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Bradley J. Sayles
University of Kentucky

THE DECLINE OF EDIBLE EQUINE: A COMMENT ON *CAVEL INTERNATIONAL INC. V. MADIGAN*

BRADLEY J. SAYLES*

I. INTRODUCTION

The horse is an iconic symbol that holds a special place in the hearts of many Americans. Not only is the animal an athlete racing for glory in the sport of kings, but the horse has carried American soldiers into war and American cowboys into the west. Ironically, at a time when the Lone Ranger called out to his trusty steed Silver on television sets and radios, the horse found its way on to the American kitchen table. Following World War II, beef prices skyrocketed and some Americans began to purchase cheaper and leaner horse meat.[1] Although horse meat never became a staple of the mainstream American diet, it still found its way onto several menus. For example, the Harvard Faculty Club served horse meat it obtained from the nearby Suffolk Downs racetrack until 1985 and it was only removed when the newly hired French chef refused to prepare it.[2]

While the consumption of horse meat remains legal in the United States, currently there exists no market for it. However, several European and Asian countries eat the meat regularly.[3] In 2006 America was the fifth largest exporter of edible equine, shipping over 26 million pounds of horse meat and generating $40 million in sales.[4] This is even more amazing given the fact that only three slaughterhouses butchered horses for human consumption in 2006.[5] Two of those companies maintained slaughterhouses in Texas, but were forced to cease operations in 2007 when the Fifth Circuit upheld legislation outlawing the practice.[6] This left Cavel International (hereinafter "Cavel"), as the sole exporter of edible equine in the United States. Cavel's primacy was short-lived, however, as Illinois quickly followed Texas's lead and passed an amendment to the Illinois

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*Notes Editor, KENTUCKY JOURNAL OF EQUINE, AGRICULTURE, & NATURAL RESOURCES LAW, 2009-2010. B.A. 2005, Northern Kentucky University, M.P.A. 2007 Northern Kentucky University, J.D. expected May 2010, University of Kentucky College of Law.

[1] *See Manners and Morals: Horse of a Different Flavor*, TIME, July 9, 1951, at 17 (Article provides tips for preparing horse meat).

[2] History of the Harvard Faculty Club, http://www.hfc.harvard.edu/about_history.html (last visited Aug. 26, 2009). The newly hired chef refused to prepare the horse meat because it was frozen.

[3] *See* Cavel Int'l, Inc. v. Madigan, 500 F.3d 551, 552 (7th Cir. 2007).

[4] Tony Dokoupil, *They Shoot Horses, Don't They?*, NEWSWEEK, Oct. 15, 2007, at 86, 87.

[5] *Id.*

[6] Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry, 476 F.3d 326, 337 (5th Cir. 2007).

Horse Meat Act, which made it illegal to butcher horses for human consumption.

In *Cavel International Inc. v. Madigan*, Cavel challenged the constitutionality of the Illinois amendment on two grounds: claiming, first, that the Illinois amendment was preempted by the Federal Meat Inspection Act and, second, that the amendment unduly interfered with U.S. foreign commerce and therefore violated the Dormant Commerce Clause. This Comment examines the U.S. Court of Appeals for the Seventh Circuit's approach to removing the Cavel slaughterhouse and the issues surrounding that approach.

Section II of this Comment provides the legal background controlling the issues in question, including an examination of the Illinois Horse Meat Act, the Federal Meat Inspection Act, and Article I, § 8, clause 3 of the Federal Constitution. Section III discuses the background and the procedural history of the case. Section IV addresses the claims put forth by Cavel, the Seventh Circuit's discussion of the issues in the case, and the court's holding. Finally, section V explains the implications of the holding and the impact the decision had on both Cavel and the horse meat industry as a whole.

II. LEGAL BACKGROUND

A. Illinois Horse Meat Act

On May 24, 2007, the Illinois Horse Meat Act was amended to include section 1.5 which states that slaughter for human consumption is unlawful:

> (a) Notwithstanding any other provision of law, it is unlawful for any person to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption.
>
> (b) Notwithstanding any other provision of law, it is unlawful for any person to possess, to import into or export from this State, or to sell, buy give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption.

