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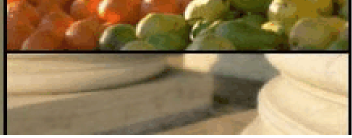

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Hampton Feedlot, Inc. V. Nixon: Slaughtering Price Discrimination Statutes with the Dormant Commerce Clause

by

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HAMPTON FEEDLOT, INC. V. NIXON: SLAUGHTERING PRICE DISCRIMINATION STATUTES WITH THE DORMANT COMMERCE CLAUSE

BRANDY M. RHEAD[†]

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I. INTRODUCTION

In 1999, Missouri, Nebraska, and South Dakota enacted similar legislation prohibiting price discrimination by packers to livestock producers, as well as requiring price reporting.[1] The South Dakota statute was struck down as invalid *per se* in *American Meat Institute v. Barnett*,[2] and the Missouri statute was struck down under the *Pike* balancing test[3] in *Hampton Feedlot, Inc. v. Nixon*, both in federal district courts.[4] The Eighth Circuit Court of Appeals reversed *Hampton Feedlot*, holding that the plaintiffs had not met their burden of proof.[5] The court determined that the challenged Missouri

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1. Missouri *Governor Bob Holden*, http://www.gov.state.mo.us/legis01/sslegaction.htm (as of Oct. 2, 2001); H.R. 4, 91st Gen. Assem., 1st Spec. Sess. (Mo. 2001), *available at* http://www.house.state.mo.us/spec01/bilsum01/ commit01/sHB4C.htm. On September 28, 2001, the Missouri Legislature signed House Bill Number Four (4), repealing "the right of sellers of livestock who are discriminated against by packers to receive treble damages, costs and reasonable attorney fees," and repealing "the right of any person injured by a violation of the livestock marketing law to bring suit." *Id.* It also extended the "expiration date of December 31, 2002, . . . to December 31, 2006." *Id.*

2. *See generally* American Meat Institute v. Barnett, 64 F.Supp.2d 906 (D.S.D. 1999).

3. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970).

4. *See generally* Hampton Feedlot, Inc. v. Nixon, No. 99-4206-CV-C-SOW-ECF (W.D. Mo. March 23, 2000) (order granting preliminary injunction) [hereinafter *Hampton Feedlot Order*].

5. *See generally* Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001) [hereinafter

statute did not burden interstate commerce, therefore the statute could not be held unconstitutional under the dormant commerce clause.[6]

II. FACTS AND PROCEDURE

A. THE ANIMAL PACKING INDUSTRY IN MISSOURI

At the time of trial, Missouri had one hog packer and no cattle packers.[7] Missouri producers produce more hogs than can be purchased by this single Missouri packer, so packers from Illinois, Iowa, and South Dakota come to Missouri to purchase hogs.[8] Only Texas has more cattle and calf operations than Missouri, and all cattle produced in Missouri are sold to outside packers.[9] Out-of-state producers also bring their cattle to Missouri feedlots to be fed and sold.[10]

There are various methods of pricing used to purchase livestock for slaughter.[11] One method is the purchase of livestock by auction, which the Missouri statute does not govern.[12] All other sale methods are covered by statute, however.[13] The three primary pricing methods used in Missouri are live on a cash basis ("Live"), flat in the meat method ("In the Meat"), and grade and yield ("Grade and Yield").[14] Each of the primary methods represents roughly a third of all Missouri cattle sales.[15] Hogs in Missouri are also sold using the three primary methods, but over half of the sales are made using the Grade and Yield method.[16]

Livestock are sold live per pound with both the Live method and the In the Meat method.[17] The difference between the two methods is that with the Live "price per pound [is] for entire animal,"[18] whereas the In the Meat "price per pound [is] for the animal without head, hide, hooves, and entrails."[19] Substantial negotiations between producers and packers are required in both the Live method and the In the Meat method.[20] With the Grade and Yield

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Hampton Feedlot].

6. *Id.*; *see also* U.S.C.A. CONST. ART. I § 8, cl. 3. "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

7. *Hampton Feedlot Order* at 4.

