

# NOT ALL IT'S QUACKED UP TO BE: WHY STATE AND LOCAL EFFORTS TO BAN FOIE GRAS VIOLATE CONSTITUTIONAL LAW

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|---|-----|
| I. Introduction.....  | 303 |
| II. Background.....   | 305 |
| A. The Domestic and International Foie Gras Trade.....                          | 305 |
| B. Enacted Foie Gras Legislation.....   | 307 |
| C. Proposed Foie Gras Legislation.....  | 308 |
| III. Commerce Clause Jurisprudence and the Foie Gras Legislation.....           | 314 |
| IV. Dormant Commerce Clause Jurisprudence and the Foie Gras<br>Legislation..... | 317 |
| V. Vagueness, Overbreadth, and the Foie Gras Legislation.....                   | 319 |
| VI. The Takings Clause and the Foie Gras Legislation.....                       | 321 |
| VII. Conclusion.....  | 323 |

## I. INTRODUCTION

What do Egyptian Pharaohs, Roman Jews, French farmers, immigrants to America, consumers of haute cuisine – and the chefs who create it – and business owners in Long Island, New York, and Sonoma, California have in common?<sup>1</sup> Strangers in time, language, culture, and geography, these groups form an unlikely cohort around the humble duck and, more specifically, the love of its liver.<sup>2</sup> Foie gras, known as the fatty liver of a duck, goose, or mulard,<sup>3</sup> is an ingredient

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1. *See generally* MICHAEL A. GINOR ET AL., FOIE GRAS: A PASSION (1999) (providing an in-depth history of the production of foie gras and the many different societies and cultures that have and do use foie gras as part of their foodstuffs).

2. *Id.*

3. *Id.*

that has transcended societies and social status throughout the course of human history.<sup>4</sup> And now, this delicate dish is at the center of a controversy in which its protagonists seek to transcend the dictates of the U.S. Constitution and constitutional law, in an effort to ban the food from production and/or sale in several states and large cities.

This article will address the increasingly popular actions by state and local governments to ban the production and/or sale of foie gras within their jurisdictions and the constitutional flaws in these attempts. Part II of this article examines the genesis and extent of these legislative actions.<sup>5</sup> To date only one state, California,<sup>6</sup> and one city, Chicago, Illinois,<sup>7</sup> have enacted a legislative ban on foie gras. However, several states and at least one large city have considered legislation that would ban the production and/or sale of foie gras.<sup>8</sup> Part II then goes on to examine and compare these proposed and enacted anti-foie gras laws for their content, impact, and motivational underpinnings.<sup>9</sup> In order to understand the trade aspect of foie gras production and sale, this Part also discusses the roles of domestic and international foie gras trade in the American marketplace, and the economic contributions that domestic foie gras producers make in the American market and their communities.<sup>10</sup>

Part III of this article examines the foie gras legislation under the Commerce Clause and its jurisprudence, as well as the doctrine of federal pre-emption in constitutional law, particularly as it relates to the regulation of international trade and our relationships with international trading partners.<sup>11</sup> Part III concludes that the content and effects of foie gras legislation are in direct violation of the Commerce Clause<sup>12</sup> and that the doctrine of federal pre-emption applies to bar any state or local legislation that attempts to ban the sale of imported foie gras.<sup>13</sup> Further, Part III concludes that the trade relationships that the United States enjoys with the two nations that are the primary sources of foie gras imports to the United States – Canada and France – are such that the foie gras legislation threatens to undermine both the position of the United States as a NAFTA proponent, and the status of the United States as a trading partner in the European Union.<sup>14</sup>

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4. *Id.*

5. *See* discussion *infra* Part II.B, C.

6. *See* discussion *infra* Part II.B.

7. *See* discussion *infra* Part II.B.

8. *See* discussion *infra* Part II.C.

9. *See* discussion *infra* Part II.B, C.

10. *See* discussion *infra* Part II.A.

11. *See* discussion *infra* Part III.

12. *See* discussion *infra* Part III.

13. *See* discussion *infra* Part III.

14. *See* discussion *infra* Part III.

Part IV of this article examines the foie gras legislation under the jurisprudential tenets of the Dormant Commerce Clause, finding this legislation to be the type of legislation which the Dormant Commerce Clause was created, and is frequently used, to prevent.<sup>15</sup> Part V examines the individually enacted and proposed pieces of foie gras legislation, concluding that, as it relates to the ban on the production and sale of foie gras, the foie gras legislation, collectively and individually, is void for vagueness and is unconstitutionally overbroad.<sup>16</sup>

Part VI examines the role of the Takings Clause in relation to the enacted foie gras production ban in California and the proposed foie gras production ban in New York, as these are the only states with significant commercial foie gras producers who supply a significant quantity of the domestic foie gras market.<sup>17</sup> Using the standard analysis applied to regulatory takings, this Part concludes that foie gras producers in California and New York would have a valid claim against the foie gras legislation under the Takings Clause.<sup>18</sup>

Finally, Part VII of this article summarizes the findings and conclusions made in the previous parts and goes on to conclude that the foie gras legislation is not only an unconstitutional threat to domestic and foreign commerce, but also serves as a dangerous starting point from which individual choice regarding food can easily be subsumed by groups wishing to stop practices which they regard as cruel, and allowing certain groups to accomplish an agenda which, undermines the freedoms accorded to society at large under the United States Constitution.<sup>19</sup>

## II. BACKGROUND

### A. *The Domestic and International Foie Gras Trade*

Although it is most commonly associated with French cuisine, there are currently three domestic producers of foie gras in the United States, two of which are regarded as major forces in the industry.<sup>20</sup> One of these producers, Sonoma

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15. See discussion *infra* Part IV.

16. See discussion *infra* Part V.

17. See discussion *infra* Part VI.

18. See discussion *infra* Part VI (This claim is especially valid in light of the stated legislative intent behind the foie gras legislation in each of those states, which, it is argued, does not rise to the level of social welfare necessary for a court to justify and uphold a regulatory taking.).

19. See discussion *infra* Part VII.

20. *Chicago Foie Gras Ruling Sets Dangerous Precedent*, GRASSROOTS: THE VOICE OF THE NEW YORK FARM BUREAU (July 2006), available at <http://www.nyfb.org/Grassroots/grass0706/FoieGras.htm>.