> (c) Any person who knowingly violates any of the provisions of this Section is guilty of a Class C misdemeanor.[7]

The Illinois Legislature went on to provide exceptions by allowing horse slaughter for the following: "commonly accepted non-commercial recreational or sporting activities[,] . . . existing laws relate[d] to horse taxes or zoning," and non-equine food producing animals.[8]

B. Federal Meat Inspection Act

The Federal Meat Inspection Act (hereinafter "FMIA") includes regulations governing the processing of horse meat when it is used for human consumption. Section 601 of the FMIA, initially limits its scope to "any meat or other portion of the carcass of any cattle, sheep, swine, or goats . . . capable of use as human food."[9] However, the section also states that "equines shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, and goats."[10] The Act further provides rules that impact the packing of any meat food product. Section 678 of the FMIA contains a preemption clause that states that "[r]equirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act [USCS §§ 601 et seq.], which are in addition to, or different than those made under this Act may not be imposed by any State or Territory."[11]

C. *The Dormant Commerce Clause*

The Federal Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[12] Courts have long recognized that this clause not only delegates to Congress the authority to regulate interstate or foreign commerce, but prevents state and local laws from placing an undue burden on that commerce.[13] There are two predominate ways a state can impede upon Congress' commerce power: first, a state can create a law that clearly discriminates in favor of local citizens or, second, a

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[7] Illinois Horse Meat Act, 225 ILL. COMP. STAT. 635/1.5 (2007).

[8] *Id.*

[9] 21 U.S.C. § 601(j) (2006).

[10] *Id.*

[11] 21 U.S.C. § 678 (2006).

[12] U.S. CONST. art. I, § 8, cl. 3.

[13] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–25 (1978); *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

state can create a law that is nondiscriminatory and treats all citizens equally, but still imposes an undue burden on interstate commerce.[14] If the law is discriminatory, the Court applies the strict scrutiny test which only upholds the state law if it is narrowly tailored to further a compelling state interest.[15] In contrast, nondiscriminatory statutes are given more favorable treatment with the Court, balancing the burden on the interstate and foreign commerce against the local state interest and putative benefit.[16]

Whether discriminatory or not, when a state passes legislation that places a burden on foreign commerce it is subject to further review. The need to have a single unified voice when trading with foreign nations has made foreign commerce "pre-eminently a matter of national concern."[17] The burden of proof rests with the plaintiff to demonstrate that the state law interferes with foreign commerce.[18]

III. CASE HISTORY

In the last 20 years, Cavel has participated in horse slaughter and recently stood as the last remaining U.S. slaughterhouse in the business.[19] The facility was located in the small college town of Dekalb, Illinois, near Chicago.[20] It employed over 60 workers that slaughtered 40,000 to 60,000 horses a year with an estimated $20 million in annual revenues.[21] Brokers obtained the horses at auction and sold them to Cavel for around $300 a horse.[22] Although the facility was located in the U.S., Cavel's entire output was exported to European and Asian markets.[23]

Prior to May 24, 2007, the Illinois Horse Meat Act governed the licensing, inspecting, and labeling of horse meat slaughtered within the state.[24] The May 24 amendment put an end to the practice altogether by making it illegal for a person "to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption."[25] Soon after the Illinois Horse Meat Act's enactment "Cavel moved for a preliminary injunction against the enforcement of the

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[14] *See City of Philadelphia*, 437 U.S. at 623–25; *see also Pike*, 397 U.S. at 142.

[15] *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); *see also* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

[16] *City of Philadelphia*, 437 U.S. at 624.

[17] Japan Line, Ltd. v. Los Angeles, 441 U.S. 434, 448 (1979).

[18] *Id.*; *see also* Barclays Bank, PLC v. Franchise Tax Bd., 512 U.S. 298, 324–28 (1994); Bd. of Trustees v. United States, 289 U.S. 48, 59 (1933).