8. Brief of Appellees at 1; Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001) (No. 00-2506WMJC) [hereinafter Brief of Appellees]; *see also Hampton Feedlot Order* at 4. "There is currently only one packer located in Missouri that purchases hogs for slaughter in Missouri." *Id.* "In addition, packers from other states come into Missouri to solicit and purchase hogs in Missouri." *Id.*

9. Brief of Appellees at 1-2.

10. *Id.* at 1.

11. *Hampton Feedlot Order* at 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 6.

16. *Id.*

17. *Hampton Feedlot*, 249 F.3d at 816.

18. *Hampton Feedlot Order* at 5.

19. *Id.*

20. *Id.*

method, the price per animal is based upon the combined grade and yield determined by a USDA inspector after slaughter.[21] Regardless of which pricing method is used, a USDA grader will grade all cattle after slaughter.[22] Negotiations are rare with the Grade and Yield method because packers usually set the prices.[23]

The plaintiffs' concern with the price discrimination statute is that the packers will go to out-of-state producers to solicit and purchase livestock, especially cattle, because genetic diversity makes it difficult to determine the quality of cattle before slaughter.[24] The Grade and Yield method is less favorable for Missouri cattle producers due to the genetic inconsistencies in cattle as compared to hogs.[25] It is currently much easier to determine the quality of hogs before slaughter because of consistencies in their genetic history.[26] If price differences can only be based on the quality of meat, packers may be limited to the Grade and Yield method of purchasing cattle.[27] The price discrimination sections would do away with all other methods that deal in live cattle, which is how approximately two-thirds of the cattle are currently purchased in Missouri.[28] According to the plaintiffs, this will most likely be detrimental to all Missouri producers, including the family farmers, for the Grade and Yield method takes away the producers' negotiating power with packers.[29] The plaintiffs argue that Missouri and out-of-state producers will likely start using feedlots in other states to sell their livestock to take advantage of the other purchasing methods.[30] If Missouri feedlots are unable to use methods other than Grade and Yield, the plaintiffs "may be forced to close."[31]

B. THE PARTIES AND PROCEDURE

The Missouri legislature enacted the price discrimination statute in 1999.[32] These sections were enacted to provide for price reporting of packers who buy Missouri livestock, and to protect against price discrimination between large producers and small producers in Missouri.[33] The overall goal of the Missouri

21. *Id.* "Using the grade and yield method ('Grade and Yield'), the animal is sold for a specified price per pound based upon the grade combined with the yield of each animal as determined by an inspector for the U.S. Department of Agriculture." *Id.* "The grid method ('Grid') is a variant of Grade and Yield." *Id.*

22. Brief of Appellees at 7.

23. *Hampton Feedlot Order* at 5.

24. *Id.* at 6.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 5, 6.

29. *Id.*

30. *Id.* at 7.

31. *Id.*

32. MO. ANN. STAT. §§ 277.200-277.215 (West 2000); *Hampton Feedlot Order* at 1. In 1999, the Missouri Legislature enacted "portions of Senate Bill 310, . . . codified as §§ 277.200" through 277.215, Revised Statutes of Missouri (RSMo), effective "on August 28, 1999." *Id.*

33. Appellants' Brief at 5; Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001) (No. 00-2506WMJC) [hereinafter Appellants' Brief].

legislature in protecting the family farm and the rural communities against price discrimination is to allow the family farm to remain competitive with feedlots and corporate farms without succumbing to corporate farms or going out of business.[34] Some of the plaintiffs' main concerns were that packers would stop soliciting and purchasing livestock from Missouri producers and that out-of-state producers would stop using Missouri feedlots.[35] The plaintiffs challenged the price discrimination sections,[36] claiming that the sections were unconstitutional as the dormant commerce clause, and as being vague.[37]

The plaintiffs are a Missouri cattle corporation, two Missouri feedlots, and three trade associations. [38] The defendants, the Attorney General of Missouri and the Director of Agriculture for the State of Missouri, are those "responsible for the enforcement of the [s]tatute."[39]

One day prior to the effective date of the price discrimination statute, the District Court for the Western District of Missouri, Central Division, entered a temporary restraining order.[40] The court permanently enjoined the same statute sections after a consolidated "trial on the merits" and "hearing on the preliminary and permanent injunction," declaring them an unconstitutional