Foie Gras, is located in California;<sup>21</sup> the other two producers are located in New York State, the most prominent of which is Hudson Valley Foie Gras, located on Long Island.<sup>22</sup> Having banned the production and sale of foie gras effective July 1, 2012, California is currently encouraging foie gras producers to develop a more “humane” method of creating the same fat concentration necessary to produce foie gras. However, California has not provided budgetary or other support to Sonoma Foie Gras, or any other would-be foie gras producers to assist in this endeavor.<sup>23</sup> On the other hand, the State of New York appropriated \$420,000.00 in 2006 to Hudson Valley Foie Gras in order for it to expand and develop its production capabilities thereby encouraging the development of a New York business.<sup>24</sup> All of these domestic foie gras producers are currently economically viable businesses that provide jobs in the communities in which they are located supplying restaurants and retailers throughout the country.<sup>25</sup>

Figures available from the United States International Trade Commission state that in 1997 – the most recent date for which such information is available – the United States imported approximately one million dollars in foie gras-related items,<sup>26</sup> while exporting over one million dollars worth of “animal livers . . . prepared and preserved.”<sup>27</sup> These figures show there was a slight decline in the amount of annual foie gras imports to the United States during the period between 1993 and 1997; however, this time period coincides with a period where the domestic foie gras industry became a more visible and viable alternative to imported foie gras.<sup>28</sup> More current foie gras import figures are not available from the United States International Trade Commission; however, it is widely under-

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21. *Id.*

22. *Id.*

23. *See generally* CAL. HEALTH & SAFETY CODE § 25980 (2007) (enacting legislation making force-feeding birds illegal without providing financial or other support to the affected businesses).

24. *See* GRASSROOTS, *supra* note 20.

25. *See id.*

26. *See* OFFICE OF INDUSTRIES, U.S. INT’L TRADE COMM., INDUSTRY & TRADE SUMMARY: POULTRY A-13 (1998) (This amount was derived by rounding up the portion of the American import figures shown for goose livers, because the category of other types of liver products was over-inclusive and the goose liver category alone was under-inclusive.).

27. *Id.* at A-20 (This figure takes into account many segments of the overall poultry market that do not include or relate to foie gras.).

28. *Id.* at 24; *see also* *About Hudson Valley Foie Gras*, Hudson Valley Foie Gras, *available at* <http://www.hudsonvalleyfoiegras.com/abouthvfg.html>; *Sonoma Foie Gras*, Sonoma Foie Gras, *available at* <http://www.sonomafoiegras.com> (both of these foie gras businesses were started in the late 1980s).

stood that, across the board, there has been an upswing in consumer demand for foie gras in recent years.<sup>29</sup> Of the foie gras imported annually to the United States, the bulk comes from Canada and France.<sup>30</sup> While the amount of annual trade in foie gras is not on par with the annual importation rates of more common foodstuffs, it generates more trade than products such as live chickens over a certain weight,<sup>31</sup> whole turkeys,<sup>32</sup> and turkey cuts.<sup>33</sup> Also, since a significant amount of imported foie gras comes from France, it represents an issue that has the potential to be of importance in the already fragile U.S./E.U. trade relationship.<sup>34</sup>

### B. Enacted Foie Gras Legislation

In 2004, California became the first state in the Union to enact legislation which would ban the production and sale of foie gras.<sup>35</sup> The legislation enacting the ban defines “force feeding a bird” as “a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily while foraging. Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into a bird’s esophagus.”<sup>36</sup> The bill proceeds to outlaw force feeding a bird “for the purpose of enlarging the bird’s liver beyond normal size, or hir[ing] another person to do so,”<sup>37</sup> and specifies that “[a] product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size.”<sup>38</sup> The statute provides for civil and criminal penalties in the event that these prohibitions are violated,<sup>39</sup> and tolls the application of these laws until July 1, 2012, “to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to modify

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29. See, e.g., Maria C. Hunt, *Delicacy or Disgusting?*, THE SAN DIEGO UNION-TRIBUNE, Oct. 4, 2006, at E-1 (showing restaurant owners have continued to serve foie gras despite protests by animal rights groups).

30. See INDUSTRY & TRADE SUMMARY, *supra* note 26, at 24, 32-33.

31. *Id.* at A-13.

32. *Id.*

33. *Id.*

34. See discussion *infra* Part III.

35. See CAL. HEALTH & SAFETY CODE § 25980 (2004).

36. *Id.*

37. *Id.* at § 25981.

38. *Id.* at § 25982.

39. *Id.* at § 25983(b).

their business practices.<sup>40</sup> Interestingly, California carved out a small exception to the force-feeding ban in instances where a bird is force-fed for medicinal purposes.<sup>41</sup> To date, this was the last piece of legislation introduced in California regarding the production and sale of foie gras and foie gras-related products.

In 2006, the City of Chicago – a renowned culinary center in the United States – took the unprecedented step of becoming the first city in the nation to ban the sale of foie gras within city limits.<sup>42</sup> The legislative justifications for this ban were: “[t]he State of Illinois is currently considering a similar ban of the practice of force feeding and the resulting product;”<sup>43</sup> “[a]ccording to a recent Zogby poll, nearly eighty percent (80%) of Americans, when educated about foie gras, support a ban on the force feeding of birds;”<sup>44</sup> “[t]he people of the City of Chicago and those who visit here have come to expect, and rightfully deserve, the highest quality in resources, service and fare;”<sup>45</sup> and “[b]y ensuring the ethical treatment of animals, who are the source of the food offered in our restaurants, the City of Chicago is able to continue to offer the best dining experiences . . . .”<sup>46</sup> The ban itself is simply stated: “[a]ll food dispensing establishments . . . shall prohibit the sale of foie gras.”<sup>47</sup> Establishments that violate the foie gras ban are subject to monetary penalties,<sup>48</sup> as several Chicago restaurants have discovered.

### C. Proposed Foie Gras Legislation

In the aftermath of the California and Chicago foie gras bans, the states of Connecticut,<sup>49</sup> Hawaii,<sup>50</sup> Illinois,<sup>51</sup> Massachusetts,<sup>52</sup> New York,<sup>53</sup> New Jersey,<sup>54</sup>

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40. *Id.* at § 25984(c).

41. *See* CAL. S.B. 1520 (2004).

42. *See* CHICAGO, ILL, Ordinance 7-39-001 (Apr. 26, 2006).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* H.B. 6866, 2007 Gen. Assem., Jan. Sess. (Conn. 2007).

50. *See* H.B. 3012, 2005 Leg., 23d Sess. (Haw. 2006); S.B. 2686, 2005 Leg., 23d Sess. (Haw. 2006).