[19] Cavel Int'l Inc. v. Madigan, 500 F.3d 551, 552 (7th Cir. 2007).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 553.

[24] *Id.*

[25] *Id.*

amendment."[26] The District Court for the Northern District of Illinois held that Cavel failed to show that its claims were likely to ultimately prevail on the merits and denied the request.[27] Cavel appealed to the Seventh Circuit which granted a preliminary injunction pending its decision.[28] The case was argued on August 16, 2007 and the decision was issued on September 21, 2007.[29]

IV. THE ANALYSIS OF THE UNITED STATES SEVENTH CIRCUIT COURT OF APPEALS

A. Holding

In its decision, the Seventh Circuit quickly ruled that amendments made to the Illinois Horse Meat Act (hereinafter "Amendment") were not preempted by the FMIA and spent a majority of the decision discussing whether the state's action was in violation of the Commerce Clause.[30] First, the Court found that the Amendment was not discriminatory, and, second, that the burden imposed on commerce was not clearly excessive in relation to the putative local benefits, and, finally, that Cavel failed to meet its burden of proof as to the potential impact on foreign commerce.[31]

(1) Federal Meat Inspection Act

Cavel claimed that the Amendment was preempted by the FMIA which stipulates that any requirements imposed by any state "'in addition to, or different'" from those made under the Act, are void.[32] Cavel argued that the FMIA specifically refers to, and regulates, horse slaughter and therefore the Amendment is voided because it rendered the federal requirements inapplicable by disallowing the slaughter of horses.[33] The court stated that the clear intent of the FMIA was the regulation of meat produced for the purpose of human consumption and, because in years past horse meat was produced for human consumption in the United States, it was "natural to make the Act applicable."[34] The Court reasoned that just because the federal government taxes income from gambling, it does not follow that all states have to permit gambling. [35] It was clear that the

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 551.
[30] *See id.* at 553–54.
[31] *Id.* at 555–58.
[32] *Id.* at 553 (quoting 21 U.S.C. §678 (2006)).
[33] *See Id.*
[34] *Id.* at 553–54.
[35] *Id.* at 554.

Amendment was not meant to be an addition to the FMIA.[36] However, the Court found that the two laws could co-exist because the Illinois Amendment was not concerned with inspection, which is the primary purpose of the FMIA.[37] The FMIA is "concerned with inspecting premises at which meat is produced for human consumption rather than with preserving the production of particular types of meat for people to eat."[38]

(2) Dormant Commerce Clause

Having refuted the preemption argument, the Court addressed Cavel's claim that the Amendment violated the Dormant Commerce Clause. In so doing, the Court provided an in-depth discussion of the legal issues involved.

i. Discrimination

The first step in the court's analysis was to determine whether the statute discriminated in favor of local citizens.[39] The Court cited several cases concerning laws with an obvious state-firm bias and noted that these incidents were the clearest cases of a Commerce Clause violation.[40] However, discrimination alone does not make a state law unconstitutional. If the state proves there is no other way to accomplish its legitimate goals except through discriminatory legislation the law may remain in place.[41] The Seventh Circuit found that in this case there was no discrimination.[42] The Amendment equally prevented both in-state and out-of-state firms from slaughtering horses and no local merchant or producer benefited from the ban on slaughter.[43]

When a statute is determined to be nondiscriminatory, a high burden is on the plaintiff and the Court applies the test derived from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[44] In *Pike*, the Court held that when a "statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly* excessive in relation to the putative local benefits."[45]

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[36] *See id.*
[37] *See id.*
[38] *Id.* (citations omitted).
[39] *See id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 559.
[43] *Id.* at 555.
[44] *Id.*
[45] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

ii. Balancing the Burden Imposed Against Putative Local Benefits

Before applying the *Pike* Test the court noted that in the past it "expressed doubt that even this tough test is available to plaintiffs unless they show at least "mild" discrimination against interstate commerce."[46] At a minimum, the *Pike* test requires "'incidental' 'effects on interstate commerce be shown.'"[47] The court continued on to note that absent any "discrimination, a burden on interstate commerce that had no rational justification would be invalid."[48] As an example the court pointed to a famous Illinois case, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), which required all semi-trucks to have a particular type of mudguards.[49] The mudguard law impacted both non-local and local truckers alike, but because it lacked a rational basis the state law was invalidated, despite no proof of a disparate impact.[50]