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34. *Id.*; *Hampton Feedlot Order* at 7.
35. Brief of Appellees at 4-5.
36. MO. ANN. STAT. §§.277.200, 277.203, 277.209, 277.212.
37. *Hampton Feedlot Order* at 1; *see also* U.S.C.A. CONST. ART. I § 8, cl. 3.
38. *Hampton Feedlot Order* at 3, 4; Brief of Appellees at 2-3; Appellant's Brief at 4. Plaintiff Bob Vandiver Cattle Co. ("Vandiver") is a Camden, Missouri, cattle corporation. *Hampton Feedlot Order* at 4. Vandiver buys "light cattle" and "backgrounds" them. *Id.* Cattle that "weigh between 400 and 600 pounds . . . are called 'light cattle.'" Brief of Appellees at 3. When a feedlot "backgrounds" cattle, it grazes the cattle on grass. *Id.* Vandiver backgrounds light cattle until they "weigh between 850 to 900 pounds." *Id.* When the cattle are ready for "finishing," they are either sent to a feedlot or fed by Vandiver until they are market ready for slaughter. *Id.* "Finishing" is feeding the cattle until they are ready for sale. *Hampton Feedlot Order* at 4; Brief of Appellees at 3. "Cattle destined for sale to a packer are raised on grass and then switched to corn and other nutrients for periods of 90—120 days, depending on the quality desired." Appellants' Brief at 4.

Plaintiffs Hampton Feedlot, Inc. ("Hampton") and GM Feedlot, Inc. ("GM") are Missouri corporations who custom feed "fed cattle" until they are ready to market. *Hampton Feedlot Order* at 3; Brief of Appellees at 2. "When cattle first arrive at . . . [f]eedlot[s], they weigh between 600 and 900 pounds." *Id.* "Ownership of the cattle remains with . . . [the] [f]eedlot's customers while the cattle are being fed to slaughter weight" which typically "takes 120 to 150 days." *Id.* Neither Hampton nor GM ever owns the cattle that they feed and sell. *Id.* at 2-3. Including Missouri, Hampton receives cattle from producers in eleven states and GM receives cattle from packers in ten states. *Id.* Both Hampton and GM sell the cattle in Missouri. *Id.*

The trade association plaintiffs are American Meat Institute ("AMI"), the Missouri Cattleman's Association ("MCA"), and the Missouri Livestock Association ("MLMA"). *Hampton Feedlot Order* at 4. AMI is "an Illinois corporation and a national trade association representing packers and processors of meat and meat food products." *Id.* "AMI members acquire cattle and hogs from feedlots and producers in Missouri and other states." *Id.* MCA is a trade association representing slaughter cattle producers, and MLMA is a trade association representing auction livestock markets for livestock operators. *Id.*

39. *Id.* (stating that defendants are Jeremiah W. Nixon, the Attorney General of Missouri, and John Saunders, the Director of Agriculture for the State of Missouri.).
40. *Id.* at 1; *see also* Appellants' Brief at 1 (stating the district court had jurisdiction under 28 U.S.C. § 1331and the appellate court had jurisdiction under 28 U.S.C. § 1291).

violation of the dormant commerce clause.[41] The defendants filed their appeal with the Court of Appeals for the Eighth Circuit on April 12, 2000.[42]

III. BACKGROUND

A. THE MISSOURI LIVESTOCK PRICING STATUTE

The sections of the price discrimination statute that were challenged as being unconstitutional included the definition section; the price discrimination section giving the specific prohibitions; and the penalty sections, including treble damages and attorney's fees.[43] Perhaps the most controversial part of

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41. *Hampton Feedlot Order* at 1, 11-12. On March 24, 2000, Senior United States District Judge Scott O. Wright entered the court's final order. *Id.*

42. *Id.*

43. *Id.* at 2; *Hampton Feedlot*, 249 F.3d at 816; MO. ANN. STAT. §§ 277.200, 277.203, 277.209, 277.212.