51. *See* S.B. 312, 95th Gen. Assem., Reg. Sess. (Ill. 2007); S.B. 413, 94th Gen. Assem., Reg. Sess. (Ill. 2005); H.B. 867, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

52. *See* S.B. 2397, 184th Gen. Court, 2006 Reg. Sess. (Mass. 2006); S.B. 498, 184th Gen. Court, 2005 Reg. Sess. (Mass. 2005).

53. *See* Assem. B. 6277, 230th Annual Legis. Sess. (N.Y. 2007); S.B. 1463, 2007 Reg. Sess. (N.Y. 2007).

54. *See* Assem. B. 3230, 212th Leg., Reg. Sess. (N.J. 2006).

Oregon,<sup>55</sup> and Washington,<sup>56</sup> as well as the City of San Diego,<sup>57</sup> have introduced legislation that would effect similar and, in many cases, the same results.

The legislation proposed in Connecticut, which was introduced in 2007 and is currently pending before the Senate, is among the broadest of all attempted foie gras bans, providing “the general statutes be amended to prohibit the production or sale of any food item produced by force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size.”<sup>58</sup> The stated legislative intent is equally simple, “[t]o prohibit the inhumane treatment of birds in the production of certain food items.”<sup>59</sup>

During its 2006 session, the Hawaii Legislature saw the introduction of foie gras bills in both its House and Senate.<sup>60</sup> The House bill, HB 3012, merely proposed to criminalize

[t]he force feeding of a bird for the purpose of enlarging the bird’s liver beyond normal size, or the hiring of another person to do so. For purposes of this subsection, ‘force feeding’ means a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily.<sup>61</sup>

The Senate bill, SB 2686, went further than its House counterpart, criminalizing the act of “force-feeding” a bird and the sale of “any product that is the result of force feeding a bird . . . .”<sup>62</sup> The Senate bill used the same definition of “force feeding” as the California bill.<sup>63</sup> Ultimately, these bills did not come out of committee for a floor vote and, at the end of the 2006 session, these bills died.<sup>64</sup> To date, they have not been reintroduced.

Before the City of Chicago took up the issue of foie gras banning, the Illinois Legislature started a gaggle of activity with its proposed foie gras ban. The first piece of legislation regarding foie gras was introduced in early 2005, and ultimately passed the Illinois Senate before dying in the General Assembly.<sup>65</sup> Had it been passed, this bill would have made it illegal to “force feed a bird for

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55. See S.B. 861, 73d Leg. Assem., 2005 Reg. Sess. (Or. 2005).

56. See H.B. 2421, 59th Leg., 2006 Reg. Sess. (Wash. 2006).

57. See SAN DIEGO, CAL. CODE ch. 5, art. 2 (2006) (amending Chapter 5, Article 2).

58. See Conn. H.B. 6866.

59. *Id.*

60. See Haw. H.B. 3012; Haw. S.B. 2686.

61. See Haw. H.B. 3012 § 1(21).

62. *Id.* at § 1(2), § 3 ch. 711(1)(B).

63. See *id.* at § 3, ch. 711(2)(B); see also Cal. S.B. 1520 § 1(b).

64. See *id.*

65. See Ill. S.B. 413.

the purpose of enlarging the bird's liver beyond normal size or to hire another person to do so."<sup>66</sup> In order to determine what constituted "force-feeding," this bill would have adopted the same definition as used in the California legislation.<sup>67</sup> During the 2007 session, both houses of the Illinois Legislature have taken up the issue of banning foie gras. The bills introduced in the General Assembly and Senate are identical, both making it illegal to "force-feed a bird for the purpose of enlarging a bird's liver beyond normal size or hire another to do so"<sup>68</sup> and providing that "a product may not be sold, served, or dispensed in this State if it is the result of force-feeding a bird for the purpose of enlarging the bird's liver beyond normal size."<sup>69</sup> Both bills use the California language to define "force-feeding a bird,"<sup>70</sup> and simply define a "bird" as "includes, but is not limited to, a duck or goose."<sup>71</sup>

The Massachusetts Senate flocked to the idea of banning the production and sale of foie gras in Massachusetts, proposing bills to do so during both its 2005 and 2006 sessions.<sup>72</sup> These bills, identical in text, would have defined "force feeding" as

any method of feeding poultry that causes the poultry to ingest an excessive quantity of food, or more food than a typical bird of the same species would consume voluntarily while foraging, for the purpose of enlarging the bird's liver to beyond normal size. Force feeding methods include, but are not limited to, delivering feed through a tube or other device inserted into the poultry's esophagus.<sup>73</sup>

These bills also would have criminalized the production of foie gras in Massachusetts,<sup>74</sup> and the 2005 bill would have criminalized the sale of foie gras by providing that:

[a] separate violation of said clauses, subject to a separate fine, occurs: (1) each time an individual bird is force fed; (2) on the first day that a prohibited product is offered for sale; (3) every day that a prohibited product continues to be offered for sale; and (4) upon consumption of any prohibited sale by delivery of the prohibited product.<sup>75</sup>

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66. *Id.*

67. Compare Ill. S.B. 413 and CAL. HEALTH & SAFETY CODE § 25980.

68. See Ill. H.B. 867 § 5(a)(2); Ill. S.B. 312 § 5(a)(2).

69. See Ill. H.B. 867 § 5(c); Ill. S.B. 312 § 5(c).

70. Compare Ill. H.B. 867 and CAL. HEALTH & SAFETY CODE § 25980.

71. See Ill. H.B. 867 § 5(a)(1); Ill. S.B. 312 § 5(a)(1).

72. See generally Mass. S.B. 2397; Mass. S.B. 498.

73. See Mass. S.B. 2397 at § 1; Mass. S.B. 498 at § 1.

74. See Mass. S.B. 2397 at § 4; Mass. S.B. 498 at § 4.

75. See Mass. S.B. 2397 at § 5; Mass. S.B. 498 at § 5.

Had either of these bills been enacted, they would have been among the most stringent of the foie gras legislation in the extent of their prohibitions on the transportation and sale of foie gras within the State of Massachusetts.