Cavel's argument was similar to the one made in *Bibb*, that the Amendment served no reasonable purpose.[51] Cavel argued that since horses age, their usefulness wanes and they inevitably die, it makes no difference whether the horses "are eaten by people or by cats and dogs."[52] The Court was not persuaded by this line of argument because slaughtering horses for human consumption is different than slaughtering horses for other purposes. If horse meat is to be used for human consumption, the horses must be alive prior to slaughter. Therefore Cavel had to pay for the horses and their shipment. Factories that produce pet food, however, do not slaughter the animal but make the product from the carcasses.[53] Furthermore, the owner of the deceased horse usually pays to have it delivered to the rendering plant.[54] The court held that these practices created an obvious financial benefit to the horse owner willing to sell his horse for slaughter rather than wait for it to die or have it euthanized and then pay to have it taken to a rendering plant.[55] It is a logical inference that many horses die sooner than they naturally would have because of the practice of horse slaughter for human consumption.[56]

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[46] *Cavel*, 500 F.3d at 555.

[47] *Id.* (citations omitted).

[48] *Id.* at 556 (citing Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995)).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 553.

[54] *Id.* at 556.

[55] *Id.*

[56] *See id.* at 556–57.

States have a long recognized "legitimate interest in prolonging the lives of animals that their population happens to like."[57] It mattered little to the court that Illinois could have done more to protect horses because states are allowed to balance competing interests or to take only small steps in furtherance of a legitimate goal.[58] If the Amendment failed to prolong the life of even one horse, the state may also have an interest, "within reason, to express disgust at what people do with the dead, whether dead human beings or dead animals."[59] The court opines that "[t]here would be an uproar if restaurants in Chicago started serving cat and dog steaks, even though millions of stray cats and dogs are euthanized in animal shelters."[60] Whether the Amendment was based on the state's interest of prolonging the life of an animal its population adores, or expressing distaste for human consumption of horse meat, the court felt there was some rational basis for the Amendment. Furthermore, the court pointed out that Cavel could have moved into other markets which use slaughtered horse meat, such as zoos.[61] The statute as written only prohibited slaughtering for human consumption[62] and therefore Cavel may shift its horse slaughter to serve the zoo market which uses the meat to feed their carnivorous animals.[63]

iii. Potential Impact On Foreign Commerce

In this case the Dormant Commerce Clause analysis did not end at establishing a rational basis for the nondiscriminatory law because Cavel exported its entire output to foreign countries and therefore the Amendment placed some burdens on foreign commerce.[64] The court explained that "an interference by a state with foreign commerce can complicate the nation's foreign relations, which are a monopoly of the federal government; states are not permitted to have their own foreign policy."[65] The Court pointed to *Japan Line, Ltd. v. County of Los Angeles*, the leading authority on the Foreign Commerce Clause,[66] which stated "[f]oreign commerce is pre-eminently a matter of national concern."[67] Although the seventh circuit recognized that at least one *Japan Line* challenge failed, it continued with its analysis and concluded that the doctrine from *Japan Line* would not help

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[57] *Id.* at 557.
[58] *See id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* (citing Brad Haynes, *Zoos in a Pickle over Horse Meat*, SEATTLE TIMES, Sept. 18, 2007, at A1, *available at* NEWSBANK.)
[62] *See* Illinois Horse Meat Act, 225 ILL. COMP. STAT. ANN. 635/1.5 (2007).
[63] *See Cavel*, 500 F.3d at 557.
[64] *See Id.* at 553.
[65] *Id.* at 558.
[66] *Id.* at 558.
[67] Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 449 (1979).