> Section 277.200. Definitions. —As used in sections 277.200 to 277.215, the following terms mean:
> (1) "Department", the department of agriculture;
> (2) "Livestock", live cattle, swine or sheep;
> (3) "Packer", a person who is engaged in the business of slaughtering livestock or receiving, purchasing or soliciting livestock for slaughtering, the meat products of which are directly or indirectly to be offered for resale or for public consumption. "Packer" includes an agent of the packer engaged in buying or soliciting livestock for slaughter on behalf of a packer. "Packer" does not include a cold storage plant, a frozen food locker plant exempt from federal inspection requirements, a livestock market or livestock auction agency, any cattle buyer who purchases twenty or fewer cattle per day or one hundred or fewer cattle per week, any hog buyer who purchases fifty or fewer hogs per day or two hundred fifty or fewer hogs per week, or any sheep buyer who purchases fifty or fewer sheep per day or two hundred fifty or fewer sheep per week.

Mo. Ann. Stat. § 277.200.

> Section 277.203. Packers of livestock—price discrimination prohibited—exceptions. —A packer purchasing or soliciting livestock in this state for slaughter shall not discriminate in prices paid or offered to be paid to sellers of that livestock. The provisions of this section shall not be construed to mean that a price or payment method must remain fixed throughout any marketing period. The provisions of this section shall not apply to the sale and purchase of livestock if the following requirements are met:
> (1) The price differential is based on the quality of livestock, if the packer purchases or solicits the livestock based upon a payment method specifying prices paid for criteria relating to carcass merit; actual and quantifiable costs related to transporting and acquiring the livestock by the packer; or an agreement for the delivery of livestock at a specified date or time; and
> (2) After making a differential payment to a seller, the packer publishes information relating to the differential pricing, including the payment method for carcass merit, transportation and acquisition pricing, and an offer to enter into an agreement for the delivery of livestock at a specified date or time according to the same terms and conditions offered to other sellers.

Mo. Ann. Stat. § 277.203.

> Section 277.209. Violations—penalty. —1. Any agreement made by a packer in violation of sections 277.200 to 277.215 is voidable.
> 2. Any packer acting in violation of sections 277.200 to 277.215 is guilty of a class A misdemeanor.

Mo. Ann. Stat. § 277.209.

> Section 277.212. Violations referred to the attorney general—treble damages, costs and attorney's fees, when. —1.The attorney general shall enforce the provisions of sections 277.200 to 277.215. The department of agriculture shall refer violations of

the statute was in the prohibition section, which stated: "[a] packer purchasing or soliciting livestock in this state of the slaughter shall not discriminate in prices paid or offered to be paid to sellers of that livestock."[44] The policy behind the legislation was to protect the family farmer from price discrimination within Missouri.[45]

B. THE DORMANT COMMERCE CLAUSE TESTS

The district court held that the challenged price discrimination statute did not have an "extraterritorial reach" for it "only directly controls the conduct of purchasers in Missouri."[46] Therefore, the challenged sections were not invalid *per se*.[47] The court then looked at the challenged price discrimination sections using the *Pike* balancing test as cited in *Cotto Waxo Co. v. Williams*:

> [I]f the challenged statute regulates evenhandedly, then it burdens interstate commerce indirectly and is subject to a balancing test. *See Pike*... Under the balancing test, a state statute violates the Commerce Clause only if the burdens it imposes on interstate commerce are "clearly excessive in relation to the putative local benefits." [48]

The district court held that the price discrimination statute did fail the *Pike* balancing test, therefore violating the dormant commerce clause, for "almost all livestock purchases that will be regulated by the Statute are made by out-of-state buyers who travel into Missouri and then transport the livestock out of Missouri.... Therefore, the Statute will directly affect the flow of livestock both into and out of Missouri.[49]

The defendants then appealed, stating that the district court did not properly apply the *Pike* test because the local benefits outweighed the burdens on interstate commerce.[50] The defendants also stated that "there is no requirement" for an "absence of a less restrictive alternative if the statute is nondiscriminatory."[51] This is not the general rule as stated in *Pike*, which is as follows:

> the provisions of sections 277.200 to 277.215 to the attorney general. The attorney general or any person injured by a violation of the provisions of sections 277.200 to 277.215 may bring an action pursuant to the provisions of chapter 407, RSMo, for any remedy allowed for unlawful merchandising practices.
>
> 2. A seller who receives a discriminatory price or who is offered only a discriminatory price in violation of the provisions of sections 277.200 to 277.215 may receive treble damages, costs and a reasonable attorney's fee.