Unlike other states that have flocked to the foie gras ban bandwagon, New Jersey's proposed foie gras-related bill focused solely on the production of foie gras, and did not attempt to ban the sale of foie gras or products containing it.<sup>76</sup> Had it been enacted, this bill would have made it illegal to "use a tube or other apparatus inserted in the beak, bill, or throat of a duck, goose, or other poultry to forcibly overfeed the duck, goose, or other poultry, to produce foie gras."<sup>77</sup> Interestingly, bill sponsors undercut the need for, and importance of, this legislation by making the following statements as the legislative intent for the bill:

Ducks and geese are found in nature with engorged livers prior to migration when these birds have been observed to overeat, probably to sustain themselves through migration. However, certain practices of forcibly feeding ducks and geese for the commercial production of foie gras have been viewed as inhumane to the birds.<sup>78</sup>

Perhaps most surprising given the concentration of foie gras producers within its borders, there are currently bills pending before each house of the New York State Legislature which, if passed, would ban the production of foie gras in New York State.<sup>79</sup> Interestingly, these bills do not address the sale of foie gras, or attempt to regulate any such transactions, but they both seek to make illegal the force-feeding of a bird, "by hand or machine, for the purpose of fatty enlargement of such bird's liver."<sup>80</sup>

Despite the history of overfeeding ducks and geese in order to produce what has been termed foie gras,<sup>81</sup> the legislative intent behind these bills attempts to paint the foie gras industry, and its practices, as "unusual," with perhaps the strongest argument advanced being one of potential litigation, explaining that "the United States Humane Society has recently filed suit against the N[ew] Y[ork] S[tate] Department of Agriculture and Markets to prohibit the production

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76. See N.J. Assem. B. 3230.

77. *Id.* at § 1(a).

78. See *id.*

79. See generally N.Y. Assem. B. 6277; N.Y. S.B. 1463.

80. See N.Y. Assem. B. 6277 § 1; N.Y. S.B. 1463 § 1.

81. See generally GINOR ET AL, *supra* note 1.

and sale of foie gras as an adulterated food product.<sup>82</sup> In light of the presence of two of America's three domestic foie gras producers in New York, it is interesting to note that both the Assembly and Senate versions of this bill claim that there will be no fiscal impact on the state if these bills were to be enacted.<sup>83</sup>

Members of the Oregon Legislature introduced foie gras-related legislation in 2005. Although, unlike their counterparts in California, the members who introduced the Oregon bill were not successful in their efforts to ban foie gras.<sup>84</sup> This bill defined "bird" for the purposes of the statute as "a fowl grown for purposes of human consumption,"<sup>85</sup> and defined "force-fed" as "to deliver food by: (a) [p]lacing a tube or other device into the esophagus; or (b) any other method used with the intent of causing ingestion of an amount of food that exceeds. . . [what] would be ingested voluntarily by . . . typical member[s] of the same species."<sup>86</sup> This bill made the use of force-feeding a misdemeanor, and created the "crime of trading in force-fed products," which would have been committed whenever a person "offer[ed] for sale or deliver[ed] one or more food products that the person knows to have been produced in whole or in part by force-feeding a bird."<sup>87</sup>

The 2006 session in the House of Representatives of the State of Washington saw a foie gras production and sale ban introduced.<sup>88</sup> This bill included the same definition of "force-feeding" as used in California's legislation and contained a very broad definition of "bird," namely "includes, but is not limited to, any species of waterfowl such as goose, duck, or the cross breed commonly known as the mulard."<sup>89</sup> This bill criminalized the production of foie gras via force-feeding – "A person may not force-feed a bird, or hire another person to force-feed a bird, for the purposes of enlarging the bird's liver beyond normal size"<sup>90</sup> – except in the event that force-feeding is necessary for "improving the bird's health,"<sup>91</sup> and also criminalized the sale of foie gras, providing "[a] person may not sell or offer to sell any foie gras or any product containing foie gras unless the foie gras or product containing foie gras originated from a state or other

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82. HUMANE SOCIETY OF THE UNITED STATES, *HSUS Files Suit to Block Foie Gras Production in New York*, Nov. 15, 2006, [http://www.hsus.org/farm/news/pressrel/suit\\_foie\\_gras\\_production\\_new\\_york.html](http://www.hsus.org/farm/news/pressrel/suit_foie_gras_production_new_york.html).

83. *See generally* N.Y. Assem. B. 6277, *supra* 80.

84. *See generally* Or. S.B. 861.

85. *Id.* at § 1(1).

86. *Id.* at § 1(2).

87. *Id.* at § 3.

88. *See* Wash. H.B. 2421.

89. *Id.* at § 1(1) & (3).

90. *Id.* at § 2.

91. *Id.*

jurisdiction that prohibits the practice of force-feeding birds to produce foie gras.<sup>92</sup> This bill was not passed in 2006 and has not been reintroduced to date.<sup>93</sup>

After California's action to ban foie gras in 2012, legislators in the City of San Diego pressed the City Attorney for an opinion as to whether they could enact a similar ban to be effective immediately.<sup>94</sup> The City Attorney, recognizing that this was a "close issue," ultimately advised the legislature that it could indeed enact a foie gras ban, anticipating that a legal issue would only occur when the State of California began to enforce its own foie gras ban in 2012.<sup>95</sup> The City Attorney's memo, which analogized the issue of banning foie gras to the issue of the City of Chicago's banning spray paint cans and other items associated with gangs, urban decay and unrest, was used to lay the foundation for the legislation currently pending before the City of San Diego's legislature.<sup>96</sup> The legislative intent supporting the San Diego bill addresses purported claims of cruelty in the production of foie gras through the force-feeding of ducks, geese, and mulards that are used for foie gras as surface claims without substantiated evidence.<sup>97</sup> The ordinance, stating that several restaurants in San Diego have already ceased serving Foie Gras states that:

[T]he City Council of the City of San Diego finds and declares that the purpose of this ordinance is:

- (1) to protect public morals and general welfare;
- (2) to protect the reputation of the City of San Diego; and
- (3) to support those businesses that have stopped selling foie gras before the state law takes effect.<sup>98</sup>

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92. *Id.* at § 3.

93. *See generally* Wash. H.B. 2421.

94. *See generally* Michael J. Aguirre, City Attorney of the City of San Diego, Memorandum of Law: Ordinance Banning the Sale of Foie Gras in the City of San Diego (2006) (Although this document addressed the collective ability of the San Diego City Council to ban foie gras within the city, it was specifically addressed to Councilmember Donna Frye, who was instrumental in the creation of San Diego's foie gras legislation.).

95. *See id.* at 4-6.

96. *Id.* at 7. (The author would like to reiterate the difference in justifications between the Chicago case and cases in which assault rifles and other weapons have been legally banned by a city due to immediate threats to the health and safety of citizens and the justifications offered to support the ban on foie gras, which are utterly devoid of any health or safety issues.)

97. *See generally* SAN DIEGO, CAL., CODE ch. 5, art. 2 (2006) (amending Chapter 5, Article 2).