Cavel because the Court lacked sufficient information to determine the possible impact on foreign markets.[68] The only evidence before the court of any significance on the issue was a letter written from the foreign minister of Belgium to the Governor of Illinois concerning the Amendment, and this letter did not mention any opposition to the legislation.[69]

The court ultimately concluded that "curtailment of foreign commerce by the amendment is slight and we are naturally reluctant to condemn a state law, supported if somewhat tenuously by a legitimate state interest, on grounds as slight as presented by Cavel."[70] Still, the court expressed some displeasure in having to uphold a statute that impacted a foreign-owned export-only company because "the shareholders and consumers harmed by the amendment have no influence in Illinois politics."[71]

Although this was a direct appeal from the denial of a preliminary injunction, the court determined that the merits of Cavel's challenge were adequately presented, and no existing unresolved factual issues remained. As such, the court treated the appeal as a final judgment and affirmed the lower court's denial of relief to Cavel.[72]

V. IMPLICATIONS OF THE CASE

On June 16, 2008, the United States Supreme Court denied Cavel's petition for writ of certiorari, closing the door on its hope of overturning the Illinois Amendment.[73] A similar law was upheld in Texas by the Fifth Circuit Court; there the two affected slaughterhouses stopped killing horses and began slaughtering beef along with niche market meats, namely bison and ostrich.[74] Due to the Dekalb slaughterhouse's limited output, it seems unlikely that Cavel could operate slaughtering cattle. Nor could Cavel continue to slaughter horses solely for the consumption of zoo animals, despite Judge Posner's suggestion that this was a potential market for Cavel[75]. The news article Judge Posner cited in his opinion not only mentioned that zoos use horse meat, but also that zoos are fearful that the

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[68] *Cavel*, 500 F.3d at 558.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 559.

[73] Cavel Int'l Inc. v. Madigan, 500 F3d 551 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2950 (2008).

[74] *Id.* at 552 (discussing Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry, 476 F.3d 326 (5th Cir. 2007)).

[75] *See id.* at 557.

slaughtering of horses for meat will be federally outlawed and zoos will have to import most of the horse meat they utilize.[76]

As legislatures continue to restrict the practice of horse slaughter in the U.S., the practice appears to have gone to other countries. Following the closure of the two Texas slaughterhouses, studies indicated that the sale of American horses intended for slaughter in Mexico rose from 12,000 a year to 30,000.[77] It is also likely, given the location of the Illinois slaughterhouse, that the sale of horses for slaughter just moved north of the border to Canada where horses are not only slaughtered, but eaten. However, this may become less of an issue as the United States Congress considers the Prevention of Equine Cruelty Act of 2008, which would prohibit the possession, transport, sale, delivery, or receiving of a horse or horse meat in interstate or foreign commerce with the intent that it be used for human consumption.[78]

VI. CONCLUSION

Cavel's facility in Illinois was the last operating slaughterhouse in the United States producing horse meat for human consumption. In *Cavel International Inc., v. Madigan*, 550 F.3d 551 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit upheld an Illinois law which outlawed the practice.[79] The Court held that the law was not pre-empted by the Federal Meat Packing Act and was not in violation of the Commerce Clause.[80] In 2008, Cavel was forced to close.[81] The Supreme Court's denial of certiorari eliminated the possibility of Cavel re-opening in Illinois and if Congress passes the Prevention of Equine Cruelty Act of 2008, the door on American edible equine, just like that of the Cavel slaughterhouse, may be permanently closed.

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[76] *Id.* (citing Brad Haynes, *Zoos in a Pickle over Horse Meat,* SEATTLE TIMES, Sept. 18, 2007, at A1, *available at* NEWSBANK).

[77] Tony Dokupil, *They Shoot Horses, Don't They?*, NEWSWEEK, Oct. 15, 2007, at 86, 87.

[78] H.R. REP. NO. 110-901. Pt.1, at 2 (2008).

[79] *Cavel*, 500 F.3d at 559.

[80] *See id.* at 558.

[81] *See id.* at 559.