the other way. Since the State engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure.

This is not to derogate the State's interest in ecological purity. But the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. … If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity. Otherwise, it must further that asserted interest in a manner far less offensive to the notions of comity and cooperation that underlie the Commerce Clause. …

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97 S.Ct. 2434

Supreme Court of the United States

**James B. HUNT, Jr., Governor of the State of North Carolina, et al., Appellants,**

**v.**

**WASHINGTON STATE APPLE ADVERTISING COMMISSION.**

No. 76-63.

Argued Feb. 22, 1977. Decided June 20, 1977.

Mr. Chief Justice BURGER delivered the opinion of the [unanimous] Court.

In 1973, North Carolina enacted a statute which required, inter alia, all closed containers of apples sold, offered for sale, or shipped into the State to bear “no grade other than the applicable U.S. grade or standard.”

In an action brought by the Washington State Apple Advertising Commission, a three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce. [We affirm.]

…

(1)

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a multimillion dollar enterprise which plays a significant role in Washington's economy. Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately $1 million each year.

 …

In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States, which in effect required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or none at all. State grades were expressly prohibited. In addition to its obvious consequence prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina, the regulation presented the Washington apply industry with a marketing problem of potentially nationwide significance. … [They would need to change] their marketing practices to accommodate the needs of the North Carolina market, i.e., repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. ….

With these problems confronting the industry, the Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades. An administrative hearing was held on the question but no relief was granted. Indeed, North Carolina hardened its position shortly thereafter by enacting the regulation into law…

 … [T]he Commission instituted this action challenging the constitutionality of the statute in the United States District Court for the Eastern District of North Carolina. Its complaint … sought a declaration that the statute violated, inter alia, the Commerce Clause …

… [T]he District Court found that the North Carolina statute, while neutral on its face, actually discriminated against Washington State growers and dealers in favor of their local counterparts. This discrimination resulted from the fact that North Carolina, unlike Washington, had never established a grading and inspection system. Hence, the statute had no effect on the existing practices of North Carolina producers; they were still free to use the USDA grade or none at all. Washington growers and dealers, on the other hand, were forced to alter their long-established procedures, at substantial cost, or abandon the North Carolina market. The District Court then concluded that this discrimination against out-of-state competitors was not justified by the asserted local interest the elimination of deception and confusion from the marketplace arguably furthered by the statute. Indeed, it noted that the statute was “irrationally” drawn to accomplish that alleged goal since it permitted the marketing of closed containers of apples without any grade at all. The court therefore held that the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of Washington apples, and enjoined its application.

(3)

[The Court first held that the Commission had standing to challenge the North Carolina law.]

(4)

We turn finally to the appellants' claim that the District Court erred in holding that the North Carolina statute violated the Commerce Clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants do not really contest the District Court's determination that the challenged statute burdened the Washington apple industry by increasing its costs of doing business in the North Carolina market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples.

Prior to the statute's enactment, appellants point out, apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including the State of Washington, had their own grading systems which, while differing in their standards, used similar descriptive labels (e. g., fancy, extra fancy, etc.). This multiplicity of inconsistent state grades, as the District Court itself found, posed dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion by replacing the numerous state grades with a single uniform standard. Moreover, it is contended that North Carolina sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin. …

As the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. … Moreover, as appellants correctly note, [state authority] is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs.  By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national “common market,” we are confronted with the task of effecting an accommodation of the competing national and local interests. …

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most obvious, is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As previously noted, this disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA, system because of the former's greater consistency, its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

Third, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-a-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such “downgrading” offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

…

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under no grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. Finally, we note that any potential for confusion and deception created by the Washington grades was not of the type that led to the statute's enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only “deceive” or “confuse” a consumer to his benefit, hardly a harmful result.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grand would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington’s could not be demonstrated to be equal or superior to the corresponding USDA categories. Concededly, even in this latter instance, some potential for “confusion” might persist. However, it is the type of “confusion” that the national interest in the free flow of goods between the States demands be tolerated.

The judgment of the District Court is

Affirmed.