98. *Id.*

The San Diego bill goes on to define a “bird,” when dealing with the ordinance, as “a duck, goose, or any other warm blooded vertebrate with feathers,”<sup>99</sup> and defines “force feeding” as “delivering feed through a tube or other device inserted into the bird’s esophagus in order to cause the bird to consume more food than it would consume voluntarily.”<sup>100</sup> The bill goes on to ban the sale of foie gras in the City of San Diego, providing that “it is unlawful for any person to sell in the City of San Diego foie gras or any other product from a bird that has been force fed for the purpose of enlarging the bird’s liver beyond normal size.”<sup>101</sup> To date, this bill has not been passed by the San Diego City Council.

### III. COMMERCE CLAUSE JURISPRUDENCE AND THE FOIE GRAS LEGISLATION

One of the best known, and most frequently used, powers granted to Congress under the Constitution are the powers vested under the Commerce Clause. As complex as the Commerce Clause jurisprudence is, it is remarkably simple in wording, providing that Congress has the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>102</sup> From this power, Congress has been able to exert control over interstate commerce and the products and goods travelling between states.<sup>103</sup> Congress has used this power to regulate both commercial traffic and to bring within its orbit areas of social concern which have bearing on interstate commerce, such as the civil rights movement.<sup>104</sup> Constitutionally, these laws must be within the zone of Congress’ powers to legitimately regulate some aspect of interstate commerce or instrumentalities of interstate commerce, or concern the overall public health, safety, and morals.<sup>105</sup>

As applied to the foie gras legislation, the Commerce Clause bars any attempts at regulation of this industry by states or cities in the United States on two levels. In terms of interstate commerce, both the enacted and proposed foie gras

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99. *Id.* at § 52.9201.

100. *Id.*

101. *Id.* at § 52.9202.

102. U.S. CONST. art. I § 8, cl. 3.

103. *See, e.g.,* NLRB v. Jones & McLaughlin Steel Corp., 301 U.S. 1 (1937) (affirming Congressional power to regulate intrastate commerce and commercial regulation where intrastate commerce or commercial regulation would have an effect on interstate commerce).

104. *See* Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 261 (1964) (showing Congress has authority to regulate even local issues as long as they had some articulable nexus with interstate commerce).

105. *See* U.S. v. Lopez, 514 U.S. 549 (1995) (holding that it was possible for Congress to overstep its bounds under the Commerce Clause where it could not articulate an interstate commerce based rationale for a law which otherwise sought to protect the general public health and safety of communities plagued by gun violence).

legislation (with a few exceptions) aim to regulate the ability of foie gras placed in interstate commerce to travel and ultimately come to rest at its destination despite any legitimate health or safety justification in regards to the human beings who would consume the foie gras.<sup>106</sup> Perhaps the most obvious unconstitutional aspect of the foie gras legislation comes from the attempts to ban the transportation of foie gras found in the Massachusetts foie gras bills.<sup>107</sup> Absent a prescient threat, the regulation of a product which necessarily travels in interstate commerce is by its nature within the regulatory province of Congress, and currently Congress has not attempted to address the foie gras issue (by virtue of the limited number of states which produce foie gras for the American market, and because most states, including those states that produce domestic foie gras, receive a portion of the foie gras used and sold in their state through interstate commerce, foie gras is truly an interstate product).

In terms of foreign trade and commerce, the fact that much of the foie gras that would be prohibited from sale in states and cities attempting such a ban comes from international trading partners, is a violation of Congressional power over commerce.<sup>108</sup> Further, Congress has pre-empted the role of individual states and other political entities in international commercial relations by setting specific rules and guidelines for trade and establishing formal diplomatic trade relations with other nations, thus making any attempts to ban the sale of items which are the subject of international commerce unconstitutional. Particularly worrisome is the fact that two of the largest sources of foie gras imports to the United States are Canada and France, as Canada is part of NAFTA and France is part of the European Union.

With regard to Canada, attempts by states and cities in the United States to limit international trade in foie gras with a NAFTA partner – other than for health and safety reasons as they relate to humans – undermine the terms and intent of NAFTA, and the commitment of the United States to this hard-won international agreement, because it seeks to place additional regulations on what is intended to be barrier-free trade between NAFTA countries.<sup>109</sup> At a time when U.S.-Canadian relations are at a low point, and the overall integrity of NAFTA is challenged on a daily basis by issues such as illegal immigration, it is particularly

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106. See CHICAGO, ILL., Ordinance 7-39-001 (Apr. 26, 2006); Haw. H.B. 3012; Haw. S.B. 2686.

107. See Mass. S.B. 2397; Mass. S.B. 498.

108. See generally U.S. CONST. art. I § 8.

109. See INTERNATIONAL ORGANIZATIONS: NAFTA, WORLD FACTBOOK, Appx. B, available at <https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html>.

egregious for states and localities to seek to regulate international commerce. These attempts are not only unconstitutional, they also undermine the diplomatic position of the United States with some of its most important allies, trade partners, and neighbors.

Further, as part of the European Union, France has challenged the United States on several occasions over foreign and domestic trade practices used by the United States as they relate to the European Union. These challenges, and the likelihood that such challenges will result in a trade dispute ultimately decided by an international court, undermine the place of the United States in the international market, while poisoning existing trade relations between the United States and valued trading partners. The foie gras legislation as it relates to the sale of foie gras and foie gras-related products threatens to involve the United States in new international trade disputes at a time when the United States cannot afford – politically or economically – to risk either damage to its credibility as a trading partner or retaliatory actions against its products abroad.

Thus, for the reasons set forth above, the foie gras legislation – both enacted and proposed – as it relates to the ban on selling foie gras and foie gras related products, is an unconstitutional violation on the Commerce Clause as it relates to Congressional power to regulate interstate commerce and to regulate international commerce. There has been no human public health or safety reason advanced – such as an immediate threat to the health of foie gras consumers – which would allow any of the states or localities attempting to ban the sale of foie gras to enforce the ban in the wake of its facial unconstitutionality. Indeed, the legislative intent attributed to the foie gras legislation universally makes it clear that these pieces of legislation are being proposed, or were enacted, because of vague claims that the methods of feeding ducks and geese necessary to commercially generate foie gras are in some ways inhumane to the birds involved.<sup>110</sup> Nowhere has an assertion regarding a negative human health impact from foie gras been advanced.<sup>111</sup> Furthermore, even pieces of legislation which do claim to be enacted for the public health, welfare and morals make that assertion without actually providing a rationale for these claims.<sup>112</sup>

Additionally, the foie gras legislation is unconstitutional because it directly contravenes the powers granted to Congress in the Constitution to preempt certain areas of law, including foreign trade regulation. This is of particular concern because two of the primary trading partners who would be affected by

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110. See N.J. Assem. B. 3230.