Mo. Ann. Stat. § 277.212.

44. *Hampton Feedlot*, 249 F.3d at 817; Mo. Ann. Stat. § 277.203.
45. Appellants' Brief at 5-7; *see also Hampton Feedlot Order* at 7.
46. *Id.* at 9.
47. *Id.* at 8 (quoting Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995) (citation omitted)).
48. *Cotto Waxo*, 46 F.3d at 793.
49. *Hampton Feedlot Order* at 9.
50. Appellants' Brief at 15-16.
51. *Id.* at 15.

> Where the statute regulates even-handedly 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 . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[52]

The *Pike* balancing test clearly states that there is to be a showing of less restrictive alternatives to be balanced against "the nature of the local interest involved," when "the statute regulates even-handedly," or, as the defendants would have it, when "the statute is nondiscriminatory."[53] The Eighth Circuit Court of Appeals reviewed "the district court's conclusions of law *de novo* and its conclusions of fact under a clearly erroneous standard"[54] and reversed "[b]ecause appellees have failed to establish that the cited provisions . . . are unconstitutional."[55]

The appellate court first used "rigorous scrutiny" to determine if the statute "overtly discriminates against interstate commerce."[56] Determining that it did not, the appellate court then used the *Pike* balancing test to determine "if the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits.'"[57] The appellate court stated that "[t]hose challenging the legislative action have the burden of showing that the statute's burden on interstate commerce exceeds its local benefit."[58] The *Minnesota v. Clover Leaf Creamery Co.* Court stated, "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'"[59] The *Clover Leaf Creamery* Court also laid out the *Pike* balancing test, with the provision that considers the local interest involved and less restrictive alternatives in addition to the burden on interstate commerce.[60]

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52. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847 (citations omitted).
53. *Id.*; Appellants' Brief at 15.
54. *Hampton Feedlot*, 249 F.3d at 818 (citing Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Friends of the Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1995)).
55. *Id.* at 816.
56. *Id.* at 818 (citations omitted).
57. *Id.* (citations omitted).
58. *Id.* (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (holding that the challenged statute's "incidental burden imposed on interstate commerce was not clearly excessive in relation to the putative local benefits and no approach with a lesser impact on interstate activities was available," reversing the lower courts)).
59. *Clover Leaf Creamery*, 449 U.S. at 464, 101 S.Ct. at 724 (quoting Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 950, 59 L.Ed.2d 511 (1979)) (citations omitted).
60. *Clover Leaf Creamery*, 449 U.S. at 471, 101 S.Ct. at 727-728 (quoting *Pike*, 397 U.S. at 142, 90 S.Ct. at 847).

C. THE *AMERICAN MEAT INSTITUTE* CASE COMPARISON

The Eighth Circuit Court of Appeals distinguished a South Dakota district court decision, *American Meat Institute*, which was based on a similar price discrimination statute.[61] In one of the corresponding South Dakota price discrimination statutes, two key prepositional phrases are switched: "[a] packer purchasing or soliciting livestock *for slaughter in this state* may not discriminate in prices paid or offered to be paid to sellers of that livestock."[62] In the South Dakota case, strict scrutiny was applied because the statute was found to result in "South Dakota projecting its legislation into other states and regulating the prices which must be paid by South Dakota packers to producers in other states and under what conditions prices may be paid."[63]

The Eight Circuit Court of Appeals made two clear distinctions between *American Meat Institute* and *Hampton Feedlot*.[64] One distinction is the price discrimination portions of the South Dakota statute were struck under *Cotto Waxo*, for "'a state regulation is per se invalid when it has an "extraterritorial reach," that is, when the statue has the practical effect of controlling conduct beyond the boundaries of the state.'"[65] A second distinction between the cases is that the South Dakota statute had already become effective and there were actual effects that the court was able to consider in its decision at the district court.[66] In *American Meat Institute*, there was evidence proving that the price discrimination statute resulted in "lower prices paid to South Dakota producers."[67]

The Eighth Circuit Court of Appeals stated:

> The Missouri statute . . . only regulates the sale of livestock sold in Missouri. If enacted, it may have the effect of increasing the price that packer pays and producers receive for livestock fed in Missouri, but the extraterritorial reach that the district court found in the South Dakota statute does not exist in the application of the Missouri statute.[68]

The court further stated:

> There is no chilling effect on interstate commerce if packers can just as easily purchase Nebraska or Kansas livestock for slaughter if they do not purchase Missouri livestock. In sum, the Missouri statute does not, on its face, discriminate between in-state and out-of-state packers or producers, nor does it attempt to regulate out-of-state commerce as the unconstitutional South Dakota statute had. The statute affects the flow of interstate commerce but it does not burden

61. *Hampton Feedlot*, 249 F.3d at 818-19 (citing to generally *American Meat Institute*, 64 F.Supp.2d 906).
62. *American Meat Institute*, 64 F.Supp.2d at 910 (quoting SDCL 40-15B-2) (emphasis added).
63. *Id.* at 919.
64. *Id.* at 913-15, 917, 920.
65. *Id.* at 917 (quoting *Cotto Waxo*, 46 F.3d at 793).
66. *American Meat Institute*, 64 F.Supp.2d at 913-15.
67. *Id.* at 920.
68. *Hampton Feedlot*, 249 F.3d at 819.

> interstate commerce... For that reason we need not reach the second step of the analysis, which balances the statute's burden on interstate commerce against the statute's putative local benefits.[69]

The appellate court did, however, go on to state how it would still find the challenged statute selections constitutional under the *Pike* balancing test because there is legitimate local interest and the defendants did not demonstrate that the statute had the unconstitutional effect of burdening interstate commerce.[70] According to the court, the "[e]conomic hardship experienced by Missouri feedlots does not rise to the level of a dormant Commerce Clause violation."[71] The court further stated that "[i]n the event that the implemented statute adversely effects Missouri farms or consumers, appellees are free to petition the legislature to amend or repeal the statute."[72]

IV. ANALYSIS

A. THE DORMANT COMMERCE CLAUSE

The dormant commerce clause is a judicial doctrine, giving states some power to regulate interstate commerce.[73] This power is given to the states, provided that the power is not expressly given to Congress and provided that the states follow the guidelines set by the United States Supreme Court and lower courts.[74] The most common modern approach to the dormant commerce clause is to look at the balance of interests.[75] With the balancing approach, the court is to determine in a factual inquiry (1) whether the interstate commerce interests are discriminated against or if the state has a legitimate state objective and regulates even-handedly; and (2) if the regulation is not discriminatory, whether the adverse or detrimental effects on interstate commerce are outweighed by the state's interest.[76] It is also important to note that not all courts have read the commerce clause "as requiring the State... to sit idly by and wait until potentially irreversible environmental damage has occurred... before it acts to avoid such consequences."[77]

B. APPLICATION OF THE DORMANT COMMERCE CLAUSE

When a reviewing court examines a statute challenged under the dormant

69. *Id.* (citations omitted).
70. *Id.* at 820-821.
71. *Id.* at 821.
72. *Id.* at 820-821.
73. BARRON, JEROME A. & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 86-115 (3d ed. 1995).
74. *Id.*
75. *Id.* at 89-105.
76. *Id.* at 90.
77. Maine v. Taylor, 477 U.S. 131, 148, 106 S.Ct. 2440, 2452 (1986) (internal quotation omitted).

commerce clause, it first will determine if it is invalid *per se* due to an "extraterritorial reach."[78]

> If a statute is not per se invalid, then a reviewing court must determine which level of scrutiny applies. If the challenged statute discriminates against interstate transactions "either on its face or in practical effect," it burdens interstate commerce directly and is subject to strict scrutiny... A statute enacted for a discriminatory purpose is likewise subject to strict scrutiny... In contrast, if the challenged statute regulates evenhandedly, then it burdens interstate commerce indirectly and is subject to a balancing test.[79]

Under the *Pike* balancing test, the legitimate local public interest is balanced against the burden imposed on interstate commerce, and then the court looks at less restrictive alternatives that could be used.[80] In *Clover Leaf Creamery*, the Court held that:

> Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*... Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[81]

In *Cotto Waxo*, the court was "not prepared to say, as a matter of law, that the Act is constitutional."[82] The court's decision that "[t]he constitutionality of the Act should be tested at trial" was based on not only the lack of "evidence of a burden on interstate commerce," but also the lack of "evidence of a public benefit."[83] In *Clover Leaf Creamery*, the Court held the challenged statute was constitutional not only because the State's legitimate purpose was not clearly outweighed by the burden on interstate commerce,[84] but also for the finding "that no approach with 'a lesser impact on interstate activities'... is available."[85]

Once the appellate court determined that the challenged statute sections were not invalid *per se* because the sections have no "extraterritorial reach" and they are discriminatory, it then determined that the sections did not burden interstate commerce.[86] Instead, the appellate court determined that "[t]he statute affects the flow of interstate commerce."[87]

78. *Cotto Waxo*, 46 F.3d at 793.
79. *Id.* (footnotes and citations omitted).
80. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847.
81. *Clover Leaf Creamery*, 449 U.S. at 471, 101 S.Ct. at 727-28 (citations omitted).
82. *Cotto Waxo*, 46 F.3d at 795.
83. *Id.*
84. *Clover Leaf Creamery*, 449 U.S. at 474, 101 S.Ct. at 729.
85. *Id.* at 473, 101 S.Ct. at 729 (quoting *Pike*, 397 U.S. at 142, 90 S.Ct. at 847).
86. *Hampton Feedlot*, 249 F.3d at 819.
87. *Id.*

How the appellate court determined that affecting "the flow of interstate commerce"[88] is not the same as imposing "only 'incidental' burdens on interstate commerce"[89] is not clear from the court's opinion.[90] The appellate court is saying that change to "the flow of interstate commerce" is not a burden on interstate commerce.[91] The rationale of the appellate court that there is no burden on interstate commerce seems to stem around the fact that "[t]he district court granted permanent injunctive relief to the plaintiffs *before* the statute took effect."[92] Given that the statute had not even taken effect, there was no actual evidence for the plaintiffs to demonstrate how "the implemented statute adversely affects Missouri farms or consumers."[93]

V. CONCLUSION

The *Hampton Feedlot* opinion sends a message to those who challenge the constitutionality of statutes under the dormant commerce clause that actual effects of an implemented statute on interstate commerce must be brought into evidence before any burden on interstate commerce will be found.[94] The appellate court is telling the district court and the plaintiffs that injunctive relief before the statute takes effect is not acceptable and will not be tolerated.[95] The statute must be implemented and have some demonstrative effects before this appellate court would even consider its constitutionality under the dormant commerce clause.[96]

In light of the *American Meat Institute* case, which is in the process of appeals, *Hampton Feedlot* merely says that the *Pike* balance test is not a bright line rule as to whether or not a state regulation will be upheld under the scrutiny of the dormant commerce clause. While I am in agreement with the effect of *Hampton Feedlot* in its particular context, I fear what its application in the future could mean. There could be many detrimental effects if the burden rests on the plaintiffs to prove and disprove the state's legitimate interest in the regulation against the weight of its burden on interstate commerce and alternative means available to the state. The state could pass legislation that burdens interstate commerce and harms all individuals involved, but if the state has good intentions behind its legislation and the plaintiffs carry the burden to prove all elements, the *Hampton Feedlot* court would uphold the legislation. A more evenhanded result would be to use a purer form of the *Pike* balancing test, with the burdens shifting on the appropriate elements. In conclusion, the result in *Hampton Feedlot* is suitable

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88. *Id.*
89. *Clover Leaf Creamery*, 449 U.S. at 471, 101 S.Ct. at 727 (quoting *Pike*, 397 U.S. at 142, 90 S.Ct. at 847).
90. *See generally Hampton Feedlot*, 249 F.3d 814.
91. *Id.* at 819.
92. *Id.* at 816 (emphasis added).
93. *Id.* at 820-821.
94. *See generally Hampton Feedlot*, 249 F.3d 814.
95. *Id.* at 816.
96. *Id.* at 820-21.

for the facts at hand, but future application of this decision should be made with caution.