111. See generally *id.* (there is no language addressing health problems when consumed).

112. *Id.*

these bans are countries with which the U.S. has valuable, and yet often contentious diplomatic and trade relations.

#### IV. DORMANT COMMERCE CLAUSE JURISPRUDENCE AND THE FOIE GRAS LEGISLATION

The great irony of the Dormant Commerce Clause is that a review of the Constitution does not help any reader to understand what the Dormant Commerce Clause is, or how it operates; however, this clause is among the more popular tools to use in litigation challenges of state and local laws as they relate to trade and associated industries. The essence of the Dormant Commerce Clause is that, by virtue of the powers vested in Congress through the Commerce Clause, a state or locality cannot enact laws which restrict trade in a way that ultimately impacts interstate commerce even when the intention of the political entity enacting the law is to effect a change solely within the boundaries of its particular jurisdiction.<sup>113</sup> As with the Commerce Clause, courts will give some deference to states and localities which enact laws that implicate the Dormant Commerce Clause when there is an established and important public health, safety or moral justification advanced by the particular law.<sup>114</sup> For example, the United States Supreme Court has held that a law requiring an abnormally-sized mud flap placed on all trucks traversing the state of Illinois was an unconstitutional violation of the Dormant Commerce Clause because it had the effect of implicating interstate commerce, and the state failed to establish a sufficient threat to public health, safety or morals which would justify the imposition on interstate commerce.<sup>115</sup> Conversely, restrictions on the importation of certain types of fishing bait into the State of Maine were upheld by the United States Supreme Court because, although this restriction did implicate interstate commerce, there was an immediate threat to the fishing stock in the state posed by the importation of bait from other areas that carried certain types of bacteria that had the potential to destroy the state's fishing stock, an integral part of Maine's economy.<sup>116</sup>

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113. *See, e.g.*, *H.P. Hood & Sons v. Dumond*, 336 U.S. 525, 544-45 (1948).

114. *See id.* at 528.

115. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1958).

116. *See generally* *Maine v. Taylor*, 474 U.S. 943 (1985) (in which the Supreme Court denied the petition for rehearing and upheld the lower court ruling wherein the lower court held that, although the statute did discriminate against interstate commerce, it served a legitimate local purpose and there were no less discriminatory alternatives to the statute).

The foie gras legislation violates the Dormant Commerce Clause in its ban on the sale of foie gras within a state or city. This violation occurs because the effect of banning the sale of foie gras within the boundary of a state or city is that domestic foie gras producers cannot sell their wares in that jurisdiction, and food wholesalers, restaurants, and other third parties in the process located within these jurisdictions cannot allow foie gras to complete its interstate journey from one state to another for consumption. However, as the legislative intent provision of both the enacted foie gras bans in California and the City of Chicago, and the proposed foie gras legislation itself admits, there is no prescient public health, safety, or moral justification for banning the sale of foie gras,<sup>117</sup> at least none that would withstand judicial scrutiny.

The bulk of the legislative intent behind the foie gras legislation makes vague assertions that the practice of “force-feeding” fowl is “inhumane,”<sup>118</sup> and that one poll showed eighty percent of those surveyed would support a foie gras ban once they were educated about the feeding methods associated with foie gras.<sup>119</sup> However, these bills fail to state exactly what information poll respondents were given, the margin of error on the poll, or the sample used for the poll.<sup>120</sup> Likewise, the general assertions made by the City of Chicago regarding the quality dining experiences of residents of and visitors to Chicago,<sup>121</sup> and assertions made by the City of San Diego that several San Diego restaurants had stopped serving foie gras and that the ban was within the public health and welfare powers vested in the city<sup>122</sup> are without any evidentiary support, and seem particularly illogical considering that the product being banned is one that has a history of consumption since antiquity. In addition, there has never been an argument advanced regarding foie gras as a food that would pose any type of threat to public health, safety or morals.

Thus, in application, the attempts to ban foie gras contained in foie gras legislation constitute violations of the Dormant Commerce Clause, and the policy behind these bans does not fall within the zone of protected legislative activity aimed at protecting the public health, safety and morals of the states and cities which have sought to enact these bans.

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117. See CHICAGO, ILL., Ordinance 7-39-001 (Apr. 26, 2006); CAL. HEALTH & SAFETY CODE § 25980 (2004).

118. See CHICAGO, ILL., Ordinance 7-39-001 (Apr. 26, 2006); N.J. Assem. B. 3230; Conn. H.B. 6866.

119. See CHICAGO, ILL., Ordinance 7-39-001 (Apr. 26, 2006).

120. *Id.*

121. *Id.*

122. See SAN DIEGO, CAL. CODE ch. 5, art. 2 (2006) (amending chapter 5, article 2).

## V. VAGUENESS, OVERBREADTH, AND THE FOIE GRAS LEGISLATION

It is a well established tenet of constitutional jurisprudence that a law which is vague or overbroad on its face, or in its application, will be deemed unconstitutional. It is also well established, when dealing with criminal statutes, that overbroad language criminalizing more than the intended conduct is unconstitutional.<sup>123</sup> The conceptual underpinning of this rule is that, where a state or other lawmaking entity enacts a law for a particular purpose, the law should be narrowly tailored to that particular purpose, and not overreach into otherwise lawful conduct.<sup>124</sup> The prohibition on vagueness of laws exists to ensure that the public is aware of the prohibited conduct, and that prohibited conduct is identified to the point where the public understands what does and does not constitute a violation of the law.<sup>125</sup>

Vagueness plagues the foie gras legislation in several respects. First is the definition of the act of “force-feeding” itself. The foie gras legislation uniformly states that the practice of “force-feeding” is illegal when done for the purposes of enlarging the liver of a bird “beyond its normal size.”<sup>126</sup> The vagueness issues associated with this language are twofold. If the practice of force-feeding fowl is so terribly inhumane, meriting such drastic legislation, then why carve out an exception for everyone who force-feeds a bird but does not do so to the point where the bird’s liver becomes abnormally large? What would prevent a person from stating that he is not force-feeding a bird in order to make the bird’s liver expand beyond its normal size and sell the liver later? Additionally, none of these bills provide any guidance as to the size of a bird’s liver that would trigger a violation, or how the “normal” size of a bird liver should be determined. Is the determination to be made by age, weight, or actual size? This is particularly problematic because ducks, geese, and other fowl gorge themselves in the wild prior to their seasonal migration.<sup>127</sup> Therefore, since these birds essentially force-feed themselves in the wild, these laws seek to criminalize conduct that has been

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123. See WILLIAM H. ESKRIDGE, JR. ET AL., LEGISLATIVE AND STATUTORY INTERPRETATION 76 (2d ed. 2006).

124. See, e.g., JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 90-95 (2d ed. 1999) (describing the concept and application of the void for vagueness doctrine); *RAV v. St. Paul, Minnesota*, 505 U.S. 377 (1992) (holding unconstitutional a city ordinance banning certain categories of speech when based solely upon the subjects the speech addressed).

125. See DRESSLER, *supra* note 126.

126. See, e.g. CAL. HEALTH & SAFETY CODE § 25980.

127. See GRASSROOTS, *supra* note 20.

scientifically proven to occur naturally.<sup>128</sup> Further, in terms of the animal cruelty argument, the fact that ducks, geese, and other birds have no gag reflexes<sup>129</sup> means they are able to gorge themselves in the wild without suffering unpleasantness in the process. How then can a vague standard such as those used in these bills be the basis of a criminal charge? Also, with the exception of two states,<sup>130</sup> the remainder of the foie gras legislation contains no medical exception for the health of the fowl at issue; thus, there is an overbreadth issue because in the course of medical treatments for malnourished or otherwise ill birds, it would be possible for a veterinarian or farmer to become the potential target of criminal prosecution for “force-feeding” a bird.<sup>131</sup>

The City of Chicago’s foie gras ban is certainly the most unambiguous of any foie gras-related legislation in terms of its prohibition of the sale of foie gras.<sup>132</sup> Other legislation relating to the sale of foie gras, however, suffers from vagueness and overbreadth issues. For instance, one of Hawaii’s foie gras bills criminalizes the sale, or offer of sale, of “any product that is the result of force-feeding a bird as prohibited.”<sup>133</sup> This is both vague and overbroad, to the extent that it criminalizes the sale of any portion of a bird that was deemed to have been force-fed (with the attendant deformities in that term as outlined above), meaning that any meat associated with a bird that may have been force-fed would become suspect. This deformity is shared by pieces of legislation introduced in other jurisdictions as well, and again implicates the interstate commerce and international trade issues discussed in Part II.<sup>134</sup> Additionally, under the definition of “force-feeding” found in this Hawaii bill,<sup>135</sup> it is possible to argue that tubes, funnels, and even grain itself, when used to feed a bird, can become a “product that is the result of force feeding a bird” because these items are not typically illegal, but when used in the context of foie gras, are made criminal. Thus, this definition is overbroad and can be interpreted, in its strictest sense, as criminalizing items other than the targeted force feeding of birds. Several other states have introduced legislation that share the same deformities as they relate to the sale of foie

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128. *See id.*

129. *Id.*

130. *See* CAL. HEALTH & SAFETY CODE § 25980; Wash. H.B. 2421.

131. *See* Haw. H.B. 3012; Haw. S.B. 2686; Mass. S.B. 498; Mass. S.B. 2397; Or. S.B.

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132. *See* CHICAGO, ILL., Ordinance 7-39-001 (Apr. 26, 2006).

133. *See* Haw. S.B. 2686.

134. *See* discussion *supra* Part II.

135. *See* Haw. S.B. 2686, sec. 3, ch. 711(B).

gras and foie gras-related products,<sup>136</sup> as does the California statute banning the sale of foie gras.<sup>137</sup>

If the legitimate purpose advanced by the state and local bodies that have introduced and/or enacted foie gras legislation is to protect birds from a practice that is claimed to be “inhumane,” this goal has not been met. Instead, the foie gras legislation is riddled with vague and overbroad provisions, which serve to make criminal more conduct than necessary to achieve the advanced purpose, while at the same time, threaten the health of the fowl that these laws seek to protect. Thus, the foie gras legislation suffers from vagueness and overbreadth issues which render it, collectively and individually, unconstitutional.

#### VI. THE TAKINGS CLAUSE AND THE FOIE GRAS LEGISLATION

One of the first guarantees made to Americans in the Constitution is their right to property.<sup>138</sup> This right is so integral to the Constitution, and to the society which it formed and continues to guide, that the Framers gave property owners the right to compensation from the government in the event that the government attempted to take a person’s property.<sup>139</sup> Generally, if the property affected by a government regulation is not left valueless by the regulation, the Takings Clause only works to provide the owner with redress where the regulation is not legitimately tied to social welfare, or where there is a significant reduction in the value of the affected property.<sup>140</sup>

As has been mentioned above, the two foie gras producing states – California and New York – have introduced legislation to ban the production of foie gras.<sup>141</sup> The enacted California law gives foie gras producers until 2012 to find an alternate method of producing foie gras, or face criminal penalties for continuing its current operations.<sup>142</sup> Although the bill exhorts foie gras producers to find an alternative means of producing foie gras,<sup>143</sup> it does not provide any economic

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136. See Conn. H.B. 6866; Ill. S.B. 413; Ill. H.B. 867; Ill. S.B. 312; Mass. S.B. 2397; Mass. S.B. 498; Or. S.B. 861.

137. See CAL. HEALTH & SAFETY CODE § 25980.

138. U.S. CONST. amend. V.

139. *Id.*

140. See Penn. Coal Co. v. Mahon, 260 U.S. 393 (1945); Nollan v. Calif. Coastal Comm’n, 479 U.S. 1015 (1987); *but see* Miller v. Schoene, 276 U.S. 272 (1928); Dolan v. City of Tigard, Or., 510 U.S. 1162 (1994).

141. See CAL. HEALTH & SAFETY CODE § 25980; N.Y. Assem. B. 6277; N.Y. S.B. 1463.

142. See CAL. HEALTH & SAFETY CODE § 25980.

143. *Id.*

assistance or relief to California's sole commercial foie gras producer (Sonoma Foie Gras) in its attempts to either change its operations altogether or find some undefined, and currently unknown, method of producing foie gras without forcing the fowl to overeat in order to create the fatty liver that is its source.<sup>144</sup> The pending New York bills make the production of foie gras illegal as of the effective date of the bills, but does not provide any incentives or other means of promoting industry research, or provide economic aide to the New York foie gras producers who would be effectively closed by the bills.<sup>145</sup> Indeed, these bills are silent on the fiscal impact that shutting down the New York foie gras industry would have on New York.<sup>146</sup>

While it is true that the lands used by domestic foie gras manufacturers could in all likelihood be used to raise other livestock, and would retain some value in the face of a foie gras ban, the owners of these lands would still have a valid suit against their respective states under the Takings Clause based on the motivations behind the foie gras bans. The United States Supreme Court has upheld regulatory takings in certain instances; however, these have been instances where the needs and safety of the human citizens of a political subdivision have been the basis of the legislative intent behind the regulation.<sup>147</sup> However, regulating the use of a person's property to the point where he cannot conduct a heretofore legal agricultural enterprise – which supports local feeder industries in the process – because a group has voiced concerns over the treatment of his livestock, involving a practice that dates back centuries and has traditionally been legal in the United States, while not posing a threat to the health, safety or morals of the immediate community or the community at large, is unlikely to fall within the realm of a legitimate societal purpose in order to justify a regulatory taking regardless of whether the land at issue could be used for some other agricultural endeavor.

Thus, states which seek to ban the production of foie gras, while having established foie gras producers in their jurisdiction, face the very real threat of legal challenges to their banning of foie gras production under the Takings Clause. These states would be hard pressed to offer a legitimate purpose that would justify invading the land of these foie gras producers with regulations that criminalize an otherwise legal practice.

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144. *See id.*; *Foie Gras Foes Win A Round*, CBS NEWS, Sept. 30, 2004, [www.cbsnews.com/stories/2004/09/30/national/printable646479.shtml](http://www.cbsnews.com/stories/2004/09/30/national/printable646479.shtml).

145. *See* N.Y. Assem. B. 6277; N.Y. S.B. 1463.

146. *See generally id.*

147. *See* Penn. Coal Co., 260 U.S. 393; Nollan, 479 U.S. 1015; *but see* Miller, 276 U.S. 272; Dolan, 510 U.S. 1162.

## VII. CONCLUSION

As legislators in the states and cities that have taken measures to ban foie gras freely admit, the drive to ban foie gras stems from an onslaught of campaigning by animal rights groups, not a groundswell of popular or legislative support or outcry. The history of the Chicago foie gras ban indicates that many in the City of Chicago, including Chicago's Mayor Daley, see taking the time to put forth and act upon a foie gras ban as a folly at best, and as a waste of legislative resources at a time when Chicago is plagued with life or death issues.<sup>148</sup> Beyond the debate regarding the propriety of a state or city legislative body addressing the issue of banning the production and/or sale of foie gras lays the far more important issue of the legality of attempting to implement such bans.

It is the goal of this article to highlight the many constitutional deformities that the foie gras legislation suffers from and address the serious domestic and international trade ramifications that attempts to ban foie gras will cause in the future. Specifically, the foie gras legislation, collectively and individually, implicates the Commerce Clause, the constitutional doctrine of federal preemption, international trade and foreign relations, the Dormant Commerce Clause, constitutional jurisprudence providing that laws are unconstitutional when void for vagueness, and overbroad in comparison to their stated aims and the Takings Clause. Additionally, the foie gras legislation will wreak havoc, not only on the few domestic foie gras producers who have made a place for themselves in the culinary community, but also on U.S. trade relations with Canada and France, because these countries are the sources of a bulk of the foie gras imported into the United States every year, and are countries with which the United States routinely trades with.

It is an unfortunate reality that, for a variety of reasons, legislation that falls within the ambit of unconstitutionality is introduced, and sometimes passed, by legislatures across the United States. What makes the foie gras legislation unique and disconcerting is not only the plethora of constitutional problems associated with it, or the outrage of those who enjoy foie gras as a culinary treasure,

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148. Indeed, Chicago's Mayor Daley was so taken aback by the legislative focus on foie gras that he issued a public plea to the Chicago City Council to drop the foie gras issue and focus on the real issues facing the City of Chicago and its human residents. See *Foie Gras Ban Blows Into the Windy City*, EPICURIOUS.COM, Apr. 28, 2006, <http://www.epicurious.com/features/news/dailydish/042806> (quoting Mayor Daley as stating "[w]e have children getting killed by gang leaders and dope dealers . . . . We have real issues here in this city. And we're dealing with foie gras? Let's get some priorities.").

but also the precedent that it will establish. Certainly, the animal rights groups that have advocated for banning foie gras believe that they are acting in the best interests of their members when they seek laws which do such things as create a ban on foie gras. Indeed, these groups have as much of a constitutional right as any other group to petition legislators regarding their grievances. (Also, as a food that has been regarded as a luxury foodstuff in the United States, foie gras is a good strategic first shot in an effort to ban foods which certain groups regard as inhumane.) However, as the public debate over the California and Chicago foie gras bans illustrates, the average citizen was not overly concerned by the attempt to ban foie gras because foie gras is not a food on everyone's lips. Indeed, the sponsor of the Chicago foie gras ban admits that, to the best of his knowledge, he has never had foie gras.<sup>149</sup>

However, the foie gras legislation is the perfect example of the practical realities of the slippery slope argument. It is a short step from foie gras to the already controversial foods, such as lamb, veal, and even more standard beef and poultry products. It is an even shorter step to foods that are considered cruel or unpalatable to Americans, yet are standard fare in the many immigrant communities that comprise this nation. Ultimately, absent some prescient public safety issue, the downward slope from the foie gras ban involves the potential for legislative action to codify what a particular group values as "good" and "bad" food, and becomes unconstitutional for the additional reason that it starts to interfere with personal choice. Even more troubling, banning foods such as foie gras makes a statement that some cultures and their foods are "cruel" in their eating habits, and society in general needs to be spared of these culinary depravities.<sup>150</sup> No matter how right the groups that urge the ban of foie gras (or any other food that is asserted to be "cruel" or "inhumane") believe they are, these beliefs are the product of the rights granted to individuals under the Constitution, which are the same rights as those granted to individuals who wish to feast on foie gras. The common threads between those who enjoy foie gras – or any other food – and those who protest it are personal choice and freedom, which form the backbone of America and American society. Thus, in its own terms and ramifications for the future, the foie gras legislation is not all it's quacked up to be.

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149. See Amanda Paulson, *A ban on foie gras? Could this really be Chicago?*, THE CHRISTIAN SCIENCE MONITOR, Dec. 13, 2005, available at <http://www.csmonitor.com/2005/1213/p01s04-ussc.htm> (stating that the Chicago legislator who proposed the foie gras ban, Joe Moore, didn't know if he had ever eaten foie gras).

150. *Id.* (It should be noted that, to protect foie gras from a similar fate in the European Union, France has recently designated foie gras as part of its cultural patrimony, a move which protects France's ability to produce, sell, and consume foie gras. Thus, actions by states and cities in the United States to ban foie gras implicate the cultural heritage of French nationals and those of French descent who live in the United States).